CHAPTER 14

CAN THE BRAZILIAN AGREEMENT ON COOPERATION AND FACILITATION OF INVESTMENTS BE A MODEL FOR INVESTMENT LAW IN LATIN AMERICA?

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This chapter aims at analysing the new Brazilian investment agreement considering the existing international investment treaties in Latin America. International investment law in Latin America is not a new phenomenon. Several countries have been signatories to investment treaties and protagonists in investment disputes. Nevertheless, the biggest economy in Latin America does not fit such profile. Although Brazil signed 14 bilateral investment treaties (BIT) in the 90s, it has never ratified a single one. Be that as it may, such position has never hindered the injection of foreign investments into Brazil. However, the scenario has now changed. In the courtyard of multinationals, Brazilian companies unmistakably have their share and are seeking protection to their international investments. But rather then jumping on the bandwagon of existing BIT regulations, Brazil chose to go down a different path by adopting a new approach through its Cooperation and Facilitation Investment Agreement. Although the structure for its new model is not entirely a novelty to international investment agreements, it brought original components to its content, limiting the rights of the investor towards a primarily diplomatic dispute resolution mechanism compared to most common Latin American BITs. Therefore, from the evaluation of the Brazilian investment agreement, it will be assessed if such framework can serve as a model for other Latin American countries. The conclusion reached is that the Brazilian approach is resisting the traditional BIT standard but at the same time, it is accommodating FDI views to be adopted in Brazil. Moreover, as far as it could be employed by other Latin American countries, the research shows that too much uncertainty in Latin America prevents any uniform vision when it comes to the discussion or implementation FDI regulation.

Key words: Investment Law, Investment Dispute Resolution, Investment Law in Latin America, Brazil, Cooperation and Facilitation Agreements.

Introduction

Foreign direct investment (FDI) and the regulation of investment law in Latin America is not a new phenomenon.[1] There are several regional agreements, as well as bilateral investment treaties (BIT), regulating FDI and also, if a dispute regarding FDI arises, how

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All mistakes of interpretation and translations are the authors' own. All passages cited from Portuguese and Spanish, either being legislation, scholarly work and court decisions are our translations.
[1] Daniela Campello & Leany Lemos, 'The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation' (2015) 22(5) Review of International Political Economy, 1055, 1059.

parties can seek redress. Although many Latin American countries have been signatories to investment treaties and protagonists in investment disputes,[2] Brazil has always been the 'odd one out' when it comes to BITs. It signed 14 BITs in the 1990s,[3] but it never ratified a single one.[4] Such approach would lead to a conclusion that Brazil is a resilient country with inwards policies, contrary to any type of internationalization of its trade. This logic does not apply to Brazil. Despite its refusal to accept the well-established format of FDI agreements,[5] such position has never hindered the injection of FDI into Brazil. Nevertheless, due to the increase of Brazilian outbound investments, the scenario has now changed. But, rather than jumping on the bandwagon of existing BIT regulations, Brazil chose to go down a different path. Brazil created a different type of international investment agreement called the Cooperation and Facilitation Investment Agreement (CFIA), which is the template for Brazilian BITs. Since 2015, it has already signed twelve CFIAs.[6] The new method aims at finding equilibrium between investor protection and the state's regulatory powers. The CFIA's innovations can be found in its three main pillars: investment cooperation and facilitation; improved institutional governance and risk mitigation; and dispute prevention and settlement.

At the same time, Latin America is going through a process of reformulation concerning FDI. On the one hand you have countries repealing the Convention of the International Centre for Settlement of Investment Disputes (ICSID), seeing FDI as imperialism;[7] on the other hand, there are countries embracing FDI and therefore, these countries have formed regional alliances outside Latin America.[8] As a result, Brazil being a country with an important position in Latin America, its CFIA is timely and follows a movement towards state-driven arbitration in international investment law. Moreover, recently, Brazil ceased to be just famous for beautiful

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[2] For a perspective between Latin America and ICSID see Katia Fach Gomez, 'Latin America and ICSID: David versus Goliath' (2011) 17 Law and Business Review of the Americas, 195.

[3] In the period between 1994 and 1999, Brazil signed agreements on the promotion and protection of investments with Chile, Portugal, Switzerland, United Kingdom, Denmark, Finland, France, Germany, Italy, South Korea, Venezuela, Cuba, the Netherlands and the Belgium Luxembourg Economic Union.

[4] UNCTAD, Investment Hub Policy < http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu> accessed 2 June 2018.

[5] In this chapter, it is understood that the well-established format for FDI will be the one including arbitration as a dispute settlement framework as well as the common clauses in BITs such as most favoured nation clauses, national treatment and direct and indirect expropriation.

[6] Brazil signed CFIAs with Mozambique, Angola, Mexico, Malawi, Colombia, Chile, Ethiopia, Suriname, Guyana, United Arab Emirates, Morocco and Ecuador (https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil accessed on 15 November 2019).

[7] That is the current policy in Ecuador, Venezuela and Bolivia.

[8] This is the case of Mexico, Chile and Peru.

landscape and Carnival. Brazilian multinationals have been investing heavily abroad,[9] changing Brazil's position from 'not a serious country',[10] to a promoter of footwear fashion.[11] But, could Brazil's CFIA be a model for other Latin American countries? Or be a model for investment disputes in general? The answer to this question is not elementary. If a country wishes to oppose the traditional FDI, BIT and ICSID frameworks, yes, the Brazilian option can be a method to resist and accommodate the regulation of Foreign Investment. Nevertheless, the CFIA has its own pitfalls. The first is that CFIA looks like a BIT tailored for the Brazilian scenario. The second is that the Latin American market for FDI is a plethora of different structures with participants that, either acting in groups or in isolation, have no common attitude towards FDI, similar to several countries adopting a 'run for your lives' approach. Lastly, with a variety of options, when it comes to settlement of disputes, ICSID, although subject to criticism, it is still popular. Therefore, this chapter will first assess the relation between Brazil and FDI to explain the CFIA's origin and its regulations. After such analysis, a non-exhaustive international investment law scenario in Latin America will be presented, followed by the assessment of the CFIA in the Latin American context. In the end, the chapter will conclude that although the Brazilian initiative is commendable, the FDI scene in Latin America is divided between resistance and accommodation of western ideas, making the Brazilian model a Brazilian product to protect Brazilian companies. For the purposes of this chapter, Latin America will be understood to include South and Central America, comprising Mexico, as well as the Caribbean.[12]

1 Brazil and the regulation of FDI

When it comes to the effectiveness of investment treaties to promote FDI, Brazil has been looked upon as a counterexample for those who argue that BITs are neither required nor

[9] Juciara Nunes de Alcântara, Caroline Mendonça Nogueira Paiva, Nádia Campos Pereira Bruhn, Heloísa Rosa de Carvalho & Cristina Lelis Leal Calegario, 'Brazilian OFDI Determinants' (2016) 17(3) Latin American Business Review, 177, 180.
[10] See Eul-Soo Pang, 'Brazil Is Not a Serious Country', in *The International Political Economy of Transformation in Argentina, Brazil, and Chile since 1960. International Political Economy Series* (Palgrave Macmillan, 2002).
[11] See Susana Costa e Silva, Maria João Sousa & Fernando Freyre Filho, 'Understanding the Internationalisation Process of Havaianas: The Important Role of the Brand' (2010) 6, Revista de Encontros Científicos - Tourism & Management Studies, 118.
[12] In terms of the Caribbean, the authors exclude the islands that are unincorporated territories of the United States of America; British Overseas Territories; French Overseas Collectives and constituencies countries of the Kingdom of the Netherlands.

effective for boosting foreign investment.[13] That is why Brazil seems to have questioned, or at least challenged, the long-established interaction between the number of BITs a country has ratified and the intensity of FDI.[14] Despite the wave of adherences to BITs by other Latin American countries, which acted on the assumption that the BITs would be the key to attracting foreign investment and provide investors with greater legal security, Brazil remained outside this framework.[15] Instead, foreign nationals would receive the same treatment as did nationals. In the 1960s, Brazil's view of an international investment regime was in line with the majority of Latin American countries.[16] This view was based on the so-called Calvo doctrine linked to the Latin American jurists and diplomat Carlos Calvo.[17] Its aim was to secure that foreigners were not treated better than nationals. Thus, national treatment was intended to limit, not broadening foreigners' rights.[18] This attitude against the investment protection regime resulted in the vote against the adoption of the International Bank for Reconstruction and Development Board of Governors Resolution No. 214 by 19 countries, including Brazil, in 1964, which subsequently allowed the formulation of ICSID in the '*El no de Tokio*'.[19] The international centre proposed by the World Bank was responsible for institutionalizing investor-state

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[13] Joaquim P Muniz, Kabir AN Duggal and Luis AS Peretti, 'The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change' (2017) 32 ICSID Review – Foreign Investment Law Journal 404, 405.

