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以巴西 CFIA 模式為基礎建立國際投資便捷化之規範架構

Establishing an Investment Facilitation Framework: Building on Brazil's CFIA Model

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Establishing an Investment Facilitation Framework:

Building on Brazil`s CFIA model

本論文係何昇安君（R04A21120）在國立臺灣大學法律學系完成之碩士學位論文，於民國108年01月25日承下列考試委員審查通過及口試及格，特此證明

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摘要

國際投資體制正因保守性保護主義政策的增加、投資者與國家爭端解決案件的浪潮以及南南投資的增長而發生變化。特別是，從投資促進，擔保和保護轉向投資便利化條款，作為新一代國際投資協定的新視角。在尋求多邊投資框架時，這些問題變得更加明顯。

於此脈絡下，許多國家對傳統雙邊投資協議抱持謹慎態度，並開始修改或退出現有的雙邊投資協議，以保護其政策空間。更有甚者，各國政府正在施壓要求重新談判私人投資合約，要求外國投資者在私人合約發生爭議時放棄尋求投資者與國家爭端解決的權利。

考慮到外國直接投資對於國家發展的重要性，各國政府需要吸引和維持投資。但是，人們也關注投資的品質以及如何通過可持續發展的投資工具、政策和程序來支持這些投資。

本文將從投資促進角度研究巴西最近的合作和便利化投資協議模式，探求更加平衡的國際投資合作和便利化體系。最後，將討論在 WTO 下建立多邊投資框架的可能性。

關鍵詞: 巴西; 外商直接投資; 投資便利化; 合作和便利化投資協定; 多邊投資框架模式。

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Abstract

Changes are occurring in the international investment regime caused by an increase in conservative protectionist policies, a wave of investor-state dispute settlement cases and grow of South-South investments. In particular, a shift from investment promotion, guarantee, and protection towards investment facilitation provisions as a new perspective on the new generation of international investment agreements. The issues become more apparent in the pursuit of a multilateral framework on investment.

In this context, many countries are cautious about the adhesion of traditional bilateral investment agreements and began the revision or denunciation of existing ones in order to safeguard their policy space. Moreover, governments are pressuring to renegotiate private investment contracts, requiring foreign investors to waive their right to pursue investor-state dispute settlement in the event of a dispute from the private contract.

Considering the importance of foreign direct investment on the development of a country there is a need to attract and maintain investments. However, there is also attention given to the quality of investments and how they can be supported by investment tools, policies, and processes for sustainable development.

This paper will look into the Brazilian recent cooperation and facilitation investment agreement model from the investment facilitation perspective that seek for a more balanced international investment system of cooperation and facilitation. Afterward, it will discuss the possibilities of a multilateral framework on investment at the WTO that would establish an international investment law.

Keywords: Brazil; foreign direct investment; investment facilitation; Cooperation and Facilitation Investment Agreement; multilateral framework on investment.

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LIST OF ABBREVIATIONS

BCB	Central Bank of Brazil
BIT	Bilateral Investment Treaty
BNDES	The National Development Bank of Brazil
CAMEX	Chamber of Foreign Trade of Brazil
CFIA - ACFI	Cooperation and Facilitation Investment Agreement
CFIP - PCFI	Cooperation and Facilitation Investment Protocol
CNI	National Confederation of Industry of Brazil
CONFAC	National Committee for Trade Facilitation
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EFC	Entrepreneurial Framework Conditions
EFTA	European Free Trade Association
FDI	Foreign Direct Investment
FIFD	Friends of Investment Facilitation for Development
G20	Group of Twenty
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GTEX	Technical Group for Strategic Studies in International Trade
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTSD	International Centre for Trade and Sustainable Development
IF	Investment Facilitation
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
INPI	National Institute of Industrial Property of Brazil
IPA	Investment Promotion Agency
ISDS	Investor-State Dispute Settement
ISI	Import Substitution Industrialization
LDC	Less Developed Country
MAPA	Ministry of Agriculture, Livestock and Supply of Brazil

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MC11	11th Ministerial Conference of WTO
MDIC	Ministry of Industry, Foreign Trade and Services of Brazil
MERCOSUR	Mercado Común Sudamericano
MFI	Multilateral Framework on Investment
MFN	Most Favorable Nation Treatment
MIGA	Multilateral Investment Guarantee Agency
MNE	Multinational Enterprises
MPDM	Ministry of Planning, Development and Management of Brazil
MRE	Ministry of Foreign Affairs of Brazil
NCPs	National Contact Points
NGO	Non-Governmental Organization
OEA	Organization of American States
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PFI	Policy Framework for Investment
PNE	National Exportation Plan of Brazil
RBC	Responsible Business Conduct
SCM	Agreement on Subsidies and Countervailing Measures
SCR	Social Corporate Responsibility
SEW	Single Electronic Window
SSDS	State-State Dispute Settlement
TFA	Trade Facilitation Agreement
TFS	Trade Facilitation in Services
TIWG	Trade and Investment Working Group
TRIMS	Trade Related Investment Measures
TRIPS	Trade Related Intellectual Property Measures
UNCTAD	United Nations Conference on Trade and Development
WEF	World Economic Forum
WTO	World Trade Organization

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1. Introduction

1.1 Objective of the Study

Globalization allowed the capital flows to become increasingly fluid, transposing the borders of sovereign states. Also, with the increasing complexity of global value chains (GVCs), goods are no longer thought of being manufactured and sold in a single country, as each of the tasks in the production chain can be performed in different countries, making companies spread around the globe.

These phenomena's led countries to rethink the global economic order, both in the domestic and international contexts to improve the environment for economic development. In these efforts, foreign direct investment (FDI) comprises a critical element and different efforts are adopted to make the country investment-friendlier. However, besides attracting foreign investment, there is also growing attention given to the quality of investments and how they can be supported by host state investment policies and regulation to have sustainable FDI that leads to sustainable development, contributing to the UN's 2030 Sustainable Development Goals.

Global tendencies of conservative protectionist policies[1] and the wave of investor-state dispute settlement (ISDS) cases[2] indicate that the current international

[1] *See* Karl P. Sauvant & Axel Berger, *Moving the G20's investment agenda forward*, G20 Insights: Trade, Investment and Tax Cooperation (June 19, 2018), http://www.g20-insights.org/wp-content/uploads/2018/06/moving-the-g20s-investment-agenda-forward-1529419443.pdf. (E.g. governments are encouraging multinationals to re-shore and invest at home, or tightening controls of outward FDI; screening mechanisms to review M&A; lack of reciprocal market access; performance requirements practiced as market-access conditions).

[2] UNCTAD, *Philip Morris Asia Limited v The Commonwealth of Australia*, (PCA Case No 2012-12), http://investmentpolicyhub.unctad.org/ISDS/Details/421. (Most notorious ISDS case, on it Phillips Morris Asia argues that Australia`s plain packaging legislation frustrated its 'legitimate interests and expectations', violates Article 2(2) of the Hong Kong–Australia BIT regarding fair and equitable treatment, and non-conformity with other WTO international trade treaties).

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investment regime - with its current 2.957 bilateral investment treaties (BITs)[3] – are not attending the purposes of fostering investment and adequately distributing investment benefits among host states, foreign investors and home countries. In this context, countries are cautious to the adhesion of new BITs and began the revision or denunciation of existing ones. Hence, the international investment scenario is witnessing many changes with a new generation of international investment agreements (IIAs), that are slowly shifting the international investment scenario paradigm from the promotion, guarantee and protection of investments – prevalent since the 80s – towards alternative foreign investment policies that have a more balanced approach, inclusive growth and sustainable development in mind with a new set of principles such as solidarity, absence of conditions, horizontality and respect for sovereignty.

Within this framework, the purpose of this paper is to analyze the Brazilian new international investment treaty, the Cooperation and Facilitation Investment Agreement (CFIA),[4] on the perspective of investment facilitation (IF), as an bilateral, plurilateral or even multilateral alternative for the international investment regime that is facing an unpopularity and legitimacy crisis.

Brazil is chosen as a case study due to its global importance in FDI[5] and recent developments on its international investment framework. Despite its foreign policy of legal nationalism based on the Calvo doctrine,[6] import substitution industrialization (ISI)

[3] UNCTAD *IIA database*, http://investmentpolicyhub.unctad.org/IIA. (Updated until Nov. 20, 2018).
[4] Cooperation and Facilitation Investment Agreement, Brazil Model BIT 2015 [hereinafter CFIA model]. UNCTAD, Investment Policy Hub. Investment Related Instruments (IRIs). https://investmentpolicyhub.unctad.org/IIA/CountryIris/27#iiaInnerMenu.
[5] UNCTAD. *World Investment Report 2018: Investment and New Industrial Policies*. Geneva: UN (2018), https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf. (Value between 50 to 70 billion since 2010, being Brazil in the 7th FDI receiver in 2016, and 4th in 2017 with US$ 63 billion).
[6] Carlos Calvo, *Derecho Internacional teórico y prático de Europa y América*, Paris: et Pedone-Laurie (1868), https://books.google.com.br/books?id=KsBBAAAAYAAJ&printsec=frontcover&hl=pt-BR&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false. (Doctrine based on: a) equality and submission of the foreign investor to the local jurisdiction, and b) the non-intervention of the investor`s origin State though diplomatic protection or armed intervention).

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policies[7] and previous refusal to join the investment regime in the non-ratification of the 14 BITs signed in the 90s. In the international context, Brazil is the only country with some economic weight in the world without previous investment protection agreements in force, before CFIAs, it was limited to commitments made at the end of the Uruguay Round. Due to the emergence of South-South investments,[8] Brazil developed CFIA in 2015, that has already been signed with 10 countries, in the intra-Mercosur Protocol for Cooperation and Facilitation of Investments (PCFI),[9] and bases the Brazilian Structured Discussion on Investment Facilitation, a multilateral investment agreement draft that was circulated on the WTO's General Council.[10]In addition, investment facilitation is a new and heated topic that is viewed favorably by most countries as the most cost-effective and simplest tools for the investment cycle. At the end of 2017, 70 countries signed a Joint Ministerial Statement on Investment Facilitation for Development at WTO's 11th Ministerial Conference for the IF discussion to be reinserted on WTO negotiations.[11]

Therefore, as the Brazilian CFIA treaty model is considered to be one of the most complete on IF provisions and already ratified by a country that is opposed to the traditional international investment standards shows great promise on being adopted by other countries that face similar positions of opposition.

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[7] "Import Substitution Industrialization (ISI)" Encyclopædia Britannica (Jan. 30, 2018), https://www.britannica.com/topic/import-substitution-industrialization. ([P]ursued mainly from the 1930s through the 1960s in Latin America—particularly in Brazil (…). In theory, ISI was expected to incorporate three main stages: (1) domestic production of previously imported simple nondurable consumer goods, (2) the extension of domestic production to a wider range of consumer durables and more-complex manufactured products, and (3) the export of manufactured goods and continued industrial diversification").

[8] Where many developing countries are becoming both receivers and exporters of FDI, having to attend the interests from both sides, resulting in a greater balance and change of IIA purpose.

[9] Protocolo de Cooperación y Facilitación de Inversiones Intra-Mercosur [Intra-Mercosur Cooperation and Facilitation Investment Protocol, hereinafter PCFI], signed by Argentina, Brazil, Paraguay, Uruguay on April 07, 2017 in Buenos Aires, Argentina (Paraguay).

[10] *Structured Discussions on Investment Facilitation.* Communication from Brazil circulated at the request of the delegation of Brazil at the WTO, *J*OB/GC/169 (Jan. 31, 2018). www.goo.gl/axm2eJ.

[11] WTO, 11th Ministerial Conference, *Joint ministerial statement on Investment Facilitation for Development*. WT/MIN(17)/59, (Dec. 13, 2017), https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm.

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Finally, the author is a Brazilian citizen and a licensed lawyer[12], with a pragmatic view on the Brazilian international legal system and an innate curiosity upon its international investment treaties that before 2015, were practically non-existent.

1.2 Scope and Limitations on the Thesis

First, there are three main determinants that influence the FDI destination decision: economic factors, regulatory framework, and investment facilitation efforts.[13] The economic factor (such as market size, infrastructure, labor, productivity, political stability, etc.) is the main element that can solely determine the investment destination as investors objective is to have a return on their investment, although important it is not the topic of this paper due to complexity. Instead, this paper will focus on analyzing and discussing the remaining two determinants of regulatory framework (regulations, laws, and treaties) and investment facilitation efforts.

Second, investment facilitation is still a new broad subject, as most existing IIAs contain relatively few provisions on investment facilitation.[14] It is generally understood as "the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries."[15] This concept can easily englobe other facilitation, cooperation and liberalization efforts that can also generate benefits to the investment cycle, being trade facilitation the main example. At the first stage, IF principles are focused in the

[12] Federative Republic of Brazil's Bar Association registration: OAB/SP nº. 285582.