[14] Daniel de Andrade Levy, 'The ICSID Convention and Non-contracting States: The Brazilian Position Methaphor' in Crina Baltag (ed), *ICSID CONVENTION AFTER 50 YEAR* (Wolters Kluwer Law & Business 2017) 512. See also Claus von Wobeser in Chapter 3.

[15] Michelle Ratton, Sanchez Badin and Fabio Morosini, 'Navigating between Resistance and Conformity with the International Investment Regime, The Brazilian Agreements on Cooperation and Facilitation of Investment (ACFIs), in Fabio Morosini and Michelle Ratton Sanchez Badin, *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press 2017) 221.

[16] Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, *International Investment Law: A Handbook* (Bloomsbury Publishing Plc 2015) 158 and Catharine Titi, 'International Investment Law and the Protection of Foreign Investment in Brazil' (2016) 2 Transnational Dispute Management, Special Issue on Latin America vol. 1 (eds Ignacio Torterola and Quinn Smith) <https://ssrn.com/abstract=2786967> accessed on 25 April 2018.

[17] Carlos Calvo fought for the right of newly independent states to be free of such intervention by foreign powers, promoting the so-called Calvo doctrine, whereby foreign investors should be in no better position than local investors, with their rights and obligations to be determined through an exclusive jurisdiction of the courts of that state. This thesis was first published in 1868 in the seminal Calvo, *Derecho internacional teórico y páctico de Europa y América* (Paris, 1868).

[18] Titi (n 16) 3; Bungenberg et al (n 16) 848.

[19] Titi (n 16) 4.

arbitration.[20] Thus, since the creation of ICSID by the Washington Convention in 1965, Brazilian resistance to the international investment regime has been perceived.[21]

Even in the 1990s – when most Latin American countries were competing for capital through liberal investment treaties – contrary to their reluctance in the 1960s, Brazil resisted ratifying such agreements.[22] Especially, it did not follow the example of Argentina, Bolivia, Ecuador and Venezuela, which, by August 1995, had all ratified the ICSID Convention.[23] Further, between 1995 and 1999, Brazil signed 14 BITs.[24] But despite the apparent governmental support to the idea of BITs, none of these treaties was ratified by congress and therefore, these agreements did not enter into force. Moreover, in 2002, the government withdrew from congress its requests to obtain the approval of six more BITs (with Portugal, Chile, the United Kingdom, Switzerland, France and Germany).[25] The same happened to two protocols[26] that Brazil signed in 1994 in the context of Mercosur, namely the Colonia Protocol for the Promotion and Reciprocal Protection of Investments within Mercosur Member States and the Buenos Aires Protocol for the Promotion and Reciprocal Protection of Investments for non-Member States of Mercosur. Of the two protocols, only the latter was submitted to the Brazilian congress for approval and later withdrawn.[27]

This Brazilian scepticism towards the international investment regime has always been driven by two major factors. First, the international adjudication of investment disputes was

[20] Nitish Monebhurrun, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' (2017) 8 Journal of International Dispute Settlement 79, 82.

[21] Vivian Gabriel, 'The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law' (2016) 34 Conflict Resolution Quarterly 141, 143.

[22] Ratton et al (n 14) 221.

[23] List of Contracting States and other Signatories of the Convention (as of 11 January 2018), ICSID/3, in <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> accessed on 17 November 2019.

[24] See (n 3); only six of the fourteen BITs of the first generation were sent to Congress for approval, only to be withdrawn later. The remaining eight were never even sent to Congress for ratification.

[25] Muniz et al (n 13) 405.

[26] The Colonia Protocol for the Promotion and Reciprocal Protection of Investments within Mercosur Member States and the Buenos Aires Protocol for the Promotion and Reciprocal Protection of Investments for non-Member States of Mercosur.

[27] Titi (n16) 7.

seen contrary to the state's monopoly over the administration of justice.[28] Second, international investment treaties would place foreign investors in a privileged position vis-à-vis domestic investors, thus violating the principle of equality before the law.[29] Interestingly, this same argument relates to criticisms currently raised in the European Union (EU); for instance, although the European Parliament referred to substantive standards rather than the investment dispute settlement mechanism, it underlined that EU investment agreements must provide protection no higher than that afforded by EU law.[30]

Despite all the resistance to the international investment regime, Brazil is an exception. It has been able to attract FDI without being part of the international investment regime.[31] In the last decade, Brazil became the world's ninth largest economy.[32] Not only has Brazil established itself as a highly attractive investment destination, but it has been and remains the largest recipient of FDI in South America,[33] especially for capital from developed countries.[34] In the first decade of the 2000s, this process advanced even more, notwithstanding the global economic crisis beginning in 2008. The amounts of FDI recorded in 2012, 2013 and 2014 remained above US$60 billion annually, a level reached only in 2011.[35]

In 2016, an economic recession arose in Latin America and the Caribbean which, coupled with weak commodities prices for the region's principal exports, factored heavily in the decline in FDI flows to the region (down 19% to US$135 billion)[36]. Even though there were sizable falls in FDIs in Brazil from US$65 billion in 2015 to around US$50 billion in 2016, the country kept a high level of foreign investments compared to other strong Latin American economies such as Chile, which dropped from US$16 billion in 2015 to an estimated US$11 billion in

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[28] ICSID, Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. II–I (1967), p. 306.

[29] Titi (n16) 5.

[30] Regulation (EU) No 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, recital 4.

[31] See Claus von Wobeser in Chapter 3.

[32] CIA World Fact Book <www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> accessed on 02 June 2018.

[33] Bungenberg et al (n 16) 219.

[34] Gabriel (21) 142.

[35] Confederação Nacional da Indústria. 2015. Investimentos Estrangeiros Diretos no Brasil—2014 os Regimes e Políticas de IED: tendências recentes no mundo e no Brasil. Brasília: CNIibid.. <https://static-cms-si.s3.amazonaws.com/media/filer_public/7b/db/7bdb4b72-80e9-4256-a0c8-79b6188d5266/investimentos_estrangeiros_diretos_no_brasil_2014.pdf> accessed on 18 June 2018.

[36] United Nations Publications (ed), Foreign Direct Investment in Latin America and the Caribbean: 2016 (English edition, United Nations 2016).

2016.[37] Further, even in Central America, despite its relatively stronger economic performance, flows diminished by a 20%[38] in Mexico from US$33 billion in 2015 to US$26 billion in 2016.[39] These figures prove that Brazil has been and remains a highly attractive FDI destination; but now the focus has changed. As the investments of Brazilian companies abroad grew, the lack of regulatory framework for FDI made such companies vulnerable to policy changes in the place of investment.

Since Brazil remained the only South American country without BITs, Brazilian investors found themselves in an unfavourable position when investing abroad, as they were unable to benefit from protections typically covered by BITs, which investors from other countries may be able to benefit from. As a result, there was a concern regarding the country's lack of an outward foreign investment policy.[40] The vulnerability of Brazilian transnational companies was exemplified by two major incidents that struck two major Brazilian market players in Latin America. In 2006, the leading Brazilian company for natural gas, Petroleo Brasileiro SA – Petrobras – had two of its Petron Bataan refineries expropriated by the Bolivian government. On 1 May 2006, President Evo Morales issued the 'Nationalization' Supreme Decree No 28701, through which the state effectively took control of the entire commercial and production chain of the oil and gas sector.[41] The Bolivian government demanded that foreign companies renegotiate their contracts with Bolivia so that Yacimientos Petroliferos Fiscales Bolivianos, the state-owned oil and gas company, could hold the majority shareholder control in Bolivian oil and gas trade. By the time of the Decree's enactment there were six subsidiaries of Petrobras in Bolivia.[42]

The move astonished Brazilian President Luiz Inácio Lula da Silva's government, which considered itself friendly towards Bolivia's President Evo Morales. However, energy security

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[37] ibid.

[38] ibid.

[39] UNCTAD, 'Global FDI flows slip in 2016, Modest recovery expected in 2017' (1 February 2017) <http://unctad.org/en/PublicationsLibrary/webdiaeia2017d1_en.pdf> accessed on 17 March 2018.

[40] Lucas Bento, 'Time to join the "Bit Club"? Promoting and Protecting Brazilian Investments Abroad' (2013) 24 American Review of International Arbitration 2.

41 Paulo Prada, 'Bolivian Nationalizes the Oil and Gas Sector' The New York Times (2 May 2006) <https://www.nytimes.com/2006/05/02/world/americas/02bolivia.html> accessed on 4 November 2018.

[42] Marilda Rosado de Sá Ribeiro, 'Sovereignty over Natural Resources Investment Law and Expropriation: The Case of Bolivia and Brazil' (2009) 2 The Journal of World Energy Law & Business 129.

constraints limited Brazil's margin to manoeuvre.[43] Therefore, the Brazilian government took a cautious approach both to negotiations over the effects of nationalization on Petrobras's assets in Bolivia and the price of Bolivian gas exports to Brazil.[44] It recognized Bolivia's right to nationalize and ruled out retaliation.[45] On 10 May 2007, the Brazilian government announced the conclusion of a contract between Petrobras and Bolivia whereby the Brazilian company would receive US$12 million for selling its assets in its Bolivian refineries. Until then, besides the US$104 million used in the purchase refineries, Petrobras had invested US$30 million in Bolivian-related investments. Due to this expropriation, Petrobras's investments outside the Brazilian territory are now concentrated in Petrobras International Braspetro BV, an incorporated subsidiary with headquarters in the Netherlands, which is considered native to that country and therefore able to rely on Dutch BITs.[46]

A similar case occurred a year later in Ecuador. In 2008, Odebrecht, a Brazilian engineering and construction company, was forced to withdraw its operations from Ecuador.[47] The Ecuadorian government decided to issue executive decrees that ordered the militarization of Odebrecht's camps and offices, the termination of all its agreements with the Ecuadorian government, and the revocation of Odebrecht executive officers' and employees' visas. In the process, the Ecuadorean military seized over US$800 million of Oderbrecht's assets.[48] The Ecuadorian President, Rafael Correa, declared that his country would not compensate the company for what it had built;[49] furthermore, he also refused to repay the US$243 million loan that Brazil's National Bank of Economic and Social Development gave to Ecuador to finance the activities of Odebrecht. The decision led Brazil to recall its ambassador in Ecuador.[50] When

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[43] Dan Keane, 'Bolivia, Firms Reach Deal Nationalizing Oil and Gas' (30 October 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900937.html> accessed on 4 November 2018.

[44] 'Bolívia reduz pobreza e pobreza extrema através de programas sociais' (*ISTOÉ Independente*, 17 October 2016) <https://istoe.com.br/bolivia-reduz-pobreza-e-pobreza-extrema-atraves-de-programas-sociais/> accessed on 4 November 2018.

[45] Ian Bremmer and Preston Keat, *The Fat Tail: The Power of Political Knowledge for Strategic Investing* (Oxford University Press 2010) 128.

[46] Sá Ribeiro (n 42) 132.

[47] See Leonardo Kataoka, Chapter 8.

[48] Bento (n 40) 16; Huub Ruël, *International Business Diplomacy: How Can Multinational Corporations Deal with Global Challenges?* (Emerald Group Publishing 2017) 232.

[49] 'BBCBrasil.Com | Reporter BBC | Odebrecht: "Usina Trabalhou Acima Da Capacidade"' <https://www.bbc.com/portuguese/reporterbbc/story/2008/09/080925_odebrecht_equador_cq.shtml> accessed on 4 November 2018.

[50] Pía Riggirozzi and Diana Tussie, *The Rise of Post-Hegemonic Regionalism: The Case of Latin America* (Springer Science & Business Media 2012) 175.

Ecuador seized Oderbrecht's assets in 2008, and when Bolivia expropriated Petrobras' plant in 2006, there were no direct means of international redress against the host states other than going to the respective countries' courts. They became subject to political and diplomatic processes which were slow and provided no guarantee for compensation.

Brazil's new status as a capital exporter, the aforementioned cases and an increasing presence of Brazilian multinationals in many African countries motivated the Brazilian National Confederation of Industries, the Federation of Industries São Paulo and many Brazilian multinational companies to influence national policies on foreign investment protection abroad. Due to this support, in 2015 the Brazilian government designed a new model investment agreement titled the Cooperation and Facilitation Investment Agreement (CFIA).[51] At the core of this agreement lies the mitigation of risks and the prevention of investment disputes with a dispute settlement framework formed by a negotiating phase.[52] The focus of the Brazilian agreement thereby lays on a state-to-state dispute settlement process that is similar to traditional diplomatic protection. This is unlike traditional BIT procedures. Such framework contradicts the trend of judicialization of foreign investment law and the concomitant growing role of private entities in international law over the past century.[53]

2 The atypical Brazilian investment agreement

The CFIA stands out compared to the BITs signed by Brazil in the 1990s.[54] Undoubtedly, it marks an evolution in international investment law by taking decades of investment law practice and doctrine into account and forming a new role model for the investment protection regime. The Brazilian investment protection regime, thereby, can be divided into three main pillars: substantive protection; institutional governance; and dispute prevention and resolution.[55] Although this structure is not entirely new to international investment agreements,[56] the Model CFIA includes new provisions in contrast to the wide-spread BITs.

[51] Monebhurrun (n 20) 82; Gabriel (n 21) 141–2.
[52] Gabriel (n 21) 142.
[53] David M Trubek and Sonia E Rolland, 'Legal Innovation in Investment Law: Rhetoric and Practice in the South' (2017) 39(2), University of Pennsylvania Journal of International Law 355.
[54] The full English text of the model agreement is available at UNCTAD's Investment Hub Policy <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786> accessed on 2 June 2018.
[55] Muniz et al (n 13) 406–07; Ratton et al (n 15) 223 and Monebhurrun (n 20) 83–85.
[56] Titi (n 16) 9.

Constant cooperation among governmental agencies,[57] mediated by diplomatic action,[58] deference to domestic legislation, and balanced obligations between foreign and domestic investors[59] as well as between investor and host state can be considered the leading notions behind this model arrangement.[60]

2.1 Substantive protection

The most distinctive characteristic about the CFIA is the absence of classical private international investment protection provisions compared to common international investment agreements. This characteristic is a result of Brazil's historically grown scepticism towards the international investment regime. So classical provisions such as the fair and equitable treatment standard, an investor-state dispute settlement mechanism, as well as provisions concerning indirect expropriation, are missing in the model agreement. Also, the CFIA does not contain an observance of undertakings or an umbrella clause.[61] While these international standards might be seen as an effective tool for the protection of investors, they can be used to limit host states' right to regulate in the public interest.[62] Since the CFIA is meant to stand out as an alternative to standard international practice, it is no surprise that Brazil went down this path in order to strengthen the position of the host state.

However, it is noticeable that one of the components of the fair and equal treatment is included in Article 9 of the Model CFIA. This states that all the regulatory measures regarding investments must be administered in an objective, reasonable and impartial manner, in line with each party's domestic legal system.[63] These obligations, as well as the publication of all laws and regulations affecting any provision of the CFIA, are made to guarantee transparency. Even further, the host state must enable the interested stakeholders to voice out their opinion on investment-related measures. Therefore, Article 9 of the Model CFIA includes at least some of the elements of a fair and equitable treatment standard into the agreement. Parallels can be

[57] 2015 Model Investment Agreement (n 54) Art. 17.
[58] Ibid (n 54) Art. 18 and 22.
[59] Ibid (n 54) Art. 14–16.
[60] Ratton et al (n 15) 224.
[61] Muniz et al (n 3) 412; Monebhurrun (n 20) 93.
[62] Ratton et al (n 15) 229.
[63] The full wording of the provision declares: 'Each Party shall ensure that its laws, regulations, procedures and general administrative resolutions related to any matter covered by this Agreement, in particular regarding qualification, licensing and certification, are published without delay and, when possible, in electronic format, as to allow interested persons of the other Party to be aware of such information.'

drawn to Article 10.1 of the Energy Charter Treaty as a common example of the equalization of transparency and the means of fairness and equitability in the international investment regime.[64]

Even the most favoured nation clause (MFN) – another common standard of protection in international investment law – has been pruned to fit Brazil's ideology of international investment law. The goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties. The normal effect of an MFN clause in a BIT is to widen the rights of the investor.[65] The Model CFIA contains such a traditional MFN clause in Article 6.1: 'Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party.' A similar provision in Article 6.2 of the Model CFIA extends this treatment to 'investments of investors of the other party.' Nevertheless, Article 6.3(ii) of the Model CFIA limits the mentioned articles in relation to the benefits that may be derived from 'any agreement for regional economic integration, free trade area, customs union or common market, of which a Party is a member'. In Article 6.3(i), the scope of the MFN is narrowed down even further. The clause excludes the benefits deriving from regional economic integration as well as the 'provisions relating to investment dispute settlement'. This provision prevents investors from relying on investor-state dispute settlement by operation of the MFN clause.[66]

Regarding expropriation, the CFIA does not fulfil the minimum standard granted by BITs standard regulations. Most modern BITs apply to direct, indirect and creeping expropriation. Their scope is usually limited either by the definition of certain situations or by carve-outs. Consistent with its goal to persevere the regulatory freedom on the contracting state, Article 7

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[64] Article 10.1 of the Consolidated Energy Charter Treaty [2016] states: 'Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'

[65] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 206.