[13] *Accord* UNCTAD. *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*. New York and Geneva: UN (2009), https://unctad.org/en/Docs/diaeia20095_en.pdf; and Karl P. Sauvant, *Investment promotion and facilitation in a broader context, Good practices in investment promotion and facilitation.* Paris: OECD (Oct. 18, 2016), https://works.bepress.com/karl_sauvant/474/download/.

[14] UNCTAD, *World Investment Report 2017: investment and the digital economy.* Genebra: UNCTAD, (2017), http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1782.

[15] UNCTAD. *Investment Facilitation: A Review of Policy Practices*. (2017a), http://investmentpolicyhub.unctad.org/Publications/Details/160.

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improvement of transparency, information, predictability, efficiency, and effectiveness on policies, laws, regulations and administrative proceedings; a standard that is applied in the domestic context discussion. On international investment treaties, although there are seldom cases of IF application, the CFIA model[16] represents a breakthrough, possessing IF provisions that will be discussed in the context of institutional enhancement, thematic agendas, risk mitigation, and dispute prevention.

Third, despite the amount of FDI, Brazil is not considered a case model of IF application or monitoring. Far from it, it has a peculiar set of bureaucratic, economic and structural difficulties that interfere in the development of the country, affecting both Brazilians and foreign investors alike; these obstacles added to the unprecedented and prolonged economic crisis since 2014 have left the country in a precarious economic situation.[17] In this context, this paper limits to briefly discuss Brazil's domestic IF policymaking deficiencies and focus on the recent Brazilian interactions on the global investment regime with the CFIA model, where, in the author's opinion, represents the best possibility of being accepted by the most radically opposed countries to the current international investment standards.

Lastly, this paper does not aim to cover all aspects of investment facilitation or IIA formulation, it only represents a small piece of discussion on the CFIA model as a new generation of IIAs in the perspective of investment facilitation as an alternative framework for the international investment regime that is facing an unpopularity and legitimacy crisis.

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[16] *Infra* Annex 3.

[17] *See* Paul A. Laudicina, Erik R. Peterson, & Courtney Rickert McCaffrey, *The 2018 A.T. Kearney Foreign Direct Investment Confidence Index*, (2018), https://www.atkearney.com/foreign-direct-investment-confidence-index/full-report. (Brazil ranks on the 25th position regarding foreign investors' confidence, a drop of 9 positions compared to 2017).

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1.3 Layout of the Paper

Chapter 2 will look in the international investment regime, its origin, and development in the absence of a multilateral framework on investment (MFI), which resulted in the indiscriminate adoption of bilateral and regional IIAs that are now heavily criticized for a lack of balance and legitimacy. In this framework, WTO's current role (or lack of it) on investment issues to demonstrate why the current investment regime is unsustainable, making countries to oppose its current standards, attempting to reform it or simply withdrawing.

On chapter 3, the discussion is on Brazil's investment regime, its legal treatment, main obstacles and the central investment strategy that is the main of which a country's international investment relations derive from and are meant to support. Followed by a discussion of investment facilitation initiatives in the Brazilian domestic context, using diverse international organizations guidelines, ending with a general assessment on the Brazilian IF framework using different toolkits and checklists offered by different international organizations.

Afterward, chapter 4 will discuss Brazilian history and recent developments in the international context, focusing on the CFIA model. It will be compared with traditional BITs, and point out peculiarities in the already signed CFIAs as they offer larger flexibility on negotiations.

Finally, chapter 5 will analyze IF on the multilateral context, efforts for a MFI that would implement an international investment law, developments of the investment and IF issue on WTO, and the relation between trade and investment. Furthermore, a closer analysis of the Brazilian Structured Discussion on Investment Facilitation, a draft proposal for a MFI structure to further the investment facilitation discussion.

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2. Overview of Investment Facilitation

The fact that FDI[18] contributes to the development of a country is unquestionable. Beyond the injection of needed capital, it also benefits the host state with technical know-how, best practices, and foreign markets access; increasing innovation, productivity, and higher quality jobs in the investment cycle.[19] Thus, it is simply impossible for countries to not be concerned about attracting investments and do not adhere to the international investment legal regime. When countries on the receiver end of FDI join international investment agreements, it increases foreign investors' confidence to elect it as a FDI destination. Hence, adhering to international investment standards helps countries to keep their investment environment friendlier and stay as a competitive investment destination.

Having the notion that signing BITs attracts FDI (in the lack of a multilateral framework on investment), and that in turn creates development in the host country. This conventional view made countries to indiscriminately participate in IIAs without the proper assessment or negotiation. While it is indeed that the host country enjoys the benefit of capital injection in its economy, it does not reflect the full spectrum of interests of the other stakeholders in the investment cycle. For many investors and host countries, there is a need for a more balanced approach, with rights and duties better distributed, as many countries are undergoing a process of reviewing or denouncing their investment agreements in the growing view that they represent a higher liability as opposed to the benefits that they may bring.

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[18] *See* OECD. *Benchmark Definition of Foreign Direct Investment*. 4th Ed., at 24 (2008). (Defined as one in which the investor holds "a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy" on an enterprise in a country other than his own).

[19] *Cf.* World Bank. *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications*. Washington, DC: World Bank (2018), https://openknowledge.worldbank.org/handle/10986/28493.

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This chapter will look in the international investment framework, its origin in the absence of a multilateral framework on investment, and WTO's role (or lack) on investment issues, leading to the current unpopularity and legitimacy crisis. It aims to demonstrate why the current investment regime is unsustainable, making countries to oppose its current standards, withdrawing or attempting to reform it. Finally, to introduce one of the reform attempts is investment facilitation (IF), that is still a new broad topic, it possesses various different viewpoints, requiring further explanation and delimitation on the scope of application in this paper.

2.1 Origin and Proliferation of Modern BITs

The traditional Bilateral Investment Treaties (BITs) began with Germany in 1959, that had its investments expropriated after its defeat in World War II, hence, the German State was particularly sensitive about the political risks to which the German investors were exposed. Hence, the first bilateral investment treaty was signed between Germany and Pakistan in 1959 and entered into force in 1962.[20]

In addition, the US, in the mid 50's, with the growth of its investments in developing countries, began to propose the conclusion of investment guarantee agreements administered by the Overseas Investments Corporation (OPIC), designed at protecting American investors in the context of the Marshall Plan from the risks of expropriation and nationalization, as well as to losses caused by armed conflicts and impossibility of remittances of profits or repatriation of capital.[21] This system inspired, in 1965, the creation of the Multilateral Investment Guarantee Agency (MIGA) and the

[20] Kenneth J. Vandevelde, *A brief history of international investment agreements*, U.C. Davis Journal of International Law & Policy, California, vol. 12, n. 1, at 169 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478757.
[21] *Id*. at 171.

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International Centre for Settlement of Investment Disputes (ICSID), both organizations of the World Bank Group, that respectively have the mandate to elaborate treaties specifically designed to protect foreign investments, and provide the arbitration of international investment disputes.

In the mid-'70s and early '80s, we can see the early start in the signing of BITs, exploding in the '90s, due to strong interest of developed countries in developing a firmer protection policy of their investments and diminish the political or non-commercial risks on the host States. Until 1990, the number of treaties in force was 355, as early as 2000, this number rose to 1633 and currently, there are 2.958 BITs, being 2361 of them being in force.[22] This sudden interest on BITs, especially from the FDI capital exporter countries, can be explained by the wave of nationalization processes in the 60's and 70's, in part, as result of UN Charters defining that "every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities", recognizing the right "to nationalize, expropriate or transfer ownership of foreign property" as an expression of the full sovereignty of the state.[23]

On the developing countries, the increase in the price of imported products, fall in the price of commodities, and large international bank loans by providing large amounts of capital for industrialization and infrastructure programs caused the countries' external debt to rise sharply. Rising foreign debt made developing countries to be in dire need of foreign capital,[24] thus, BITs were seen as devices capable of increasing the inflow

[22] UNCTAD, *supra* note 3. (Updated until Nov. 20, 2018).
[23] U.N., General Assembly, Res. 3.281(XXIX)/74, *Charter of the Rights and Social Economic Duties of States*, article 2, A/RES/29/3281 (Dec. 12, 1974). http://www.un-documents.net/a29r3281.htm, *See also* U.N., General Assembly, Res. 1.803(XVII)/62, *Permanent sovereignty over natural resources*. (Dec. 14, 1962), http://www.un.org/documents/ga/res/17/ares17.htm
[24] *Cf.* Zachary Elkins; Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties: 1960-2000.* U.Ill. L. Rev. 265, at 2-4 (2008), https://scholarship.law.berkeley.edu/facpubs/433/.

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of FDI, meaning, at the very least, an injection of capital in its economy. The economic and political unbalance on the investment treaties relationship made them being primarily drafted by the developed countries exporters of FDI as a conditional for FDI on a join or leave basis, meaning more of an imposition than a negotiation.

In theory, both parties should have the same obligations as both of them can become host states receiving investors from each other, however, in practice, the agreements are non-reciprocal because FDI flows are generally asymmetric, flowing from developed to developing countries. The idea of an investor from a developing country investing in the developed country is possible, but not probable, and even if it happens, it would not be close to similar.

2.2 The crisis of Traditional BITs

Now that it is better understood the context of the origin and proliferation of BITs, it will be discussed the developments that made IIAs unpopular on the public eye and the reasons for its legitimacy crisis. Although the greater part of governments is not opposed to IIAs *per se*, focusing the concerns on its ISDS provision, the general public does not make such technical distinction, confusing them as a single issue.

Nationalism, protectionism and isolationism tendencies are being observed worldwide with the rise of far-right, “Brexit”, the Donald J. Trump US presidency, and the recent election of Jair Bolsonaro in Brazil, hard-liner conservative. On global economics, it is observed a return of global xenophobic tendencies, including Brazil that has a new far-right president. All these movements have their particularities, but a common factor is that anything foreign is blamed for social problems and downfall of the economy. The world has archived much on global integration, but it is frightening how fast past mistakes are repeated when people are hungry and afraid.

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In the same optic, international investment agreements have never been so unpopular - viewed as instruments of globalization – they are blamed for economic problems, shifting jobs to the exterior and having the remaining work taken by immigrants. It is a controversial topic, those in favor defend that it allows economic development, raise the standards of living, where corporations can internationalize and gain competitive advantage. Those against, claim that the creation of an unchecked international free market created a small elite that concentrates information and power that exceed small nations, posing a threat to human rights on an international scale at the expense of local enterprises, cultures, and people.

In the author's opinion, no matter the adopted position, an uncontested fact is that this process is happening and will continue to do so. Of course, both sides should be taken into consideration, but a common misunderstanding is a common conception that the rich get richer and the poor get poorer. Globalization creates wealth, what we do have is an unbalanced distribution of it, the rich undeniably get a huge part of it, but the poor also improve, receiving more than before. While the poorest (extreme poverty) is left out of the globalization process and stay in the same condition as they had for millennia. In this sense, what is needed is to include those that are left out and have a more balanced distribution on the benefits.

Nevertheless, the fact that there is a negative view of the global trade and investment liberal agenda is irrefutable. In reaction to this unpopular view, in the last decade, countries are opting to elect conservative protectionist policies, such as encouraging multinationals to re-shore and invest home, or tightening controls of outward FDI; screening mechanisms to review merger and acquisitions; lack of reciprocal market access; performance requirements practiced as market-access conditions and so on.[25]

[25] Karl P. Sauvant & Axel Berger (June 19, 2018), *supra* note 1.

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In this framework, traditional bilateral investment treaties are deemed unbalanced and overprotective on the private property of foreign investors at the expense of the right of host countries to regulate their policy space in the public interest, their focus on the guarantee and protection of investments are considered inadequate due to their passive nature, as their main function occurs after a dispute arises between the parties when the relationship between the investor and the host country has already significantly deteriorated. This puts into question the benefits and contribution to the increase in the flow of FDI.[26]

In addition, some IIAs are related to tax heavens[27] and forum-shopping[28] practices, that have become standard practices in corporate and tax planning. IIAs make feasible the existence of tax heavens used from tax planning to money laundering schemes[29], while Forum-shopping occurs when an investor acquires nationality of a state party to an investment treaty, gaining access to treaty's protection provisions and corporate tax laws by setting a holding company in that country, in some cases, it is even done by domestic business making themselves foreign.[30]

On the legitimacy crisis, problems are traced back to the fundamental lack of democratic principles, such as the lack of publicity on IIAs negotiations; constraints on

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[26] *Cf.* UNCTAD, *Reform of Investor- State Dispute Settlement: In Search of A Roadmap,* IIA Issues N.2 (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf; Giorgio Sacerdotti, *Bilateral Treaties and Multilateral Instruments on Investment Protection.* Recueil, Haia, v. 269, at 281 (1998); Karla Closs Fonseca, *Os acordos de promoção e proteção recíproca de investimentos e o equilíbrio entre o investidor estrangeiro e o estado receptor de investimentos*. Florianópolis: Federal University of Santa Catarina, at 42 (2007); Chakravarthi Raghavan, *Bilateral investment agreements play only a minor role in attracting FDI*. https://www.twn.my/title/bil-cn.htm; Karl P. Sauvant, *The International Investment Law and Policy Regime: Challenges and Options*. E15Initiative. Geneva: ICTSD and World Economic Forum, at 13-15 (2015), www.e15initiative.org/.

[27] *Cf.* IMF, *Offshore Financial Centers IMF Background Paper*, (2000), https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm#II_A. (Countries or locations that are used from tax planning to money laundering, e.g. UK (City of London), US (Delaware), Luxembourg, Switzerland, Cayman Islands, Ireland, Hong Kong, Singapore, Belgium and Bermuda.)

[28] Defined as when an investor acquires nationality of a state party to an investment treaty, gaining access to treaty's protection provisions.

[29] *See* ICIJ. *The Panama Papers*, (2017), https://www.icij.org/investigations/panama-papers/.

[30] *Tokios Tokelès v Ukraine Decision*, ICSID Case n. ARB/02/18 (April 29, 2004), http://investmentpolicyhub.unctad.org/ISDS/Details/78.

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governments' policy space; restrictions and procedures on the conception of new regulation or policies; and awards by foreign states and foreign investors through international arbitral tribunals. All these relate to the investor-state dispute settlement mechanism (ISDS), a provision in most BITs that allows foreign investors to take claims against host States on international arbitral tribunals, in view that the domestic judiciary system is biased towards national interests. In extreme cases, it means that the foreign investor can sue the host State for compensation on indirect loses in their investment caused by the adoption of basic public welfare policies, such as health, food, labor, environment, and so on.

The total number of ISDS cases is unknown, as most BITs do not require the disclosure of information on their existence or outcome. The United Nations Conference on Trade and Development (UNCTAD) has the most reliable database, with a total of 904 known cases and 580 of them are concluded.[31] It raises questions about the legitimacy of ISDS, such as the broad and contradictory interpretations of IIA provisions, inadequate enforcement and annulment procedures, conflict of interests on the nomination and qualification of arbitrators, lack of transparency and high costs of the proceeding.[32]

The unpopularity and legitimacy crisis made many countries undergo a review or denunciation process on existing BITs. In 2009, Venezuela terminated its BIT with the Netherlands, Bolivia terminated 12 of its 23 BITs from 2006 to 2013, Ecuador terminated 24 of its 29 BITs, and all three countries denounced the ICSID Convention. Outside LATAM, countries have reviewed their IIAs and reformed their policy on investment protection, South Africa terminated 9 out of the 21 BITs in force, Indonesia terminated 29 of 55, India terminated 22 of 74 and is renegotiating the remaining IIAs.[33] Australia

[31] UNCTAD *database*, https://investmentpolicyhub.unctad.org/ISDS. (Updated until Dec. 11, 2018).
[32] UNCTAD. *World Investment Report 2012: Towards a New Generation of Investment Policies.* Geneva: UN, at 88 (2012), https://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.
[33] UNCTAD, *IIAs Navigator*, Investment Hub, http://investmentpolicyhub.unctad.org/IIA. (Updated until

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has moved away from ISDS provisions and the E.U. Commission is proposing the creation of a reformed tribunal for dispute settlement.[34] Moreover, governments are pressuring to renegotiate private investment contracts, especially in the natural resource exploration, requiring foreign investors to waive their right to pursue ISDS in the event of a dispute from the private contract.[35] Many countries are also finding alternatives to investment policymaking, such as South Africa, that implanted a new domestic investment code[36] to replace its expiring investment treaties, having the same strategy in the regional level with changes in the Southern Africa Customs Union (SACU).[37]

All these factors contributed to halt and even revert the progress on global integration, as result, there is a need for reforms in the global investment framework, changing its focus from the passive investment protectionism to alternative active measures, such as investment facilitation initiatives.

2.3 The Definition of Investment Facilitation

Despite investment facilitation efforts being considered the most cost-effective and simplest tools for growth and development.[38] In each country's investment strategy policy and the majority of existing IIAs, there is a lack of concrete investment facilitation provisions, especially Brazil that has a high burden of government regulation. The most common and identifiable IF provisions on investment treaties are mostly those facilitating

May 02, 2018. India new model BIT requires the exhaustion of local remedies before ISDS).

[34] José Henrique Viera Martins, *Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*. Investment Treaty News, IISD (2017), https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/.

[35] *Cf*, Antoine Romanetti, *Preventing the Abuse of Multiple and Concurrent Arbitration Proceedings: Waiver Clauses*, Stockholm International Arbitration Review, vol. 2, at 75-101 (2009), http://romanettiavocats.com/index.php?option=com_docman&task=doc_download&gid=2&Itemid=63

[36] Protection of Investment Act. n. 22 of 2015 (South Africa).

[37] IISD, *Report of the Ninth Annual Forum of Developing Country Investment Negotiators*. Rio de Janeiro, (Nov. 2015), www.iisd.org/project/annual-forum-developing-country-investmentnegotiators.

[38] UNCTAD (2017a), *supra* note 15, at 2-5.

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the entry of personnel[39] and those furthering transparency.[40] The first was included in over 46% and the second in 59% of BITs during the 2011-2016 period.[41]

In order to introduce IF into IIAs and even to better conceptualize it, several international organizations and the academia have come up with different definitions for IF as a way of fostering global investment. This is achieved through the integration of national and international national policies, taking into account that facilitation is intrinsically related to the national environment. Hence, in an attempt to describe the different aspects of IF, the criteria is to start discussing the broader understandings and go towards the more specific and peculiar ones.

On an early stage, the 2016's G20 Guiding Principles for Global Investment Policymaking have elements of investment facilitation focusing on transparency and the adoption of international best practices on its arts. IV, VII, and VIII of Annex III:

> IV. Regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law. (…)
> VII. Policies for investment promotion should，to maximize economic benefit, be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses.
> VIII. Investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance.[42]

[39] UNCTAD (May 2017), *supra* note 50, at 6. (Action line 3: Improve the efficiency of investment administrative procedures, such as facilitation on visa concessions).
[40] *Id*., at 5. (Action line 1: Promote accessibility and transparency in investment policies and regulations and procedures relevant to investors", such as publication of investment related documents).
[41] UNCTAD (2017), *supra* note 14, at 124-125.
[42] G20. *G20 Guiding Principles for Global Investment Policymaking*, Trade Ministers Meeting Statement, Shanghai, Annex III, Arts. IV, VII, and VIII. (July 9–10, 2016),

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Afterward, IF is understood with a broader definition that can easily encompass anything involved with facilitation, cooperation and liberalization efforts that can generate beneficial effects on the investment cycle making it easier for investors to establish or expand their existing investments. It is a result-based definition that understands investment facilitation as "benefitting from FDI as much as possible",[43] seeing FDI from the perspective of host countries to advance their own growth and development. Therefore, this definition includes (or considers IF a subsection of) investment promotion, being adopted by the World Bank and some few authors,[44] but it is not much applied since the early 2000s as most modern definitions make clear the distinction between investment promotion and IF as two separate fields.

The Organization for Economic Co-operation and Development (OECD) further clarifies that it is a common confusion as many investment promotion agencies (IPAs) are given both mandates of promoting investment (image building and investment generation) and facilitating investment (investor servicing, aftercare, and policy advocacy). The distinction between institutes is made very clear by the OECD's Policy Framework for Investment (PFI), being one "about promoting a country or a region as an investment destination, while the other is about making it easy for investors to establish or expand their existing investments."[45] In fact, the investment facilitation effort requires the capacity for interagency coordination between different institutional and cultural

https://www.wto.org/english/news_e/news16_e/dgra_09jul16_e.pdf.

[43] Karl P. Sauvant, *Investment promotion and facilitation in a broader context, Good practices in investment promotion and facilitation.* Paris: OECD, at 1 (Oct. 18, 2016), https://works.bepress.com/karl_sauvant/474/download/.

[44] Jacques Morisset & Kelly Andrews-Johnson, *The Effectiveness of Promotion Agencies at Attracting Foreign Direct Investment*. FIAS Occasional Paper n. 16. Washington, DC: World Bank. (2004), https://openknowledge.worldbank.org/handle/10986/15073; Andreas Dressler, *Facilitação de Investimentos: Uma Perspectiva Prática*, Pontes, vol. 14, n. 3, ICTSD (May 31, 2018), https://www.ictsd.org/bridges-news/pontes/news/facilita%C3%A7%C3%A3o-de-investimentos-uma-perspectiva-pr%C3%A1tica; *see also supra* note 43.

[45] OECD. *Policy Framework for Investment*, OECD Publishing, Paris, at 39 (2015), http://dx.doi.org/10.1787/9789264208667-en.

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governing bodies that goes far beyond the institutional and political capacity of investment promotion.

On the definition of IF, OECD states "investment facilitation should be understood as a combination of tools, policies, and processes that foster a transparent, predictable and efficient regulatory and administrative framework for investment that maximizes the benefits to the host economy." [46] In this definition, there is the functional objective to "maximizes the benefits to the host economy", meaning that IF should work towards the benefit of the host state. To archive this a normative approach is adopted on "transparent, predictable and efficient regulatory and administrative framework" are set as underlying principles of a healthy investment climate.

OECD innovates further through the peculiar separation of the normative approach of investment facilitation in: a) Tools and Services, to assist foreign investors (one-stop-shop); b) Policies, for implementing transparency, predictability and effectiveness of regulatory practice, ensuring a more sustainable and responsible environment; and c) Processes, that give the tools and policies utility and impact.[47]

In addition, OECD proposes a checklist of key policy issues to enable governments to pursue sustainable economic development from the investment and facilitate investment in the OECD's Policy Framework for Investment User's Toolkit[48] that focuses on investment strategy, information gathering, stakeholder consultations, functions enhancement and the monitoring of investment promotion agencies (IPA).

Following, there is the UNCTAD's investment facilitation definition that, in the

[46] Ana Novik & Alexandre de Crombrugghe. *Towards an International Framework for Investment Facilitation*, Investment Insights series. OECD at 8 (April 2018), https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf.
[47] *Id.*, at 5.
[48] OECD. *Policy Framework for Investment User's Toolkit: Chapter 2. Investment Promotion and Facilitation*, Investment Division of the OECD Directorate for Financial and Enterprise Affairs, (2011), http://www.oecd.org/investment/toolkit/policyareas/investmentpromotionfacilitation/41246119.pdf.

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author's opinion, is the most relevant and likely to be adopted, given its source and the general adoption of it in related documents and articles that relate to IF:

> Investment facilitation is the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries. It focuses on alleviating ground-level obstacles to investment, for example through improvements in transparency and information available to investors, more efficient and effective administrative procedures for investors, or enhanced predictability and stability of the policy environment for investors.[49]

Different from OECD that has a host state centered functional approach, UNCTAD is centered on the foreign investor, setting the IF objective to "making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business". Between the two definitions the constant is in the normative form to archive these objectives through the enhancement on transparency, information, predictability, and efficiency (fewer steps, reduce cost) and effectiveness (right goal) of policies, laws, regulations and administrative proceedings, although UNCTAD refers to it as a mere example, opening the possibility of other forms in the future.

UNCTAD also contributes to the IF discussion with the Global Action Menu for Investment Facilitation[50] that proposes 10 clear and mutually inclusive action lines on what IF measures countries can unilaterally adopt, defines obstacles to overcome, and supply's options for international collaboration and possibilities to be incorporated in

[49] UNCTAD (2017a), *supra* note 15, at 3. (Emphasis added).

[50] UNCTAD, *Global Action Menu for Investment Facilitation*, (May 2017), http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_Investment%20Facilitation%20Action%20Menu_3_1.pdf. (Action Lines Summary: 1. Accessibility and transparency in policies, regulations and procedures; 2. Predictability and consistency; 3. Efficiency and effectiveness of administrative procedures; 4. Constructive stakeholder relationships; 5. Agency with specific mandate for dispute prevention and mediation; 6. Monitoring and review mechanisms for IF; 7. International cooperation for IF; 8. IF through technical assistance; 9. Investment policy through capacity building; and 10. International cooperation through IIAs).

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future investment treaties.