[66] Muniz et al (n 13) 410; Catharine Titi, 'Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law' (2016) 33(5) Journal of International Arbitration, 425 and Ratton et al (n 15) 228.

of the Model CFIA excludes from its scope all indirect or creeping expropriations. The agreement, therefore, applies only to direct takings, and confers policy powers to the host state.[67] In addition, the Model CFIA names certain measures that are carved from the regulations on expropriation. It also opens up space to define general exceptions that influence the content of expropriation. Among the 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.[68] Article 7.1 of the Model CFIA sets forth the conditions for lawful direct expropriations, stating that direct expropriations can only be justified if they are 'for a public purpose or necessity or when justified as social interest', carried out 'in a non-discriminatory manner' and if they require 'payment of effective compensation […] in accordance with due process of law'.[69]

In addition to the aforementioned novelties, Article 14 of the Model CFIA, provides for a new trend in investment treaty drafting. The agreement commits companies to make sure that their investments fulfil corporate social responsibility (CSR) obligations. The investments shall be in line with, and contribute to, the objective of sustainable development of the host state and the local community. The implementation and execution of these standards depend on the investor's voluntary conduct. The enforcement of these obligations are, however, essentially based on domestic supervision by the host state, given that they were explicitly excluded from arbitration in Article 24.3 of the Model CFIA.[70] The CSR shall encourage foreign investors to respect human rights and environmental laws in the host state.[71] Still in the logic of a voluntary conduct, the investor must also refrain from seeking or accepting any kind of exemption which would not be in line with the host states' laws on environment, health and security issues, financial incentives and right of workers. The bottom line is that the CSR mainly tries to mitigate the risk of the parties through these regulations.[72]

2.2 Institutional governance

[67] Ratton et al (n 15) 229.
[68] Ratton et al (n 150) 229–30.
[69] Muniz et al (n 13) 412.
[70] Ratton et al (n 15) 231.
[71] 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements? – Investment Treaty News' <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/> accessed on 3 May 2018.
[72] Monebhurrun (n 20) 96.

The CFIA does not merely provide for dispute resolution but has an entire chapter devoted to ‘Institutional Governance and Dispute Prevention’. Thus, two types of institutions govern the agreement. On the one hand, a joint committee for the administration of the agreement composed of government representatives of both parties works towards implementing the concluded CFIA. The committee shall resolve any issues or disputes concerning an investment in an amicable manner. It operates on a state-to-state level.[73] On the other hand, in addition to the joint committee, the CFIA institutes national focal points or ombudsmen on an investor-state level. Thereby, the main task for the national focal points or ombudsmen is to provide support for investors from the other party in its territory. The creation and regulation of the focal points, or rather ombudsmen, depend on each party’s domestic regulation and will be generally formed as an agency. In the case of Brazil, the regulation of the ombudsman is linked to the Chamber of Foreign Trade as an interministerial body. The CFIA also includes provisions regulating the exchange of information regarding the regulatory and policy framework for investment, promoting transparency and accessibility of information relevant for investment initiatives and envisaging an Agenda for Further Investment Cooperation and Facilitation that paves the way for future initiatives.[74]

2.3 Dispute prevention and resolution

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.[75] By emphasizing dispute prevention, Brazil develops an innovative set of institutional mechanisms to pursue that goal. The Model CFIA presents three different levels of dispute resolution. The basis of this mechanism is formed by the focal point or ombudspersons. On the second level, the consultation and negotiation between the parties and the joint committee is the further escalating measure. Finally, if the aforementioned mechanisms fail, the arbitration between the contracting parties is the last instance to resolve any matters arising.[76]

[73] Ibid 83–84; Muniz et al (n 13) 413; Ratton et al (n 15) 226.
[74] Monebhurrun (n 20) 85 et seq; Muniz et al (n 13) 413; Ratton et all(n 15) 227.
[75]Ratton et al (15) 232.
[76] Ibid 233–35; Muniz et al (n 13) 414.

On the first level of dispute prevention,[77] the permanent institutional body articulates the different constituencies from the representatives of the parties to the private sector, as well as governmental and non-governmental 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. The joint committee is, however, the first mandatory instance for addressing an investor claim based on the CFIA 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 CFIA declares that a formal notice to the joint committee is due by submitting a claim on behalf of an investor. 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[78] held by the joint committee.[79]

If the disputes are not resolved through dialogue and bilateral consultations, the contracting parties can initiate state-to-state arbitration through the provision included in Article 24 of the Model CFIA.[80] As a result, a tribunal comprised of three arbitrators is assigned with resolving the dispute, provided that not more than five years have elapsed since the investor knew or should have known of the facts giving rise to the dispute. The arbitration process commences with the filing of a notice of arbitration, after which each party appoints one arbitrator and both of the selected arbitrators agree on the appointment of a chairperson. If appointments are not concluded, the Secretary General of the International Court of Justice shall make the appointment. The tribunal is empowered to determine its own procedure or to adopt the United Nations Commission on International Trade Law arbitration rules; it shall render a decision by majority vote in accordance with the CFIA and the applicable principles and rules of international law as recognized by both parties. The outcome of the case can be a dismissal by the tribunal or any monetary compensation to the investor which ultimately has to be

[77] 2015 Model Investment Agreement (n 54) Art. 17.

[78] Article 17.3 states: 'The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once a year, with alternating chairmanships between the Parties.'

[79] Ratton et al (n 15) 233.

[80] Article 24.1 states: 'Once the procedure under paragraph 3 of Article 23 has been exhausted and the dispute has not been resolved, either Party may submit the dispute to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Parties decide otherwise, such institution shall apply the provisions of this Section.'

followed.[81] The result of the CFIA mechanism is that the investor can only influence the process to a certain degree. The final resolution of any arising problems will be found on a state-to-state level by the contracting parties.

3 The FDI scenario in Latin America

The contemporary investment law scenario in Latin America is a competitive one. There are too many forms of FDI regulation in place. From Central America, the Caribbean and South America, regional, independent and international agreements have been employed to regulate investment. Such variety would represent diversity and opportunity for Latin America; nonetheless, the reality seems more like a series of different frameworks aiming at achieving a particular ideology. The most common investment agreements adopted by Latin American countries are BITs. There are different types of BITs throughout Latin America with one common pattern; most of them are subject to ICSID for dispute resolution. Exceptions can be found in Brazil, Suriname, Antigua and Barbuda, and Dominica, none of which have adhered to the ICSID Convention.[82] There are some islands in Caribbean that are not signatories to the ICSID Convention; however, they are territories of other sovereignties.[83] Lastly, three countries (Venezuela, Ecuador and Bolivia) were signatories to ICISD but they have withdrawn from the Convention.[84]

The approach to ICSID in Latin America is of mixed feelings. Countries such as Chile have used ICSID with positive and negative results. Chile has been the respondent in four ICSID cases;[85] it has been the home state of the investor in seven ICSID cases;[86] as a

[81] Muniz et al (n 13) 32.

[82] List of Contracting States and other Signatories of the Convention (n 23).

[83] Puerto Rico and the United States Virgin Islands are an unincorporated territory of the United States of America. The Virgin British Islands, Anguila, Cayman Islands and Montserrat are part of the British Overseas Territories. Saint Martin, Martinique and Guadeloupe are part of the French Overseas Collectives. St Maarten, Bonaire, Curacao and Aruba are constituencies' countries of the Kingdom of the Netherlands. All the places mentioned here are not on the ICISD list of contracting states and other signatories of the convention.

[84] List of Contracting States and other Signatories of the Convention (n 23). Venezuela withdrew on 25 July 2012, Ecuador withdrew on 7 January 2010 and Bolivia withdrew on 3 November 2007.

[85] They are: *MTD Equity Sdn Bhd. and MTD Chile SA v Chile* (ICSID Case No. ARB/01/7); *Víctor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No. ARB/98/2); *Sociedad Anónima Eduardo Vieira v Republic of Chile* (ICSID Case No. ARB/04/7) and *Carlos Ríos and Francisco Ríos v Republic of Chile* (ICSID Case No. ARB/17/16).