The action lines 1 and 2 intend to encourage the host country to promote accessibility and transparency in policies and regulations as a means of achieving predictability and consistency in its application. As concrete examples, it guides the provision of clear and up-to-date information on investment, centralization of investor assistance (one stop shop), mechanisms to provide publicity and information on changes, and technical regulation in a timely manner. In addition, all administrative decisions must follow a procedure in accordance with previously published criteria, without the discriminatory use of bureaucracy, promoting transparency, predictability and stability. Furthermore, action line 2 reinforces these concepts by requiring a consistent application of investment regulations across institutions and establishing clear criteria and procedures for administrative decisions with respect to investment screening, appraisal and approval mechanisms (pre-establishment phase). It also suggests the creation of amicable dispute settlement mechanisms (e.g. arbitration, mediation) to facilitate investment dispute prevention and resolution.[51]

The Action line 4 emphasizes on maintaining mechanisms for regular consultation and effective dialogue between investment policymakers and stakeholders to identify and address issues encountered by investors aimed at building a relationship, through dialogue and governance corporate governance. It further requires establishing mechanisms providing investors and stakeholders with an opportunity to comment on existing policies, regulations or procedures or even before their implementation.[52]

Action line 5 aims to implement an agency, body or a facilitator, as a focal point, to carry out such measures. The latter, with a mandate to address investors' suggestions

[51] *Id*. at 5.
[52] *Id*. at 7.

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and complaints to the government, resolve and prevent disputes, provide information and promote a friendly investment climate.[53]

Action line 6 is the development of a method of monitoring and review the efficiency and the facilitation measures of the before mentioned action line 5 agency to identify priority areas for investment facilitation measures in line with international best practices. This is the only action line that is currently absent on the Brazilian CFIA model,[54] although the Brazilian draft for a multilateral framework on investment remediates that by proposing the creation of a WTO committee on IF[55] to coordinate and "supervise" the also proposed national focal points, both topics to be further discussed on their specific chapters of this paper.

Action lines 3 and 7 are foreseen in the recent investment agreements which aim to increase efficiency in administrative procedures by reducing the time for processing applications, simplifying licensing procedures and improving international cooperation with regular consultations to partners, collaboration with the reduction of corruption, and the realization of best practices exchanges in knowledge, technology, environmental, social impact assessments, and so on.[56]

Finally, the action lines 8, 9 and 10 aim, respectively, to strengthen the facilitation of investment through support and technical assistance, capacity building of IPAs and government agencies in order to increase the capacity to promote and maximize the positive impacts of the investment and, finally, complement the facilitating investment by encouraging responsible business by way of strengthening the corporate social responsibility (CSR) regime.[57]

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[53] *Id*.
[54] *Id*. at 14.
[55] *See supra* note 10, article 19.
[56] UNCTAD (May 2017), *supra* note 50, at 6-9.
[57] *Id*.

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Overall, it is hard to compartmentalize each of the action lines as they are mutually complementary to achieve the same goal of investment facilitation, possessing a harmonization effect framed within principles of transparency, predictability, efficiency and efficacy of regulations and procedures. These are all valuable proposals for investment facilitation and conflict prevention between stakeholders of investment.

Other important variation of IF can be found on the WTO's 11th Ministerial Conference, although there was no consensus, 70 countries signed a Joint Ministerial Statement on Investment Facilitation for Development that refers IF to "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention."[58] It is a similar definition to the one used by UNTAD and further complemented by a negative definition, excluding from it "market access, investment protection, and Investor-State Dispute Settlement" that were deemed toxic to the IF discussion.

Following the MC11, there is the Brazilian Structured Discussion on Investment Facilitation, a draft proposal for a potential multilateral agreement on investment facilitation,[59] circulated in the WTO's General Council on January of 2018, that defines IF on its article 1.1. as "facilitation measures by Members affecting the admission, establishment, acquisition, and expansion of investments in services and non-services sectors", followed by a negative definition on article 1.3 excluding "government procurement, public concessions, and market access". [60]

It is noted that there are different negative definitions adopted by the MC11 Joint

[58] WTO, 11th Ministerial Conference (Dec. 13, 2017), *supra* note 11.
[59] *See supra* note 10.
[60] *Id.*, art. 1.

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Statement on investment facilitation and Brazi's proposed draft. Despite a different wording, it is observed that investment protection is also a broad concept to exclude as just some of its standards are negatively viewed. In this aspect, there is an effort to adopt a more specific negative concept to exclude.

To complement these definitions, there are also the study on the side-effects that investment facilitation can generate, authors point out investment facilitation as a new form of regulative cooperation[61] on investment that, besides the standard change of policies, laws, regulations and administrative proceedings, provides stakeholders in the investment cycle an opportunity to comment on the elaboration or future changes on policy, laws, regulations and administrative proceedings. At the very least, the regulative cooperation on investment facilitation means that the private sector would have the right to be heard or to be consulted in the formulation and implementation of new policies.[62]

Finally, there is the Energy Charter Investment Facilitation Toolbox[63] created by the Energy Charter Secretariat based on the Implementation Group and expert consultations meetings in 2017 and contains a checklist of policy options for removing obstacles to the establishment and maintenance of energy investments, it is intended to progressively identify a variety of barriers which impede investment in the energy sector and illustrate a set of actions and best practices which countries can choose and incorporate into their own regulations and investment promotion efforts in order to improve their overall investment climate and attract energy investors. Although this

[61] Anne Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective*, 78 Law and Contemporary Problems, at 153-174 (2015), https://scholarship.law.duke.edu/lcp/vol78/iss4/7. (Regulatory cooperation is defined as the proceduralization of bilateral regulatory cooperation in trade agreements for the production of rules and regulation as a pathway to further economic integration).

[62] *Cf.* Luciana Ghiotto, *A Critical Review of the Debate on Investment Facilitation*, Investment Treaty News, IISD (Oct. 17, 2018), https://www.iisd.org/itn/2018/10/17/a-critical-review-of-debate-investment-facilitation-luciana-ghiotto/#_ftnref6.

[63] Energy Charter Secretariat. *The Energy Charter Investment Facilitation Toolbox*, Brussels: 1st ed. on Policy Guidance for Investment facilitation in the pre-establishment phase. (2017), https://energycharter.org/fileadmin/DocumentsMedia/Other_Publications/20171122-Investment_Facilitation_Toolbox.pdf.

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toolkit is designed for the energy sector, many of its elements translate to investment facilitation in a general sense.

On this document there is a detailed checklist guidance for investment facilitation that takes a closer look into IF tools, policies, and processes with further policy actions to consider on each policy goal: a) Long-term and predictable energy and investment objectives; b) Efficient institutional governance and policy-making; c) Effective bureaucracy; d) Transparent administrative and regulatory regimes; e) Favourable investment rules and conditions; f) Effective national judiciary.[64]

Therefore, in this paper, IF will primary adopt UNCTAD's definition and the subsequent created Global Action Menu for Investment Facilitation, also using OECD's IF separation in tools, policies, and processes. Being the Joint Ministerial Statement on Investment Facilitation for Development, and the Brazilian Structured Discussion on Investment Facilitation understood, by the author, as derivations from these conceptions of IF. In an effort to further specify investment facilitation policies, there will be also a general assessment of Brazil's current investment facilitation issues with the OECD's Policy Framework for Investment User's Toolkit,[65] and the Energy Charter Investment Facilitation Toolbox.[66]

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[64] *Id*. at 7-10. (Policy goal 1. Long-Term and Predictable Investment Objectives: a) Develop and publish investment strategy and investment reform roadmap; b) Priorities to clear, coherent and concrete investment policy and investment promotion reform; c) Policy coherence, policy coordination and policy monitoring. Policy goal 2. Efficient Institutional Governance and Policy-Making: a) Single window investment agency for licenses, permits, etc. Policy goal 3. Effective Bureaucracy: a) Reduce investment screening and investment requirements; Remove bottlenecks (e.g. work permits and visa regime); Enhance automation; b) Promote accountability and sound governance through whistle-blower laws. Policy goal 4. Transparent Administrative and Regulatory Regimes: a) Establish investment promotion agencies, industrial development agencies that can provide investors with the necessary information to influence their investment decisions; b) Establish an ombudsman institution which would act on behalf of investors and collect views of energy companies in order to present them to the government. Policy goal 5. Favourable Investment Rules and Conditions: a) Ensure consistency of domestic investment legislation with the country's international legal commitments in its bilateral and regional investment agreements. Policy goal 6. Effective National Judiciary: a) Ensure that contracts between states and investors can be enforced; b) Publicity, predictability and timeliness, appeal mechanism to decisions; c) Promote alternative conflict settlements).

[65] OECD (2011), *supra* note 48.

[66] Energy Charter Secretariat (2017), *supra* note 63.

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3. Brazil's Investment Facilitation Regime

Before entering the main discussion on the CFIA model and the international investment regime, there is a need to first introduce Brazil's investment regime, its legal treatment, main obstacles and the central investment strategy context as a country's domestic investment framework, at least in theory, is what the international investment relations derive from and are meant to support. In the same sense, the OECD's PFI advocates a strong role of the government in promoting stability and providing basic infrastructure, the establishment of an environment that stimulates the acquisition and transfer of technology, including intellectual property protection of such technologies for the investor, global connectivity of the host country with other markets and production chains and, finally, the establishment of competent intermediary organizations to promote horizontal connectivity with other actors and investors.[67]

Afterward, a discussion of investment facilitation initiatives in the Brazilian domestic context will be extracted from the Brazilian investment strategy, guided by the IF definition provided by UNCTAD, were IF principles are focused in the improvement of transparency, information, predictability, efficiency, and effectiveness on policies, laws, regulations and administrative proceedings; and the OECD's created classification criteria of investment facilitation in tools and services, policies, and processes. [68]

3.1 Domestic Legal Treatment of Foreign Investor and its Investments

The discussion starts on Brazil's legal treatment of foreign investor and its investments assets. There is no specific and single legal document in Brazil that

[67] OECD (2015), *supra* note 45, at 41-42.
[68] OECD. Ana Novik & Alexandre de Crombrugghe (2018), *supra* note 46.

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completely regulates foreign direct investment, but rather a sparse set of constitutional provisions and amendments and infra-constitutional laws that set definitions and treatment accorded to foreign capital.

The Brazilian Constitution of 1988 (CF/88) equates the protection of foreigners in its territory to the protection afforded its nationals: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security, and to property".[69] With regard to expropriation, there is no specific regulation in Brazil for foreign investments, having the same treatment as that given to Brazilian investments in the guarantee on the protection of property, establishing that "the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution."[70] These expropriation exceptions refer to the articles 182 (urban development policies) and 184 (agricultural land policy and agrarian reform) of CF/88, each possessing a specific compensation process.[71]

Article 172 of the CF/88 defers the definition of "foreign capital" to the complementary legislation that defines it as "goods, machinery and equipment entered in Brazil without initial foreign exchange, destined to the production of goods or services, as well as the financial or monetary resources brought to Brazil for application in economic activities, provided that they belong to persons physical or legal entities resident, domiciled or headquartered abroad".[72]

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[69] Constituição da República Federativa do Brasil de 1988 [hereinafter CF/88] (It.), *translated in* Constitution of the Federative Republic of Brazil 1988: The Federal Senate, art. 5 (Brazil), http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/Constitution_2013.pdf. (Version: by Constitutional Amendments no. 1/92 through 72/2013).

[70] *Id.*, art. 5, subsection XXIV.

[71] *Infra* Annex 1.

[72] Lei do Capital Estrangeiro e Remessas para o Exterior [Foreign Capital and Foreign Remittance Act], Law n. 4.131 of 1996, art. 1 (Brazil).

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On the side of foreign investment, it is broadly defined by the Central Bank of Brazil (BCB) as the "participation […] in a company incorporated outside Brazil", and defines FDI as "long-term investments in a country other than that of the investor", which seeks to "influence the corporate management of company" constituted according to the Brazilian law, and which "involves the direct or indirect participation of a private individuals or legal entities residing, domiciled or headquartered in a foreign country".[73] The same regulation makes the same differentiation between FDI and portfolio investment[74] that has been internationally adopted.

Specifically, on the treatment to foreign investors, there have been modifications to conform with Brazil's 1995 WTO accession. Before it, article 171 of CF/88 determined the legal distinction between "Brazilian company of national capital" and "Brazilian company of foreign capital", which created the legal base for discrimination between the two types of companies in terms of regulation and policy, such as tax incentives, preference for bids etc. This situation only changed with the Constitutional Amendment n. 6 of 1995, that modified subsection IX of article 170 and revoked the entirety of article 171, eliminates distinctions between foreign and local capital companies, ending favorable treatment for companies that only used local capital.[75] Currently, it is considered a private national company if "organized in accordance with Brazilian law and which have the seat of their administration in the country".[76] Therefore, a foreign investor meeting the requirements for registration has the right to receive the same treatment as a domestic investor.

[73] Circular do Banco Central do Brasil sobre o Capital Estrangeiro [Central Bank of Brazil`s Circular on Foreign Capital], Circular n. 3.689 of 2013, art. 11 (Brazil).
[74] *Id.,* art. 15. (Portfolio investment in Brazil are foreign transactions involving any currency linked to foreign investments through investment funds, such as equities, shares, derivatives, debentures; and it is not in the local production cycle, and remittance is limited by the Brazilian Securities Commission).
[75] CF/88 (2013), *supra* note 69, arts. 170 and 171 (Constitutional Amendment n. 6 of 1995).
[76] Lei de Sociedades por Ações [Companies Act], Decree-Law n. 2.627 of 1940, art. 60 (Brazil).

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Definitions aside, for the foreign investor entering Brazil, there are some necessary essential administrative procedures: a) to have a local representative (for liability reasons); b) obtain a registration with the Securities and Exchange Commission;[77] c) electronically register BCB's system within 30 days of resource inflow (purely declarative);[78] d) enrolled in the taxpayer registry and obtain the mandatory National Registry of Legal Entities (CNPJ) identification;[79] and e) be registered in the National Institute of Industrial Property (INPI).[80]

From this point on, the process is as it happens with any Brazilian domestic company, there are the elaboration and registration of company's contract constitution that takes an average of 11 procedures and 79.5 days.[81]

In addition, like many countries, Brazil defines pre-establishment conditions, such as oil and gas exploration that is open to concession agreements for foreign investors,[82] and governmental monopolies on some sectors that are deemed distinct, strategic, or for national security as in currency, postal service, broadcasting, telecommunications, energy, airports and air navigation services, interstate and international passenger transportation, roads and ports.

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[77] Resolução do Banco Central do Brasil sobre Aplicações de Investidor Não Residente nos Mercados Financeiro e de Capitais [BCB`s Foreign Investor on Capital Market Resolution], Resolution n. 4.373 of 2014, art. 2 (Brazil). (Both items "a" and "b").

[78] Lei de Operações de Câmbio, sobre Registro de Capitais Estrangeiros [Profit Remittance and Foreign Exchange Act], Law n. 11.371 of 2006, art. 5 (Brazil).

[79] Dispõe sobre o Cadastro Nacional da Pessoa Jurídica (CNPJ) [National Registry of Legal Entities Act], Regulatory Instruction RFB n. 1.863 of Dec. 27, 2018 (Brazil). (In an effort to combat corruption, tax evasion and money laundering companies are now obliged to present their entire chain of equity participation until reaching the individuals characterized as "final beneficiaries" (directly or indirectly with more than 25% of the share capital or that exercise the preponderance in the social deliberations and have the power to elect the majority of the administrators) under penalty of CNPJ suspension).

[80] Lei da Propriedade Industrial [Industrial Property Act], Law n. 9.279 of 1996, art. 2 (Brazil). (For investments involving royalties and technology transfer).

[81] World Bank, Doing Business project, *Time required to start a business (days), Brazil* (2017), https://data.worldbank.org/indicator/IC.REG.DURS?locations=BR.

[82] Lei de Política Energética Nacional, as Atividades Relativas ao Monopólio do Petróleo [Petroleum Act], Law n. 9.478, of 1997, arts. 4 and 5 (Brazil).

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3.1.1 Investment Obstacles in Brazil

Brazil is a peculiar country that is the 4th global FDI recipient in 2017 with a total of US$ 63 billion.[83] At the same time, it is considered harder to do business than half of the countries in the globe, being in the 109th position from 190 countries in the World Bank's Ease of Doing Business Ranking,[84] and classified as a below average openness in the ICC 2017 Open Market Index, holding the 69th position from a universe of 75 economies.[85] In addition, Brazil ranked last but one from 18 studied countries in the state efficiency indicator in the report for Brazil Competitiveness 2017-2018, which includes six LATAM countries.[86]

Brazil also ranks in the 72nd position in the overall Global Competitiveness Index of the World Economic Forum (WEF) 2018 Report, the position is below average from the total of the 140 countries studied revealing a poor integration of policies and the lack of coordination between the public and private sectors. However, the surprise is the worst position from all the 140 countries in the burden of government regulation.[87]

These conflicting elements point out that Brazil is a giant on FDI attraction possessing advantages on specific economic determinants (market size, political stability, etc.) that make large companies choose it as a profitable FDI destination, However, it faces enormous structural, bureaucratic and economic difficulties that increase overall costs, hindering development, increasing unemployment, informal work, tax evasion, and

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[83] UNCTAD (2018). *supra* note 5.
[84] World Bank Group, *Ranking of Economies – Ease of Doing Business*, (May 2018), http://www.doingbusiness.org/rankings. (A substantial improvement from the 125th position in 2017).
[85] ICC, *Open Markets Index*, 4ed. (2017), https://iccwbo.org/publication/icc-open-markets-index-2017/.
[86] CNI. *Competitividade Brasil 2017-2018*. Brasília: CNI, at 13 (2018), http://www.portaldaindustria.com.br/estatisticas/competitividade-brasil-comparacao-com-paises-selecionados/. (Countries analyzed Canada, Australia China, Chile, South Korea, Thailand, India, South Africa, Spain, Indonesia, Poland, Mexico, Colombia, Turkey, Peru, Russia, Argentina, and Brazil).
[87] WEF, *The Global Competitiveness Report 2018*, Geneva: World Economic Forum, at 117 (2018), https://www.weforum.org/reports/the-global-competitveness-report-2018.

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currency avoidance; that are resumed in the "Brazil Cost".[88] Specifically, foreign investors often mention the poor infrastructure, rigid labor laws, and a complex federal, state and municipal tax and regulatory requirements that make the country more expensive to operate.

There is also the General Entrepreneurship Monitor (GEM) 2018/2019 Global Report[89] identified in Brazil a series of factors that favor and others that still need further improvement to leverage the development of business activities in the country. Upon the 20 Entrepreneurial Framework Conditions (EFC), only market access (EFC 7) and access to physical infrastructure (EFC 8), essential investment conditions, are considered highly favorable. Among the negative conditions are Governmental Policies (EFC 2), Governmental and Private Programs to support business activity (EFC 3), whether at the municipal, state or federal stage. These data go to a large bibliography that points out in the Brazilian bureaucracy as a strong obstacle to entrepreneurship.[90]

The main source of these problems is rooted in the complex and inefficient government structure, before the 2014 crisis, there were 39 different ministries that have been reduced to 29 after the crisis, and recently reduced again to 22 ministries with the new presidency of Jair Bolsonaro in 2019. However, despite this reduction, the other ministries were not extinct, just absorbed by other ministries, although this assists in the hierarchy issue, the overinflated government structure problem persists. The Brazilian investment sector has seen no reduction; it still possesses a total of 9 Ministries and 18 agencies, not to mention the individual agencies and secretaries in the 26 states.[91]

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[88] *Custo Brasil* in Portuguese. A popular expression to resume all elements that rise the costs in Brazil.
[89] Niels Bosma & Donna Kelley, *General Entrepreneurship Monitor (GEM) 2018/2019 Global Report*, Global Entrepreneurship Research Association (GERA), ISBN: 978-1-9160178-0-1 (2018), https://www.gemconsortium.org/report.
[90] John Bessant & Joe Tidd. *Inovação e Empreendedorismo.* São Paulo: Artmed. (2009); Simara Maria de Souza S. Greco (Coord.) *et al. Empreendedorismo no Brasil.* Curitiba: IBQP (2014).
[91] *Infra* Annex 2.

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Moreover, the downfall of commodities prices in 2012 and the 2014 consecutive corruption scandals made Brazil enter the longest and deepest recession since that the Brazilian Institute of Applied Economic Research (IPEA) started recording data in 1901. To get a better sense of the crisis, within a semester, the currency lost one-third of its value, unemployment hit a six-year high of 12%, inflation ended at a twelve-year high and investment levels dropped over 14%.[92]

The obstacles in Brazil are various, defy logic and hard to imagine for someone outside the Brazilian environment, each sector has its own specific set of issues, but there can be found some common elements. A simple example is a process of acquiring a cellphone number, common to every international traveler, upon arriving on a foreign country one of the first necessities is to arrange a cellphone number, and usually, there are booths in the airports offering SIM cards and mobile internet plans. In Brazil, this service is not provided on airports; one must locate the authorized stores of the telecom company, purchase a SIM card and later activate it, providing its passport.[93] It is a process not easy to accomplish in Brazil, some common situations are long lines, lack or broken equipment (to cut the SIM card, open cell compartments, to scan documents, computers), the centralized system is not online to process payment or activate the new number. The result is a time consuming and heavily bureaucratic process for a simple procedure such as buying a mobile SIM card.

Another example would be the author's personal experience to produce the graduation certificate and academic record for the master course in Law at National Taiwan University. The process started with requiring both document transcripts from my

[92] *See* Paulo Baltar, *Crescimento da Economia e Mercado de Trabalho no Brasil.* IPEA, at 22-45 (2015), http://www.ipea.gov.br/agencia/images/stories/PDFs/TDs/td_2036.pdf.

[93] Before 2013, there was also a demand for the Brazilian social security number (CPF), even for foreigners that do not possess one, this made common the practice of foreigners having to "borrow" the CPF number to acquire a cellphone number.

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undergraduate university in São Paulo,[94] translate them through a state sworn translator,[95] notarize all firms,[96] authenticate at the Brazilian Ministry of Foreign Affairs and, finally, authenticate them at a Taiwan's Representative Office. The result was to physically go to São Paulo city, six different locations and three full days for two simple documents. In reality, the time expended was pleasantly fast given the Brazilian tradition of long lines and speed of government workers, but the main issue was with the lack of predictability as the need for notarizing the signature of the sworn translator and the need to dislocate to three different notary offices was not predicted.

Furthermore, working as a Brazilian lawyer, when faced with an investment project that requires government involvement in obtaining a license, certificate or other similar documents. The given recommendation is to evolve them the latest possible time; otherwise, there is a high chance to have the obstacles and the "costs" of solving them substantially increased. The general culture is to create difficulties in order to "profit" from the solution, the greater the obstacle, the greater the profit. This kind of peculiarities add into the cost of doing business in Brazil, as this pay to play governmental system clouds the water and creates a government that works against, instead of for the investor.

In face of these challenges, there is a need for improvement that demands a change in the system itself, being investment facilitation efforts the most cost-effective and simplest tools. In this sense, Brazil needs to re-conceptualize its IF framework, adopting the same standard on inbound and outbound FDI, to overcome its deepest and longest economic crisis in recorded history.

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[94] As these documents are not provided at graduation, being provided on a requirement basis.
[95] In Brazil, public entities do not provide an official English version, being necessary translation, which requires a state sworn translator. The official translation cost was around US$ 130 at the time.
[96] Including the requirement of notarizing the firm of the State`s sworn translator. In addition, the signatures were registered in different notaries spread across the city, for these two documents, it required to undergo the same process in 3 different notaries, with an average cost of US$ 7 on each signature.

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3.1.2 The Brazilian Investment Strategy

The Brazilian investment strategy is as complex as the government structure on foreign investment that has 9 ministries and 18 agencies, not to mention that Brazil is a federation that is composed by 26 states and a Federal District that have distinct systems between themselves. The lack of a hierarchy structure between these nine ministries signifies the lack of a central entity that is in charge of a single investment strategy resulting in a chaotic and fragmented scenario. It makes Brazil rank in the last position of a total of 140 countries in the burden of government regulation component on the Global Competitiveness Index of the World Economic Forum 2018 Report, presenting poor integration of policies and the lack of coordination between the public and private.[97]

On this structure, there is a lack of a central investment strategy with each ministry setting their own agenda that sometimes crashes with each other. The leading entities on the Brazilian investment policies are the Ministry of Foreign Affairs (MRE) and the Ministry of Industry, Foreign Trade and Services (MDIC) in charge of setting IF policies. There are many function overlaps, but in a few words, MRE acts on the international stage with the conceptualization and negotiation of IIAs, while MDIC deals with the domestic practical implementation of investment policies.

However, there are critical ideology differences between these two departments; the disconnection between policies and objectives has been ongoing since their creation due to core structural differences. MRE is an instrument at the service of the president, of political nature, while MDIC resonates according to private sector interests that has a more economical basis. In addition, there are also differences in the institutional culture of its agents, diplomats from MRE have a general background and are promoted

[97] WEF (2018), *supra* note 87.

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according to rules of career seniority rules, while foreign trade analysts from MDIC have a specific training acquired in the private sector and a practical attitude towards a hierarchy structure.