[86] They are: *Empresa Nacional de Electricidad SA v Argentine Republic* (ICSID Case No. ARB/99/4); *Industria Nacional de Alimentos, SA and Indalsa Perú, SA* (formerly Empresas Lucchetti, SA and Lucchetti Perú, SA) *v Republic of Peru* (ICSID Case No. ARB/03/4);

respondent, it had three decisions in its favour; and as a home state of the investor, it had four decisions in its favour.[87] The Chilean perspective is rather unique. Chile went through a military dictatorship in the twentieth century, but when democracy was restored in the 1990s, it adopted an open policy regionalism to reconcile regional integration with globalization.[88] This led to several agreements, bilateral and multilateral, with different trading partners, resulting in a network of investment treaties.[89] For Chile, such approach was successful but the same cannot be said about other Latin American countries such as Argentina which might not see ICSID as a great experience.[90] Argentina holds the record of 56 ICSID cases as the respondent.[91] Such a negative record led to rumours that Argentina would be withdrawing from ICSID.[92] Ironically, it remains a signatory to the Convention having its last case started in

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Chilectra SA, Elesur SA, Empresa Nacional de Electrecidad SA, and Enersis SA v Argentine Republic (ICSID Case No ARB/03/21);

Compañía General de Electricidad SA and CGE Argentina SA v Argentine Republic (ICSID Case No. ARB/05/2); Quiborax SA, Non-*Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) and *Flughafen Zürich AG and Gestión e Ingenería IDC SA v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19).

87 As the respondent, the case of *Carlos Ríos and Francisco Ríos v Republic of Chile* the decision is still pending and as the home State of the investor, two cases were discontinued (*Chilectra SA, Elesur SA, Empresa Nacional de Electrecidad SA,* and *Enersis SA v Argentine Republic* and *Empresa Nacional de Electricidad SA v Argentine Republic)* and one settled (*CGE Argentina SA v Argentine Republic)*.

88 Rodrigo Polanco Lazo, 'The Chilean Experience in South-South Investment and Trade Agreements', in Fabio Morosini and Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (CUP, 2017), pp 100–01.

89 Since 1991 Chile has concluded 55 BITs and 33 Treaties with investment provisions. Although the number of BITs is significant, after 2000, Chile only concluded four BITs. Since the beginning of this century, Chile has shown a preference to have free trade agreements, having 19 in force. In <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/41#iiaInnerMenu>, accessed on 15 November 2019..

90 See Carlos E. Alfaro & Pedro M. Lorenti, 'The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law' (2005) 6 Journal of World Investment & Trade 417; Charity L. Goodman, 'Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' (2007), 28 University of Pennsylvania Journal International Economic Law. 449 and William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 Asian Journal of WTO & International Health Law & Policy 199.

91 In <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> accessed on 17 November 2019.

92 See Eric David Kasenetz, `Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity & the Current Fight in the ICSID' (2010) 41 George Washington International Law Review 709, 745; Oscar Lopez, `Smart Move: Argentina to Leave the ICSID` (2013) 1 Cornell International Law Journal Online, 121 and 'Argentina in the Process of Quitting from World Bank Investment Disputes Centre', MERCOPRESS, in

2019.[93] Even though Venezuela, Ecuador and Bolivia do not have the same case record as Argentina, these countries decided to denounce the Convention. As opposed to Argentina, the three countries have adopted policies conflicting directly with the liberalism embodied in the ICSID framework.[94] This resistance to FDI started in Bolivia, after President Evo Morales took office. He renationalized several industries, and in 2007, Bolivia notified the World Bank to inform its denunciation of ICSID. The reasons for the withdrawal were to maintain the sovereignty of Bolivia and to avoid international arbitration as a method to solve disputes involving Bolivia and investors.[95] Ecuador followed in 2010, when President Rafael Correa adopted similar policies to Bolivia and considered ICISD as a form of control over countries that needed to be set free.[96] Last, Venezuela left ICSID in 2012 when President Hugo Chavez was still in power. The rhetoric was similar; all countries opposed a neoliberal agenda and acted to renationalize companies controlled by foreign investors.[97] Hence, ICSID was an obstacle to the policies of the three countries as it excluded the power of national courts to decide any dispute regarding investment agreements, and it provided for a platform to seek compensation for the countries' new policies. Strangely, Morales nationalised companies that were not protected by ICSID such as Petrobras refineries in Bolivia and Correa adopted a similar practice to Odebrecht in Ecuador, bringing doubt if this was a move solely against the neoliberal ideas or a subterfuge to repatriate assets.

<http://en.mercopress.com/2013/01/31/argentina-in-the-process-of-quitting-from-world-bank-investment-disputes-centre> accessed on 11 May 2018.

[93] See *Orazul International España Holdings S.L. v Argentine Republic* (ICSID Case No. ARB/19/25) which the notice of arbitration dates 11 September 2019.

[94] Such view can be extracted by the preamble of the ICSID convention when it declares that 'while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases'.

[95] Investment Treaty News reported on 9 May 2007 that Evo Morales stated that Bolivia 'emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration'. Moreover, according to the Bolivia's Charge d'Affaires for Trade with the Ministry of Foreign Affairs in La Paz, Bolivia wanted to revise 24 BITs to limit 'the definition of an investment to those that "truly generate a value to the country".' In <www.iisd.org/itn/wp-content/uploads/2010/10/itn_may9_2007.pdf> accessed 14 May 2018.

[96] Investment Treaty News reported on 08 June 2009 that Rafael Correa declared that departing from ICSID represented 'the liberation of our countries because this signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank and we cannot tolerate this'. In <https://www.iisd.org/itn/2009/06/05/ecuador-continues-exit-from-icsid/> accessed 14 May 2018.

[97] Steve Ellner, 'Distinguishing Features of Latin America's New Left in Power, The Chavez, Morales and Correa Governments' (2012) 39(1) Latin American Perspectives, 96, 102.

The approach implemented by Ecuador, Venezuela and Bolivia can also find its roots in the formation of Bolivarian Alliance for the Peoples of Our America (ALBA).[98] This organization was formed in 2004 between Cuba and Venezuela.[99] In 2005, the final declaration of the first ALBA meeting laid down its ethos, that is, to promote the ideology of Simón Bolívar and José Martí.[100] In effect, ALBA's purpose is to challenge neoliberalism by concentrating the monopoly of essential services in the government's hands instead of allowing the private sector to operate social services.[101] However, ALBA is not the only regional bloc in Latin America. As a result of the second wave of regionalism that has been observed and implemented by Latin American countries, several regional agreements promoting integration in Latin America came to life.[102]

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[98] Daniel de Andrade Levy & Rodrigo Moreira, 'ICSID in Latin America: Where Does Brazil Stand?' in Daniel de Andrade Levy, Ana Gerdau de Borja & Adriana Noemi Pucci (eds) *Investment Protection in Brazil* (Kluwer 2014) 25.

[99] The full text of the agreement can be found in Spanish at <www.portalalba.org/index.php/alba/documentos/1220-2004-12-14-i-cumbre-la-habana-cuba-acuerdo-entre-venezuela-y-cuba-para-la-aplicacion-del-alba>, accessed on 14 May 2018.

[100] The text of the final declaration expressed: 'we fully agree that the ALBA will not become a reality with mercantilist ideas or the selfish interests of business profitability or national benefit to the detriment of other peoples. Only a broad Latin Americanist vision, which acknowledges the impossibility of our countries' developing and being truly independent in an isolated manner, will be capable of achieving what Bolívar called "to see the formation in the Americas of the greatest nation in the world, not so much for its size and riches as for its freedom and glory," and that Martí conceived of as "Our America," to differentiate it from the other America, the expansionist one with imperialist appetites'. In <www.anti-imperialist.org/cuba-venezuela_5-7-05.htm>, accessed on 14 May 18.

[101] Paul Kellogg, 'Regional Integration in Lain America: Dawn of Alternative to Neoliberalism?' (2007) 29(2) New Political Science, 187– 209, 205.

[102] According to Belisa Esteca Eleoterio and Alebe Linhares Mesquita, 'The Twenty-First Century Regionalism: Brazil and Mercosur in the New International Scenario', in Giovanna Adinolfi, Freya Baetens, Jose Caiado, Angela Lupone and Anna G Micara (eds), I*nternational Economic Law, Contemporary Issues* (Springer 2017) 101, there were two well-defined waves of regionalism. The first occurred after World War II with the formation of the European Economic Community and the second during the 1990s with the formation of NAFTA, Mercosur, ASEAN etc.