Since the first conferences in the WTO Doha Round, MRE shifted from a proactive position to a more conservative and protectionist stance, while MDIC set an opposite strategy aiming for further trade liberalization that culminated in the 2015-2018 National Exportation Plan (PNE) and the need for insertion in the international investment scenario.[98] This opposite institutional ideology reflects into the lack of cooperation and communication on Brazil's foreign investment policymaking and administration, that, besides numerous, tend to be superficial, overlap and incompatible with each other.[99] Apparently, there is no clear and resolute understanding of the links between official strategies for the attraction of FDI and the Brazilian FDI sent overseas.

In the attempt to grasp a better notion of the Brazilian investment strategy the discussion will be focused on two different documents, each originating from the MRE and MDIC. One is the National Exportation Plan (PNE)[100] program from the Ministry of Industry, Foreign Trade and Services (MDIC), and the other is the "Investment Guide to Brazil 2018",[101] elaborated by the Ministry of Foreign affairs (MRE) and the Ministry of Planning, Development and Management (MPDM).

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[98] CNI. *International Agenda of Industry 2017*. Brasília: CNI, at 51-59 (2017), http://www.portaldaindustria.com.br/publicacoes/2017/7/agenda-internacional-da-industria-2017-versao-em-ingles/.

[99] E.g.: the 1997 APEX-Brazil, under the private Brazilian Micro and Small Business Support Service (SEBRAE); the Invest & Export Brazil investment portal, with a partnership between MRE, MDIC and MAPA that issues the "Brazilian Official Guide on Investment Opportunities" and the "Investment Guide to Brazil 2018"; the joint American Chamber of Commerce for Brazil (AMCHAM-Brazil) and MRE "How to do Business and Invest in Brazil" project; the MDIC`s National Investment Information Network (RENAI) that operates an investment database with the annual "Brazilian Guide on investment opportunities"; the National Investment Committee (CONINV), formed by 7 ministries, with the function to review and harmonize investment policies, and many others.

[100] MDIC. *Coming to Terms: Estudo do Plano Nacional de Exportações 2015-2018: Mapa Estratégico de Mercados e Oportunidades Comerciais para as Exportações Brasileiras*. Brasilia: ABIQUIFI, (2015), http://abiquifi.org.br/artigos/plano-nacional-de-exportacoes-2015-2018/.

[101] ApexBrazil; MRE; MPDM, *Investment Guide to Brazil 2018*. Brasilia: ApexBrazi (2018), https://portal.apexbrasil.com.br/publicacoes/

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The Brazilian PNE, with a duration of 2015 to 2018, aims to integrate the Brazilian commercial policy, with a view to stimulating the return of economic growth, diversification and the aggregation of value and technological intensity in Brazilian exports, improvements in the tax and regulatory environment, reduction of bureaucracy and simplification of administrative procedures.

On the bilateral, regional and multilateral contexts, it reinforces initiatives in the signing of CFIA treaties with its economic partners and in the intra-Mercosur Protocol, plus giving continuation in the WTO Doha Rounds. Giving priority to 32 key partners that mean 71% of the Brazilian export destination, such as EU, US, China, Canada, Russia, India, South Africa, and LATAM. While, in the efforts to consolidate, simplify, rationalize and improve the legislation, administrative and customs processes, it is focused on the single foreign trade portal to conform with WTO's Trade Facilitation Agreement (TFA)[102] and the single investment portal project.

The other source is the "Investment Guide to Brazil 2018", published by the investment portal Apex-Brazil. It is observed that the sectors of agribusiness, automotive industry, renewable energy & environmental solutions, oil & gas, infrastructure & logistics, transport infrastructure and services, innovation and RD&I, and information and communication technology are pointed as investment priorities.

However, Brazilian investment policies are still focused on the promotion of investments, especially through the concession of "special tax regimes" that are nothing more than tax exemption incentives for foreign investors in that specific sector. As for investment facilitation initiatives, the only indication is the Incentives for Scientific Development, Research, Scientific and Technological Act[103] that simplifies procedures

[102] Agreement on Trade Facilitation, Feb. 22, 2017, WT/L/940 [hereinafter TFA].
[103] Dispõe sobre Estímulos ao Desenvolvimento Científico, à Pesquisa, à Capacitação Científica e Tecnológica [Incentives for Scientific Development, Research, Scientific and Technological Act], Law n. 13.243 of 2016 (Brazil).

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for importing goods and inputs for research activities, such as equipment, tools, and materials carried by university laboratories or companies in the innovation and RD&I.[104]

3.2 Tool and Services on Investment Facilitation

A set of tools and services to aid foreign investors on the regulations and administrative processes, which are mostly comprised into the establishment of an electronic "one-stop shop". The purpose is to unite different agencies and government institutes in one place, offering a portal that connects legal and administrative procedures (not just redirecting it), facilitating the registration of information by the online method related to the authorities in the FDI cycle. On this regard, it can be identified that the most notable Brazilian IF efforts on tools and services are in the single trade portal project to facilitate customs procedures and the efforts on centralization of the investment promotion portals and the suggested expansion on its core functions.

3.2.1 Implementation Efforts of a Single Foreign Trade Portal

One of the aspects of investment facilitation is the close relation with trade facilitation.[105] While there is no confusion about trade facilitation, investment facilitation is a new broader notion that encompasses it,[106] in this sense, it will be discussed the recent Brazilian efforts to create and implement a single foreign trade portal to facilitate and streamline the outdated Brazilian customs.

The Single Foreign Trade Portal Program has just started its application in 2017, using the old Integrated Foreign Trade System (SISCOMEX) platform of 1992, under the

[104] ApexBrazil; MRE; MPDM (2018), supra note 101, at 56-103.
[105] Further discussion on the relation between trade and investment in the final chapter.
[106] OECD. Ana Novik & Alexandre de Crombrugghe (2018), *supra* note 46, at 3.

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Ministry of Industry, Foreign Trade and Services (MDIC). It aims to increase Brazilian competitiveness with the reduction of time and costs involved in customs import and export operations that is usually congested and heavily bureaucratic with a subpar infrastructure.[107] According to the World Bank, Brazil ranked 55th in 2016, taking approximately 35 hours to unload merchandise, while the other countries spend an average of 3-9 hours.[108]

This reformulation seeks to establish a more efficient, harmonized and integrated processes between all public and private actors in foreign trade based on process redesign and digitalization. It is a central program in the Brazilian trade facilitation policy and conforms with WTO's Trade Facilitation Agreement (TFA) commitments ratified by Brazil in March of 2016.[109]

The integration is based on cooperation between the 22 government agencies and the private sector that operate throughout the trade process. Other than the integration of government agencies, there is also a commitment to harmonize the database and document requirements of foreign trade processes to reduce bureaucracy. In the traditional old system, according to the National Confederation of Industry (CNI) survey, the same information can be demanded by 17 different agencies, most times through different paper forms, this situation generates duplication and redundancy of work for both government and private sector with unnecessary costs.[110]

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[107] MDIC, *Single Foreign Trade Portal Program*, Brasilia: SISCOMEX (2016), http://portal.siscomex.gov.br/conheca-o-portal/programa-portal-unico-de-comercio-exterior-1/programa-portal-unico-de-comercio-exterior.

[108] World Bank, *Logistics Performance Index Report* (2016), https://wb-lpi-media.s3.amazonaws.com/LPI_Report_2016.pdf.

[109] TFA (2017) WT/L/940, supra note 102. (Defined by WTO as "the simplification, modernization, and harmonization of export and import processes." TFA adopted in the WTO`s 9th Ministerial Conference to be entered into force once 2/3 of WTO members ratify the agreement, milestone that was reached on February of 2017, being binding to all ratifying member countries. Brazil ratified on March of 2016 and declared that it had already fulfilled 42 of the 47 commitments).

[110] CNI, *Coeficientes de Abertura Comercial*, year 8, n. 1, ISSN 2317-708X, Brasilia: FUNCEX (2018), https://static-cms-si.s3.amazonaws.com/media/filer_public/c5/f5/c5f503ba-9c6d-4ecb-930d-c1f2bf536216/coeficientesdeaberturacomercial_numero1_2018.pdf.

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However, the SISCOMEX trade portal system cannot be considered genuinely single, as 10 of the 22 governmental agencies in the custom proceeding will still have their own parallel systems after the termination of the implantation, these different systems range from licensing, authorization, qualification or registration to the simple gathering and reporting of information.[111]

Moreover, CNI, a private entity, created a digital and interactive tool that tracks whether or not Brazil complies with WTO's TFA. Despite Brazil declaring that 42 of the 47 TFA commitments are already fulfilled, the CNI tool shows otherwise, only reaching 20% compliance of all the commitments, only 6 can be considered fully implemented, 8 are in progress, 13 with exceptionalities and at least 3 can be considered idle.[112] Initiatives on simplification and facilitation in proceedings are always welcome but given that the system is still not fully implemented and that a significant amount of data still remains to be mapped, many problems still remain to be resolved. In terms of market access, trade agreements, and investments, Brazil still shows a conservative caution in commitments that require a higher degree of liberalization in the economy.

3.2.2 Centralization of the Investment Promotion Portals

Countries traditionally adopt investment promotion programs through incentives, special economic zones, or Investment Promotion Agencies (IPAs), and Brazil is no exception to this. According to UNCTAD, from a total of 194 global IF and investment

[111] Eduardo Refinetti Guardia et al., *Proposal for a New Importation Process*, Single Foreign Trade Portal Program, V. 2, at 18-20, Brasília: SISCOMEX (March 2018), http://portal.siscomex.gov.br/informativos/noticias-orgaos/noticias/portal-siscomex/resultado-da-consulta-publica-sobre-o-novo-processo-de-importacao/20180328RelatorioNPIv2.pdf.

[112] CNI. *International Affairs: Facilitation and de-bureaucracy of foreign trade. Facilitation Tool, the Vision of the Industry,* (Nov. 2018), http://www.portaldaindustria.com.br/cni/canais/assuntos-internacionais/o-que-fazemos/temas-prioritarios/facilitacao-e-desburocratizacao-do-comercio-exterior/facilitometro-pt/.

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promotion policies from 2010 to 2016, investment promotion policies were 80%, while IF just composed less than 20%.[113] There is practically one investment portal for each different government agency in Brazil.[114] In recent years, there is an effort to centralize all to make a single Guide to Foreign Trade and Investments, centralizing on the Invest & Export Brazil investment portal the information of more than ten different portals dedicated to the theme of foreign trade. This project is the result of a partnership between the MDIC, MRE, Ministry of Agriculture, Livestock and Supply (MAPA) and the Brazilian Agency for Export and Investment Promotion (Apex-Brazil).

The new platform brings together the consolidated collection of information on foreign trade and investments, as well as presenting, in an organized and thematic way, the main products and services provided. In addition, Invest & Export Brazil follows the international trend of sharing products and services among several agencies in a single electronic environment with a standardized layout. The focus is the centralization of the different existent investment portals as a crucial first step to address the Brazilian investment scenario. Furthermore, UNCTAD reveals that most information portals only contain a minimum amount of information, less than half qualify as business registration portals, and only 10% are deemed mostly complete.[115]

Unfortunately, Invest & Export Brazil investment portal presents other problems, the provided information is superficial, there is no form of business registration, and more pertinent and concise practical information about investing in Brazil can be found in outside sources such as the ones in the US 2017 Investment Climate Statements Report.[116]

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[113] UNCTAD (May 2017), *supra* note 50, at 10.
[114] *Infra* Annex 1.
[115] UNCTAD (May 2017), *supra* note 50, at 18.
[116] US Department of State, *Investment Climate Statements Report on Brazil*, Bureau of Economic and Business Affairs (2017), https://www.state.gov/e/eb/rls/othr/ics/2017/wha/270050.htm; *see also* US Department of Commerce's International Trade Administration, *Brazil - Executive Summary*, export.gov (2017), https://www.export.gov/apex/article2?id=Brazil-Executive-Summary.

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On the functionality context, the past and present investment portals still only focus on promotion elements of image building and targeting or investment generation, the information provided is superficial, with no business registration means.[117] On the website, it does not provide any practical assistance to the base requirements for a foreign investor, on some in-depth information, the user is just lazy redirected to other agencies main homepage, leaving the user to navigate again on a new environment, many times without accomplishing the intended goal. There are also deficiencies as many web links are broken or not updated, resulting in a dead-end search.

In the author's opinion, a simple step to advance the investment facilitation agenda is to broaden the investment promotion agencies (IPAs) focus from just investment promotion to investment facilitation measures of investor servicing and advocacy. This closer and personal approach serves better for investor targeting, creating partnerships, develop infrastructure and expand investments.[118] The objective is to have a central investment agency simultaneously acting in the promotion, development and dispute prevention of foreign investments matters, centralizing the entities of Investment Promotion Agency (IPA), IF single window and Focal Point/Ombudsman under the same roof. However, many reformulations on functionalities, budget, and staffing are required.