In the Caribbean, CARICOM[103] was established in 1973 targeting 'the economic integration of the Member States by the establishment of a common market regime'.[104] CARICOM has five free trade agreements with the following countries: the Dominican Republic, Costa Rica, Colombia, Venezuela and Cuba. Except for the agreement with Colombia, all the others have an express provision about investment.[105] All Agreements embrace the ideas of national treatment, MFN and transparency. The difference between the agreements can be found in relation to the settlement of disputes. With Costa Rica, ICSID is applicable, while with the other countries, a Joint Commission or a Joint Council is formed to resolve disputes if the parties cannot reach an agreement.[106] The Dominican Republic has another agreement with the United States, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua called CAFTA DR. Chapter 10 of the agreement provides for the regulation of foreign investment. The settlement of disputes is made through ICSID and national treatment, MFN and transparency are also principles applied in the agreement. Moving to countries bordering the Pacific Ocean, Mexico, Peru, Chile and Colombia, on 28 April 2011, formed the Pacific Alliance. The aim of the integration is to provide for an area of free movement of people, goods, services and capital.[107] In relation to investments, it adopts the well-established format of FDI rules and for settlement of disputes, ICSID is the chosen method.[108]

Another agreement involving Mexico is the old North America Free Trade Agreement (NAFTA), now called United-Sates-Mexico-Canada Agreement (USMCA). Chapter 11 of the NAFTA agreement regulated foreign investment in a similar manner to the CAFTA DR format, however, the USMCA presents a new scenario. Now, Chapter 14 of USMCA provides for

[103] According to its website, [s]tretching from The Bahamas in the north to Suriname and Guyana in South America, CARICOM comprises states that are considered developing countries, and except for Belize, in Central America and Guyana and Suriname in South America, all Members and Associate Members are island states'. This integration has as its core value 'winning hearts and minds to work towards a robust and inclusive Caribbean Community, able to work together to preserve the gains of regional integration and address the current challenges of economic recovery and growth and sustainable human development.' In <www.caricom.org/> accessed 1 July 2018.

[104] Article 49(a) of the Treaty Establishing the Caribbean Community.

[105] With the Dominica Republic, annex III, provides for a Reciprocal Promotion and Protection of Investments. With Costa Rica, Chapter X talks about investment. The Cuban agreement provides for Investments in Article 17 while the Venezuelan does in Article 9.

[106] For Costa Rica see Article X11, for Venezuela see Article 17, for Colombia see Article 21 and for Cuba see Article 24.

[107] Article 3 1(a) of the Acuerdo Marco de la Alianza del Pacifico.

[108] See Chapter 10 of the Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico signed on 10 February 2014.

investment with common clauses such as national treatment,[109] MFN,[110] expropriation and compensation[111] and a CSR clause.[112] But, when it comes to dispute resolution, it determines that Chapter 11 of NAFTA can only be employed up to three years after NAFTA's termination. This is called the Legacy Investment Claims and Pending Claims and once NAFTA's directives are no longer in place, a new set of rules limiting arbitration will replace the old framework of dispute resolution. Article 14.2 of USMCA determines that investors can only start arbitration in Mexico-United States Investment Dispute and Mexico-United States Investment Disputes Related to Covered Government Contracts.[113] For the Mexico-United States Investment Dispute, before arbitration can be triggered, a consultation and negotiation should be employed to resolve the dispute.[114] If no agreement is reached, claimant or respondent could have the dispute arbitrated for breach of national treatment, MFN, expropriation and compensation and loss or damage by reason of treaty breach.[115] The claim will be referred to ICISID or UNCITRAL. The same rules apply to Mexico-United States Investment Disputes Related to Covered Government Contracts but the treaty breach has to be related to a government contract.[116]An innovative feature of USMCA is the requirement to go to court before arbitrating. The American and Mexican claimants have to initiate legal proceedings before a court or an administrative tribunal and they can only resort to arbitration if proceedings have not been decided or 30 months have passed since they commenced.[117]

Regionalism involving Brazil can be found in the South Common Market (Mercosur) and in the Union of the South American Nations (UNASUR). Mercosur is a common market

[109] USMCA chapter 14, Article 14.4.
[110] Ibid, Article 14.5.
[111] Ibid, Article 14.8.
[112] Ibid, Article 14.17.
[113] Article 14.2(4) states: 'For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)'.
[114] Annex 14-D, Article 2.
[115] Ibid, Article 3.
[116] Annex 14-E.
[117] Annex 14-D, Article 5 declares: 'Article 5: Conditions and Limitations on Consent 1. No claim shall be submitted to arbitration under this Annex unless: (a) the claimant (for claims brought under Article 3.1(a) (Submission of a Claim)) and the claimant or the enterprise (for claims brought under Article 3.1(b)) first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach referred to in Article 3 (Submission of a Claim to Arbitration); (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated'.

formed by Brazil, Argentina, Paraguay Uruguay, Bolivia and Venezuela.[118] Although the treaty creating Mercosur was signed in 1991, its regulation of investment is rather new, being introduced in 2017.[119] The surprising aspect of this agreement is that it follows the steps of the Brazilian CFIA. Therefore, on one side it rejects the BITs view of fair and equitable treatment, full protection and security clauses.[120] It also excludes the protection against indirect expropriation.[121] On the other side, it embraces access to justice and due process,[122] it foments CSR,[123] it provides for an ombudsman to assist foreign investors[124] and a framework to prevent disputes.[125] If a dispute cannot be settled, the Mercosur Olivos Protocol for the Settlement of Disputes will apply and the parties can resort to state-to-state negotiations or a state-to-state arbitration.[126] As it can be seen, the options in Mercosur are also within the Latin America view of resistance to mainstream approaches. However, the refusal is partial. Instead of having a traditional investment framework, it provides remedies in a state-to-state level, accommodating the need for investors to have some protection over their investment.

When it comes to UNASUR, although Brazil has a strong influence in the economic bloc, the regulation of investment has been tendered by Ecuador.[127] More precisely, to oppose the ICSID structure, Ecuador made a proposal for the creation of an investment centre to settle

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[118] Venezuela had its membership suspended on 5 August 2017 for breaching the Mercosur Protocol of Ushuaia which established the Democratic Commitment of Mercosur. In <www.mercosur.int/innovaportal/v/8470/12/innova.front/decis%C3%A3o-sobre-a-suspens%C3%A3o-da-republica-bolivariana-da-venezuela-no-mercosul> accessed on 20 May 2018.

[119] This was done by the Protocol on Investment Cooperation and Facilitation signed on 7 April 2017. For the initial attempts in creating an investment agreement in Mercosur see James D Fry & Juan Ignacio Stampalija, 'Towards an Agreement on Investment in Mercosur: Conflict and Complementarity of International Investment Law and International Trade-in-Services Law' (2012) 13, The Journal of World Investment & Trade, 556.

[120] Protocol on Investment Cooperation and Facilitation Intra-Mercosur, signed on 7 April 2017, Article 4.3.

[121] Ibid, Article 6.6l.

[122] Ibid, Articles 4.2 and 4.3.

[123] Ibid, Article 14.

[124] Ibid, Article 18.

[125] Ibid, Article 23.

[126] Articles 4 and 9 of the Mercosur Olivos Protocol for the Settlement of Disputes, 18 February 2002, (2003) 42(1), International Legal Materials, 2..

[127] See Katia Fach Gómez and Catharine Titi, 'UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement', Investment Treaty News, in <www.iisd.org/itn/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine-titi/> accessed on 21 May 2018.

disputes.[128] A working group was established in 2008 to develop a mechanism to settle investment disputes in UNASUR.[129] In 2012, a first draft of the agreement was presented at the IV meeting of the working group. Another draft was presented in 2014, but no final version has been accepted by all UNASUR members.[130] The new framework wants to use facilitation in conflict resolution. It recommends a procedure in which a party may ask assistance from the centre to reach an amicable solution to a dispute as long as the investment agreement provides for consultation and negotiation as a framework to solve disputes.[131] Additional to facilitation, conciliation can be done by requesting it to be established by the executive secretary of the centre.[132] Last, parties can request that a dispute be submitted to arbitration.[133]

A new feature in the UNASUR arbitration is the possibility to present an appeal to the arbitral award in two circumstances: an error in the application or interpretation of the law applicable to the dispute and a manifest error in the appreciation of facts, which negatively influenced the assessment of evidence that would have otherwise changed the award.[134] Even though the initiative presents different options, the proposal has a discouraging provision stating that in disputes between an investor and a state, the latter can demand the exhaustion of domestic administrative and judicial remedies before resorting to the centre's framework of dispute resolution.[135] Not all legal systems have a fast and efficient judiciary. Therefore, the idea is a disservice to the ethos of the centre as it could take a long time to go through all domestic administrative and judicial spheres of a country. Conversely, this might be the goal of the agreement; that is, to create obstacles so parties will opt out from using arbitration and will try to settle any impasse amicably.

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[128] Silvia Karina Fiezzoni, 'The Challenge of UNASUR Member Countries to Replace ICSID Arbitration' (2011) 2, Beijing Law Review, 134, page 134.