In addition, it requires participation from the private sector, that are the real users, through recommendations, supplying data for statistics that better guide the decision makers, or even being part of them. Otherwise, any new agency will just mean another procedure for foreign investors to comply without any saying in the matter. One size does

[117] UNCTAD (May 2017), *supra* note 50, at 18. (1/3 of information portals currently in existence contain only the minimum amount of information to qualify as business registration portals, and only about 10% of portals are complete).

[118] UNCTAD, *Evaluating Investment Promotion Agencies, Investment* Advisory Series, n. 3 (2008), http://unctad.org/en/Docs/diaepcb20082_en.pdf; Bin Ni, Yasuyuki Todo & Tomohiko Inui, *How Effective are Investment Promotion Agencies? Evidence from China*, The Japanese Economic Review, vol. 68, Issue 2, SSRN, at 232-243 (2017), https://ssrn.com/abstract=2962720. (A position defended by many authors, although there is no empirical data to consubstantiate it).

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not fit all and IPA's should adequate to the home country geopolitics, that being said, they should have core elements, a clear mandate, and staff with private sector experience.[119]

3.3 Policies on Investment Facilitation

By definition, investment policy is a strategy adopted by the government to prioritize some economic segment in the allocation of its investments, in order to obtain a greater return to society.[120] Policies that implement transparency, predictability, effectiveness and efficiency of regulatory practice, ensuring a more sustainable and responsible environment are underlying principles for a sound and coherent legal framework. This is well reflected in OECD's PFI[121] and Investment Policy Reviews.[122] It also means rules and obligations expectations for the foreign investors of corporate governance, social corporate responsibility, and responsible business conduct:

> Policies should provide an enabling environment for investors to act responsibly and sustainably and level the playing field for all investors to facilitate investments in emerging sectors, such as green industries. Policy reform can also improve the efficiency of the existing investment framework, issuing modern laws and codified regulation, improving institutional mechanisms, and making it less burdensome and onerous to invest by imposing shorter deadlines, eliminating unnecessary procedures and simplifying the remaining ones. (OECD)[123]

The evaluation of public policies and the better management of processes, results and human resources are central points to improve without putting pressure on public spending. Policies need to have goals and metrics well defined prior to their

[119] OECD (2015), *supra* note 45, at 40.
[120] UNCTAD (2018), *supra* note 5, at 127.
[121] *Id*.
[122] OECD. *Investment Policy Reviews, 2006-2016.* (2016), www.oecd.org/investment/countryreviews.htm.
[123] OECD. Ana Novik & Alexandre de Crombrugghe (2018), *supra* note 46, at 6.

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implementation and that are evaluated periodically to check if the policy is reaching its desired effects. In this way, it is possible to expand programs with good results and discontinue programs that do not provide the expected results.

The current management of the competitiveness agenda in Brazil is fragmented between several programs in different agencies and departments, which makes the coordination and communication a difficult task, with repeated and even conflicting efforts a common result. It is necessary to have an impact assessment for companies and consumers before, during and after the implementation of regulatory decisions and policies. While there is no central policy, there is an investment policy for each agency, or, in the worst case, the absence of one.

In an attempt to tackle this problem, there are efforts to promote good regulatory practices in order to: a) Enhance the use of public resources; b) Promote the democratic participation of regulated agents (corporate/private sector); c) Improve the decision process – reaching public policy goals with less disturbance to market forces; d) Accelerate the learning curve of the regulator agent: e) identifying and correcting mistakes before the final regulation is enacted; f) Contribute to more predictability and improving the business environment in Brazil.[124]

In the author's opinion, these objectives are noble but lack a practical component. The good regulatory practices ideas are not exclusive and are commonly pursued by several countries, being discussed for several years. The idea is logical and does not face many criticisms, being a matter of the best application methods, but the Brazilian government measures in this matter sin on being too farfetched on paper and lack a deeper discussion on how to implement them on the practical sense.

[124] Daniela Oliveira Rodrigues, *Legal Certainty Guide for Foreign Investors in Brazil*, Imprensa Nacional, organizers: Apex-Brazil-MRE-AGU, at 31 (2018), http://www.apexbrasil.com.br/inteligenciaMercado/GuiaInvestimentos.

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In addition, the Brazilian complicated structure in the investment sector makes the lack of inter-governmental ministries cooperation and hierarchical structure a herculean task, but a crucial point. To address this issue there is a need for centralization or at least cooperation, but the further creation of institutions in a system that is already oversaturated is counterintuitive. Therefore, the suggestion is to broaden the mandate of the recently created Brazilian National Investment Committee (CONINV),[125] to have a bigger role in coordination between the different ministries with the function to review and harmonize investment policies regarding receiving and overseas FDI. Despite being structurally under MDIC's CAMEX, this committee has the advantage to be formed by representatives from 8 different ministries and two non-voting agencies encompassing almost all the Brazilian investment structure.[126] With the right funding and staffing, they are in an ideal position to coordinate and implement a single investment strategy and investment facilitation policies.

3.3.1 The Brazilian Governance Policy

In Brazil, it is hard to identify investment policies, leading to the suspicion that they are non-existent outside of the CFIA sphere. There is prominent use of traditional investment promotion policies, centered on the application of incentives,[127] Special

[125] Altera sobre a Câmara de Comércio Exterior – CAMEX [Modification to the Brazilian Chamber of Foreign Trade - CAMEX], Decree n. 8.807, of July 12, 2016 (Brazil). (CONINV has the mandate to elaborate investment policy proposals, follow the implementation of CAMEX decisions, elaborate proposals for harmonization of the agencies, evaluate the efficiency, and pertinence of procedures in the promotion and facilitation of both Brazilian FDI and FDI coming into the country).

[126] *Id*., art. 4 (Own translation: "I - President of the Republic, who shall preside over it; II - Minister of State for Foreign Affairs; III - Minister of State of Finance; IV - Minister of State for Agriculture, Livestock and Supply; V - Minister of State for Industry, Foreign Trade and Services; VI - Minister of State for Planning, Development and Management; and VII - Executive Secretary of the Executive Secretariat of the Program of Investment Partnerships of the Presidency of the Republic").

[127] Louis T. Wells Jr., Nancy J. Allen, Jacques Morisset & Neda Pirnia, *Using Tax Incentives to Compete for Foreign Investment. Are They Worth the Costs?*. Washington D.C.: World Bank (2001), https://openknowledge.worldbank.org/bitstream/handle/10986/13979/multi0page.pdf?sequence=1&isAllowed=y. (Incentives may take the form of subsidies, fiscal incentives or by waiving public ordinances (e.g. health, labor, environment etc.) and are a traditional method to attract FDI. They are useful, but should be carefully designed to

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Economic Zones (SEZs),[128] and Investment Promotion Agencies (IPAs).[129] And the establishment of priority sectors for investment (Agribusiness, automotive, renewable energies, life sciences, oil and gas, and infrastructure) that are resumed into a brief description of advantages, making passing references of the applicable regulation and the investment promotions policies applicable, in special though tax deductions incentives.[130]

Beyond this, what can be identified as closer to investment facilitation in the Brazilian domestic context is the public governance efforts on regulation[131] in the 2017's Brazilian Governance Policy Act that consists on "a set of leadership, strategy, and control mechanisms put into practice to evaluate, direct and monitor management, with a view to conducting public policies and providing services of interest to society".[132] It has six basic principles: responsiveness; integrity; reliability; regulatory improvement; accountability; and accountability and transparency;[133] to strengthen society's trust in

induce specific developmental activities and to avoid sacrifice of long-term objectives for short-term gains. However, they are largely applied without much analysis; sometimes do not even influence the destination of FDI because economic conditions weight heavier, such as market size, growth prospects, rate of return, industrialization, labor costs etc. In worst cases, incentives are applied after the FDI decision-making is already finalized, as incentives are becoming an automatized process, being applied regardless of demand or consultation with the investor).

[128] OECD. *The Policy Framework for Investment (PFI)*. Paris: OECD Publishing, at 41-42 (2015), www.oecd.org/investment/pfi.htm. (A zone-based strategy may be effective in attracting investors in the short-run, but it often stagnates in terms of sustaining innovation and competitiveness, failing in technological upgrading and new industry creation. In Brazil case, the most notorious example is the Manaus Free Zone (ZFM) in the middle of the Amazon forest. It had the stipulated duration of 30 years, ending in 1997, however it has been extended 4 times already being extended to 2073).

[129] UNCTAD (May 2017), *supra* note 50, at 18.

[130] ApexBrazil; MRE; MPDM (2018), *supra* note 101, at 56-103.

[131] World Bank. *World Development Report 2017: Governance and the Law.* Washington, DC: World Bank, at 41 (2017), http://www.worldbank.org/en/publication/wdr2017. (Public governance is defined as "the process through which state and non-state actors interact to design and implement policies within a given set of formal and informal rules that shape and are shaped by power"); *see also* OECD, *Multi-level governance reforms: overview of OECD country experiences*. Paris: OECD Publishing, at 26-28 (2017), https://doi.org/10.1787/9789264272866-en. (Good governance is a means to an end, in other words, to identify the needs of citizens and to broaden the expected results).

[132] Dispõe sobre a política de governança da administração pública federal direta, autárquica e fundacional [Governance Policy Act], Decree n. 9.203 of 2017, art. 2, I (Brazil).

[133] Civil Office of the Presidency, *Guia da política de governança pública*. Brasília :Casa Civil da Presidência da República, at 83-84 (2018), http://www.cgu.gov.br/noticias/2018/12/governo-federal-lanca-guia-sobre-a-politica-de-governanca-publica/guia-politica-governanca-publica.pdf. (The principles functions on public governance: "The first function is to create a thematic delimitation, preventing any issues are considered as belonging to the policy of governance and / or under the institutional arrangements created. The second function is normative-prescriptive, insofar as the principles and guidelines must be observed by the organs and entities in the execution of the policy (article 13, item I). The third function is to give clarity to the objectives of the public performance, since the principles that guide the administrative

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public institutions, better coordination of institutional improvement initiatives, and establishing minimum levels of governance.

This recent decree establishes concepts of public governance, public value, senior management and risk management (art. 2); the principles and guidelines of public governance (arts. 3 and 4); assigns senior management the task of implementing and maintaining governance mechanisms (art. 6); provides for the composition, functioning and attributions of the Inter-ministerial Committee on Governance (IGC) (art. 7); and a integrity program to combat corruption (art. 19). Although it has no legal binding effects for the conduct of governance policy, the concept structures and serves as a starting point for the formation of a minimum consensus on what is governance with an initial set of references good practices and the delimitation of an objective aligned with the interests of society.

Between the principles and guidelines of public governance that encompasses all public agent behavior, there are some that relate specifically to investment facilitation:

> VII - evaluate proposals for the creation, expansion or improvement of public policies and the granting of tax incentives and, whenever possible, assess their costs and benefits;
> VIII - to maintain evidence-based decision-making, legal compliance, regulatory quality, de-bureaucracy and support for the participation of society;
> IX - to edit and review normative acts, based on good regulatory practices and the legitimacy, stability, and coherence of the legal system and conducting public consultations whenever appropriate;[134]

Initially, on the subsection VII of article 4, the evaluation of public policy

activity - art. 37 of the Federal Constitution (CF / 1988) - tend to refer to an action of the bureaucratic public agent and distanced from the interests of citizens. In this sense, the public agents gain more didactic precepts so that their action is oriented towards the citizen, and the constitutional principles gain instruments to guarantee its observance and new elements to expand the interpretation of its contents").

[134] *Id.* Art 4. (Emphasis added)

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proposals requires an assessment of costs and benefits in order to: a) improve policy formulation to ensure effective results; b) create a pattern of policy formulation and debate; c) decide and prioritize in a more objective and transparent manner; and d) ensure greater cost-effectiveness.[135]

On the subsection VIII of article 4, there is the specification of evidence-based decision-making, that aims for a balance between personal discretionary and conformation to the law in a broad sense, imposing limits of appreciation according to a logic of rationality and technical, scientific evidence. The objective is to ensure more rational use of resources and deliver better results for citizens, also referring to the discussion of technocracy and politics.[136] The previous experience of the United States, with the US Commission on Evidence-Based Policymaking conclusive report, is an example of how a broad and in-depth diagnosis can help build solutions that are more consistent.[137]

Finally, the subsection IX of article 4 establishes that, when editing or reviewing normative acts, organizations must: a) Be guided by good regulatory practices; b) Ensure the legitimacy, stability, and coherence of the legal system; and c) Conduct public consultations when appropriate. The following chapter will take a closer look at the Brazilian initiatives to edit and review normative acts.