[129] This was done by the foreign ministers of UNASUR in a meeting in Colombia. In <https://repo.unasursg.org/alfresco/service/unasursg/documents/content/los_ministros_de_relaciones_exteriores_de_america_del_sur_resuelven_crear_un_grupo_de_trabajo_con_miras_a_la_constitucion_de_un_mecanismo_para_solucion_de_controversias_en_materia_de_inversiones_en_el_marco_de_unasur.pdf?noderef=55ad4a66-069a-4da6-9dc3-db570c58ddcd> accessed on 21 May 2018.

[130] The last meeting of the working group, the fourteenth meeting, was held on 31 March 2016. In <https://repo.unasursg.org/alfresco/service/unasursg/documents/content/decima_cuarta_reunion_del_grupo_de_trabajo_de_expertos_de_alto_nivel_sobre_solucion_de_controversias_en_materia_de_inversiones_de_unasur_acta.pdf?noderef=42dd7b23-19c6-4252-abd1-654d895d8a2c> accessed on 21 May 2018.

[131] Article 11 of the 2014 drafted proposal.

[132] Article 12 of the 2014 drafted proposal.

[133] Article 13 of the 2014 drafted proposal.

[134] Article 31 of the 2014 drafted proposal.

[135] Article 5(10) of the 2014 drafted proposal.

The examples presented above are samples of some of the structures currently in force in Latin America.[136] Besides the BITs covered by ICSID, there are other investment treaties relying on ad hoc arbitration or another institutional arbitration such as the International Centre of Commerce, the Stockholm Chamber of Commerce and the Permanent Court of Arbitration.[137] To put it briefly, nowadays, there is a myriad of agreements in Latin America tailored for the ideology of each regional bloc. The positive aspect of such diversity is questionable. Looking at FDI policies, each country, or regional bloc, has a different objective. Chile has a welcoming policy towards FDI,[138] it has a relatively good experience with FDI dispute settlement and has tried to merge regionalism with globalisation. Argentina incorporated a neoliberal agenda in the 1990s but since the beginning of this century, its economy has been unstable.[139] However, it has not rejected the western FDI framework. ALBA is an alliance and it does not adhere or produce FDI instruments, nevertheless, it presents an ideology that guides its members against ICSID, which can be seen by the fact that it had as its members the three anti-ICSID countries. Be that as it may, even at ALBA it is hard to find cohesion because in August 2018, Ecuador withdrew from the organisation,[140] and in November 2019, Bolivia announced it was leaving the alliance.[141] Moreover, although

[136] A list of all agreements, regional, bilateral or multilateral can be found in the Foreign Trade Information System of the Organisation of American States in http://www.sice.oas.org/.

[137] For instance, in the Permanent Court of Arbitration, Ecuador has three cases ([2012-10] *Merck Sharpe & Dohme (I.A.) LLC v The Republic of Ecuador* [2016-11] *Albacora, SA v La República del Ecuador* [2009-23] and *1.Chevron Corporation and 2.Texaco Petroleum Company v The Republic of Ecuador), Venezuela has two* ([2013-34] *Venezuela US, S.R.L. (Barbados) v The Bolivarian Republic of Venezuela and [*2016-08] *1.Manuel García Armas 2.Pedro García Armas 3.Sebastián García Armas 4.Domingo García Armas 5.Manuel García Piñero 6.Margaret García Piñero 7.Alicia García González 8.Domingo García Cámara 9.Carmen García Cámara v República Bolivariana de Venezuela) and Bolivia has two cases* ([2016-39] *Glencore Finance (Bermuda) Limited v Plurinational State of Bolivia and* [2013-15] *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia*).

[138] See OECD, *Diagnostic of Chile's Engagement in Global Value Chains*, (OECD Publishing, 2015) < https://www.oecd.org/chile/diagnostic-chile-gvc-2015.pdf>, accessed on 08 November 2018.

[139] Martha Martínez Licetti, Mariana Iootty, Tanja Goodwin, José Signoret, *Strengthening Argentina's Integration into the Global Economy: Policy Proposals for Trade, Investment, and Competition* (World Bank, 2018) https://openknowledge.worldbank.org/handle/10986/29645 License: CC BY 3.0 IGO, accessed on 08 November 2018.

[140] 'Ecuador deja la Alba al no concordar con sus principios' El Telégrafo (24 August 2018) <https://www.eltelegrafo.com.ec/noticias/politica/3/onu-venezolanos-acogida-refugiados> accessed 09 November 2018.

[141] 'Bolívia rompe relações com Maduro e anuncia saída de médicos cubanos' Veja (15 November 2019) < https://veja.abril.com.br/mundo/bolivia-rompe-relacoes-com-maduro-e-anuncia-saida-de-medicos-cubanos/> accessed on 17 November 2019 and 'Bolivia rompe relaciones con Venezuela y se retira de la Alianza Bolivariana ALBA' DW (15 November 2019) <https://www.dw.com/es/bolivia-

Ecuador, initially, moved towards a framework for solution of FDI disputes in UNASUR, trying to create an opposing method to ICSID, it announced that was leaving the bloc in March 2019.[142] If it was not enough for Ecuador to retire from the regional bloc, before that, in April 2018, Argentina, Brazil, Chile, Colombia, Paraguay and Peru suspended their membership.[143] In August 2018 Colombia left UNASUR,[144] which was followed by Brazil in March 2019.[145] The result of such exodus was the formation, believe it or not, of another group called the Forum for the Progress and Development of South America.[146] The bloc is formed of eight countries, and according to the Brazilian Ministry of Foreign Affairs, its aim is 'to build and consolidate a regional space of coordination and cooperation, by laying the foundations for launching the Forum for the Progress of South America (PROSUR). For those counties, the initiative will replace the role performed at first by UNASUR.'[147] It is too soon to know which approach, if any, this bloc will have in relation to FDI, but one thing appears to be clear, it is a new face with the same old clothes. In the meantime, MERCOSUR is trying to follow the Brazilian CFIA model, and Mexico, in the USMCA framework, is adhering to the new American policies towards FDI.

Too many FDI models will render some frameworks obsolete. Furthermore, creating formats fit for a local policy will only work if the specific country has bargaining power in

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rompe-relaciones-con-venezuela-y-se-retira-de-la-alianza-bolivariana-alba/a-51271927> accessed on 17 November 2019.

[142] 'Ecuador se retira de Unasur y abre la puerta a nuevas iniciativas de integración' El País (14 March 2019) < https://elpais.com/internacional/2019/03/14/america/1552524533_446745.html> accessed on 17 November 2019. In 20 September 2019, the Ecuadorian congress confirmed the decision made by the Ecuadorian president to withdraw from UNASUR, in 'Ecuadorean congress confirms country's exit from weakened Unasur' Buenos Aires Times (20 September 2019) < https://www.batimes.com.ar/news/latin-america/ecuadorean-congress-confirms-countrys-exit-from-weakened-unasur.phtml> accessed on 17 November 2019.

[143] Lisandra Paraguassu, 'Six South American nations suspend membership of anti-U.S. bloc', Reuters (20 April 2018) <https://www.reuters.com/article/us-unasur-membership/six-south-american-nations-suspend-membership-of-anti-u-s-bloc-idUSKBN1HR2P6> accessed on 08 November 2018.

[144] 'Colombia dejará de ser miembro de Unasur' CNN Español (10 August 2018) < https://cnnespanol.cnn.com/2018/08/10/colombia-dejara-de-ser-miembro-de-unasur/> accessed 17 November 2019.

[145] 'Brazil officially leaves Unasur to join Prosur' EBC (17 April 2019) < http://agenciabrasil.ebc.com.br/en/internacional/noticia/2019-04/brazil-officially-leaves-unasur-join-prosur> accessed on 17 November 2019.

[146] This was done in a summit in Santiago, Chile, when Argentina, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay and Peru signed the Declaration of Santiago for the renewal and strengthening of South America. The original text in Spanish can be found at http://www.itamaraty.gov.br/en/press-releases/20220-presidential-declaration-on-the-renewal-and-strengthening-of-south-america-integration-santiago-march-22-2019-spanish, accessed on 17 November 2019.

[147] 'Emergence of PROSUL' Ministry of Foreign Affairs < http://www.itamaraty.gov.br/en/politica-externa/integracao-regional/20940-emergence-of-prosul> accessed on 17 November 2019.

transacting. Perhaps, Latin American Countries could try to adopt a standard similar to the EU, in a sense that they should stop pretending and actually behave as a united group. Division seems to be the ordinary procedure in Latin America, situation that instead of encouraging trade, generates isolation. The results are that so many options do not create unity, on the contrary, although the message publicised by the blocs is of progress, because the blocs are motivated by different political ideologies, disunity has proven to be a common outcome in Latin America.

4 The Brazilian CFIA as an alternative for investment in Latin America

With the variety of models regulating investment in Latin America, the Brazilian CFIA could present a new framework to Latin American countries resisting ICSID or the like. The BIT structure, together with ICSID, has encountered obstacles that go beyond ALBA members. Australia has decided that it will no longer adopt arbitration to settle disputes involving its BITs.[148] The move is a reaction to the case of *Philip Morris Asia Limited v The Commonwealth of Australia*[149] which challenged Australia's Tobacco Plain Packaging Act 2011;[150] added to the fact that 'there are growing doubts about the perceived economic merits of trade and

[148] See Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, April 2011, in <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf> accessed on 30 May 2018, page 14 where it states: 'In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.'

[149] UNCITRAL, PCA Case No. 2012-12.

[150] The claim argued that '[t]he plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming [the Claimant's subsidiary in Australia] from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant's] investments in Australia'. (Claimant's Notice of Arbitration, para. 1.5, in <www.italaw.com/sites/default/files/case-documents/ita0665.pdf> accessed on 30 May 2018). The tribunal conclude that the claims raised were inadmissible and therefore, it had no jurisdiction over the dispute. See PCA Case No. 2012-12, Award on Jurisdiction and Admissibility 17 December 2015, in <https://pcacases.com/web/sendAttach/1711> accessed on 30 May 2018.

investment arbitration'.[151] The EU has taken a similar approach and in its latest trade agreements with Canada and Vietnam, it is proposing the creation of an investment court system.[152] Therefore, in this scenario, Brazil's vision appears innovative and bold. Nevertheless, the framework presented reflects more a necessity for Brazil to enter the investment protection world and as a result, to give assurances to its own companies.

In a sense, the Brazilian CFIA is already a model for some Latin American countries because the Mercosur's Protocol on Investment Cooperation and Facilitation is mirrored in the Brazilian CFIA. This is not a mere coincidence as within Mercosur Brazil has a leadership position. Nevertheless, even though the country is a world top ten economy,[153] within Latin America, the tale is not the same. Brazil can exercise influence but not as the main leader; additionally, Brazil's policy is not always in line with the politics of other Latin American countries.[154]

Be that as it may, so far, Brazil has signed CFIAs with four Latin American countries that are familiar with the ICSID framework and the well-established BIT. This mirrors an acceptance to the new model but no standardization. On the contrary, the four countries have agreed to different frameworks and are open to a diverse portfolio of investment agreements.[155] The initial political situation in Brazil was to reject the FDI framework. Brazil signed several BITs but never ratified them. Eventually, Brazilian companies started to invest abroad, the economy grew and Brazil became an exporter of investment as opposed to just a recipient of investment. Such events promoted a change; however, the modification needed to be done in a Brazilian way, that is, Brazil could not now turn a blind eye to the past and adhere to the mainstream BIT model. Hence, what Brazil did was to create a framework that would be acceptable internally and externally. Internally, because it proposes a framework different from

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[151] Leon E. Trakman, 'Australia's Rejection of Investor-State Arbitration: A Sign of Global Change', in Leon E. Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013), 348.

[152] See August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19, Journal of International Economic Law, 2016, 761 and Freya Baetens, 'The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges' (2016) 43(4) Legal Issues of Economic Integration, 367.

[153] CIA World Fact Book (n 32).

[154] See Levy et al (n 85) and Badin et al (n 10).

[155] Mexico, Chile and Peru are part of the TPP. Mexico is part of NAFTA and the three countries together with Colombia are part of the Pacific Alliance. Moreover, all four countries are signatory to the ICSID convention.

what has already been rejected; and externally, because it distances itself from ICSID. The latter position is materialized through the countries in which Brazil has already concluded a CFIA. These countries are all developing economies, and once the South American nations are excluded, the other signatories are from African countries in which Brazilian companies operate or want to operate.[156] Thus, at first sight, the CFIAs concluded were primarily made to protect outbound investments from Brazil as some of the counterparties of the agreements themselves do not have much investment in Brazil.

Moreover, when it comes to trade deals and regulation of investments, Latin America has a plethora of frameworks. Despite the efforts of the trade blocs such as the Pacific Alliance, UNASUR, Mercosur and CARICOM to harmonize trade, each group is pursuing local interests that do not reflect a will for Latin America integration. Otherwise, perhaps, there would be no need for so many regional agreements. Also, some countries such as Mexico, Chile and Peru appear to be comfortable with the ICSID framework.[157] The political regimes in Latin America are so diverse that despite the existing regional efforts, it is unlikely that Latin America can agree on a common standard.

Another question that will be answered through time is if western countries that heavily invest in Brazil will adhere to CFIA. Even though the ICSID model is being criticized,[158] it is still the most common method to solve investment disputes. Additionally, CFIA's exclusion of ICSID is not exceptional. The CARICOM has a framework of Joint Commission or a Joint Council to solve disputes that avoid the investor-state arbitration. The UNASUR proposal also opposes ICSID with a formation of a centre that will ultimately solve disputes through state-to-state arbitration. Outside Latin America, the EU is also working on establishing an investment court. What makes it different is its suitability to Brazil. As Brazil is an attractive place for FDI, the country has some bargaining power to implement a bespoke arrangement for investment. But until the CFIA can be deemed successful, ICSID will remain in place. Perhaps,

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[156] See A new Atlantic alliance, *The Economist* (London, 10 November 2012) <www.economist.com/business/2012/11/10/a-new-atlantic-alliance>.

[157] Mexico signed the ICSID on 11 January 2018 and it entered into force on 26 August 2018. Chile did not have a bad experience with ICSID, and for Peru see Victor Saco, chapter 15.

[158] See Muthucumaraswamy Sornarajah, 'The case Against a Regime on International Investment Law', in in Leon E Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013), Caroline Foster, 'A New Stratosphere? Investment Treaty Arbitration as "Internationalized Public Law"' (2015) 64, International Comparative Law Quarterly, 461 and Nicolas Nicolás M Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) 8, Journal of International Dispute Settlement, 673.

the ALBA countries could embrace the CFIA style as it counterposes ICSID, but Latin America seems far from reaching a homogeneous format of FDI.

Conclusion

The Brazilian CFIA comes at an interesting moment for FDI. It represents the debut for Brazil in the FDI scenario. It is also an opportunity for developing economies wishing to be recipients of Brazilian FDI or to encourage investment in Brazil, and to have some protection in its endeavours. As Latin America has been dealing with FDI and its dispute resolution framework since the 1990, it was the time for Brazil to position itself in this arena. Be that as it may, the situation in Latin America is far from stable when it comes to FDI. The revival of the Calvo doctrine and the 'us against them' ideology runs in contrast to the idea of integration that is needed in Latin America. The reality is that Latin America tends to have policies resisting and accommodating FDI and that is the Brazilian case. It resisted the FDI framework for years but when it became necessary to provide protection to its companies, it decided to accommodate, that is, create its own framework which derives, in part, from the well-established western view of FDI.

It is natural that similitudes in Latin America would bring countries together, but recently, the myriad of arrangements resembles groups forming against the threat of each other. The CFIA could be a good model for Latin America. It certainly would make some of the anti-ICSID countries feel more comfortable with the settlement of disputes. The state-to-state arbitration, in theory, would provide a different spectrum and exclude the ideas of an arbitral tribunal protecting foreign multinationals and interfering in domestic sovereignty. But even so, the imperialist argument could still be raised due to the economic position of one of the state parties in the arbitration. In any case, a state-to-state arbitration would appear more transparent as there would be a stronger public pressure to make the proceedings public.

The Brazilian initiative is good for Brazil, and it can be good for Latin America if there is a will to act together. However, nowadays, Latin American countries acting as a team seems more symbolic than real. It is hard to see a true intention to work together, which can be exemplified by Ecuador's proposal in UNASUR and its later departure from the bloc. Several UNASUR members have different FDI frameworks and a new format just to oppose ICSID is contrary to the policy applied in several Latin American nations. This could be seen in the recent evacuation made by several UNASUR members and the formation of PROSUR. It raises the question of what was the real purpose of UNASUR? Changes are happening so often and so fast that by the time this book has been published, it is likely that new blocs might be formed, and more countries will have withdrawn from regional agreements. As a result, it is difficult to aspire a true wiliness amongst Latin American countries to work together. What is clear it that different blocs are formed to either resist or accommodate foreign influence. If the CFIA proves to be successful, perhaps a movement for its expansion should be made, though, for the moment, it is an investment agreement made in Brazil for Brazil.