At first glance, the governance policy act displays a repetition from principles already stated on CF/88, but a closer look reveals that the recent governance act is successful in bringing to the public the governance theme deeper practical aspects and

[135] IPEA, *Avaliação de políticas públicas: Guia prático de análise ex ante*, Institute of Applied Economic Research. Vol. 1, Brasília: Ipea, ISBN: 978-85-7811-319-3 (2018), http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=32688.

[136] *See* Jennifer Guay, *Evidence-based policymaking: room for science in politics?* Apolitical (March 7, 2018), https://apolitical.co/solution_article/evidence-based-policymaking-is-there-room-for-science-in-politics/.

[137] United States, *The Promise of Evidence-Based Policymaking.* Report of the Commission on Evidence-Based Policymaking. (2017), https://cep.gov/content/dam/cep/report/cep-final-report.pdf.

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clear concepts on the implementation of its policies, with an important ethical direction, transparency, and predictability enhancement components. Finally, it is important to remember that legislation is not an end in itself, seeking simpler and more coherent rules and policies is on par with investment facilitation objectives.

3.3.2 Brazilian Normative Acts Reform Process

To reduce the Red Tape is not a new concept; from one side there is a need to simplify regulation and administrative processes. On the other side, there is a preoccupation with de-regulation that leads to a race to the bottom, making countries sacrifice socially important issues such as labor, environmental, etc. The idea is simple on paper, but the application is proven difficult on many countries, beyond the necessary effectiveness and efficiency analysis, there is a need for balance, cooperation and communications between different departments that are not in the same hierarchal structure, an obstacle that is aggravated on Brazil's domestic system.

The practical effects to edit or review normative acts, it can be observed on CAMEX's Good Regulatory Practices on Foreign Trade, created on May of 2018, that has the mandate to promote the use of good regulatory practices by the departments with competence to regulate and manage matters that affect foreign trade and investment. Its structure is modeled on the OECD's 2012 Best Practice Principles on the Governance of Regulators[138] and elaborated within the framework of the MDIC's CAMEX Technical Regulation Working Group that works in partnership with several other ministries and various federal regulatory bodies.

[138] OECD, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, OECD Publishing (2014), http://dx.doi.org/10.1787/9789264209015-en.

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The Good Regulatory Practices on Foreign Trade already shows results in deregulation through its reunions and resolutions despite created just some months ago. The CAMEX Technical Regulation Working Group is already on the seventh reunion that has the presence of representatives from 20 Ministries, regulatory agencies and institutes in charge of foreign trade regulations and investment. In this simplification effort, it is necessary to have the participation and willingness of those who have the autonomy to make and implement decisions, especially in Brazil that possess such a complex government structure.

Between the biggest simplification effort, there is the popularly referred to as "regulation guillotine", a common measure adopted in most countries. In Brazil, the CAMEX Resolution 64/2018 which removed 141 existing resolutions that applied to import tax rate reduction due to shortages, and CAMEX Resolution 82/2018, which removed 249 resolutions related to the List of Exceptions on the adjustment of national tariffs for Mercosur members.[139] On future projects, there is the plan to revoke 167 regulations from the Brazilian Health Regulatory Agency (ANVISA), that would roughly represent 19% of all regulation from this department.[140] The benefits of regulation and administrative procedure simplification go beyond the reduction in the number of regulations, it reduces confusion and repetitiveness for people and companies, simplifies access and guarantees more clarity for compliance; overall raising the effectiveness and efficiency of the whole regulatory system.

[139] CAMEX, *Camex avança no uso da "guilhotina regulatória" e reduz o universo de Resoluções em vigor*. MDIC news (Oct. 31, 2018), http://www.camex.gov.br/gecex/99-estrutura/2029-proposta-de-resolucao-camex-sobre-boas-praticas-regulatorias-no-comercio-exterior.

[140] ASCOM, *Consulta pública propõe revogação de 18% das normas*, Anvisa (Nov. 20, 2018), http://portal.anvisa.gov.br/rss/-/asset_publisher/Zk4q6UQCj9Pn/content/id/5119316.

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3.4 Processes and Procedures on Investment Facilitation

Institutional processes support the two previous elements of investment facilitation previously studied, the tools and policies. The most common examples of it are the public-private dialogue, inter-agency coordination, capacity building for IPAs and other public officials, monitoring and evaluation of existing tools and policies.

The public and private dialogue in the form of coordination among government departments and the private sector are a key first step of the processes, to provide the government with better feedback and gage the effectiveness and efficiency of the implementation and future design of tools and policies in investment facilitation. It can also allow host states to explain reforms to businesses, which also facilitates the attraction of new investments. What is noticed is that investment facilitation is interconnected with the set of tools, policies, and procedures that work together to guide investment in key areas of the economy in order to expand its national productive capacity, increase international competitiveness and, above all, create an economically sustainable environment.

In Brazil, the monitoring and evaluation of tools and policies, when done, is an internal process on each department that is closer to a self-assessment that does not have the desired results. As for public-private communication, there is public consultation, public hearing, and ombudsman; each with their own deficiencies. Public consultation and public hearing are only open for a determined time and have limited publicity, while each department's ombudsman or hearing sector have budget and staffing problems.

The other key aspect of institutional processes is the inter-agency coordination, or lack of it, that is responsible where different parts of the government are involved in the investment cycle, many times, overseeing the same procedure, resulting in conflicting messages and treatments, leaving the foreign investor in a catch-22. Capacity building for

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public officials, technical criteria for filling public functions, best practices of regulatory quality, (such as public consultations, regulatory impact assessments, and public policy evaluation) are many of the proposed solutions.

On these different propositions for the enhancement of institutional processes, OECD states the importance of IPAs that are in the forefront of the investment scenario and provide many different solutions for public and private dialogue and inter-agency coordination. It defends the enhancement of its functions, budget, and staffing to provide:

> 1. Image building, which consists in fostering the positive image of the host country and branding it as a profitable investment destination;
> 2. Investment generation that deals with direct marketing techniques targeting specific industries, activities, companies and markets;
> 3. Investor servicing to provide support to prospective investors in order to facilitate their establishment phase;
> 4. Aftercare, which aims to retain established companies and encourage reinvestments by assisting investors in the challenges they face after their establishment; and
> 5. Policy advocacy by identifying bottlenecks in the investment climate and providing recommendations to the government to address them.[141]

This proposition provides IPAs with both mandates of promoting investment in image building and investment generation; and facilitating investment in the form of investor servicing, aftercare, and policy advocacy.

3.5 General Assessment of Brazil's Current Investment Facilitation Issues

This chapter will make a general assessment on the Brazilian investment facilitation scenario to point out the areas that still have much space to be improved on

[141] OECD (2015), *supra* note 45, at 40-44; *see also* OECD. Ana Novik & Alexandre de Crombrugghe (2018), *supra* note 46, at 3.

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using the OECD's Policy Framework for Investment User's Toolkit,[142] and the Energy Charter Investment Facilitation Toolbox,[143] being both toolkits complementary as they mostly deal with different aspects of investment facilitation.

3.5.1 OECD's Policy Framework for Investment User's Toolkit

The OECD's PFI proposes a method to enable governments to assess which challenges must overcome to pursue sustainable economic development from the investment. It is provided with a checklist of key policy issues that should be considered by any government interested in creating an enabling environment for all types of investment, one of which is investment facilitation.[144]

OECD's Policy Framework for Investment User's Toolkit [145] focuses on: a) investment strategy; b) information gathering and stakeholder consultations; c) functions and dialogue of investment promotion agencies (IPA); and d) monitoring IPA performance.

A. Investment Strategy

Government practices should be evaluated whether there is an investment strategy document based on a study of the current investment climate, whether the opportunities are being well targeted and what the challenges are. If the government offers a direction on which particular industry or region should be focused, it is an essential component on establishing a national investment strategy. As seen on Annex 2, the Brazilian government entities that participate in the development and implementation of

[142] OECD (2011), *supra* note 48.
[143] Energy Charter Secretariat (2017), *supra* note 63.
[144] OECD (2015), *supra* note 45, at 13.
[145] OECD (2011), *supra* note 48.

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investment are a reflection of the heavy government structure, composed of a total of 9 ministries and 18 agencies. Between them, there is no hierarchy or coordination, meaning the usual occurrence of conflicts between policies and regulations. Although they have different functionalities appointed to them, they should walk towards the same objective of fostering from FDI.

The direction on particular investment or industry are on sectors of agribusiness, automotive industry, renewable energy & environmental solutions, oil & gas, infrastructure & logistics, transport infrastructure and services, innovation and RD&I, and information and communication technology. Most of these sectors are traditional ones that are economy giants, such as agribusiness, automotive, and oil & gas, infrastructure & logistics. While the others are modern and technology-heavy industries, changing at a faster pace, demanding bigger know-how and best practices transfer. However, Brazilian investment policies are still focused on the promotion of investments, especially through tax exemption incentives, also, there is an infight between the different federation states to attract or maintain such industries.

There is also the before mentioned suggestion to provide the Brazilian National Investment Committee (CONINV) a bigger role in coordination between the different ministries with the function to review and harmonize investment policies regarding receiving and overseas FDI.

B. Information Gathering and Stakeholder Consultations

In Brazil, the monitoring and evaluation of tools and policies, when done, is an internal process on each department that is closer to a self-assessment that does not have the desired results. As for public-private communication, there is public consultation, public hearing, and ombudsman; each with their own deficiencies. Public consultation

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and public hearing are only open for a determined time and have limited publicity, while each department's ombudsman or hearing sector usually have underfunded and understaffing problems.

As for the main points that are not being addressed in the Brazilian information gathering and stakeholder consultations, the OECD toolkit recommends the application of formal rules for how public input should be considered, and an appeal process available when business believes proposed changes would seriously damage economic viability or impair the use of assets and investments, at the very least, a process for reconsideration. Beyond the traditional methods of public consultation, there is also the implementation of the Ombudsman, to be further discussed in the next chapter, that is responsible for receiving inquiries and consultations regarding matters related to investments, answered jointly with government agencies involved in each case, centralized in a single body, in a timely manner. It also provides investment information, resolves doubts and seeks solutions for investors in its area of competence. There are also the suggested electronic single windows (SEW), that provide policymakers real-time information, allowing them to better understand the trade and investment environment and regulate policies accordingly that is proposed on Brazil's draft on a multilateral framework on investment treaty circulated on the WTO, to be further discussed on chapter 5.

C. Functions and Dialogue of Investment Promotion Agencies

The OECD toolkit does not limit the role of IPAs to the promotion of investments, rendering it a larger list of functions that are not restricted to investment promotion (image building and targeting or investment generation) but do also include investment facilitation (investor servicing or facilitation, and advocacy).

Investment promotion has more tangible results being the first choice of many

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countries, rendering investment facilitation to a secondary or non-existent role. Brazil is no exception, as seen before, the centralization process into a single investment portal is still ongoing, but it still does not have a registration system and many of the links redirect the user, many times it is an outdated link or just takes the user to the other agencies' homepage.

OECD's Toolkit defends that IPA has a privileged position to first notice the necessities and obstacles faced by foreign investors, being the most ideal entity to advocate them within the host country government, whether by seeking approvals for permits or requesting fundamental changes to laws and regulations. Many times, IPAs are aware of obstacles but do not possesses the means to even recommend improvements. Furthermore, IPAs can also generate relevant information from direct contact with the needs of the investors and dealing with practical problems that are crucial for the improvement of the overall investment policy.

In the author's opinion, the recommendation is to have a central investment agency simultaneously acting in the promotion, development and dispute prevention of foreign investments matters, centralizing the entities of IPA, IF single window and Ombudsman under the same roof. The investment structure requires integration and cooperation between government agencies being lean and efficient, not just a bunch of "stand-alone" systems and avoid different departments "caught by surprise" as there is no participation in the elaboration and negotiation process. It also requires participation from the private sector, that are the real users, through recommendations, supplying data for statistics that better guide the decision makers, or even being part of them. Otherwise, any new agency will just mean another procedure for foreign investors to comply without any saying in the matter.

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D. Monitoring IPA Performance

The idea is to designate a mechanism or entity to monitor and review IF policies and IIAs, that also serves to facilitate the national coordination and implementation of said policies overseeing the whole process. Therefore, similar to the single window, the concept is to centralize functions and keep it under the same roof, in order to avoid confusion and be as effective as possible, as all these treaties and initiatives have an investment relationship between them. Also, it is not recommendable for agencies to oversee themselves, hence, the separation between this and the previous chapter.

A similar provision is written on WTO's TFA, it requires members to "establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement".[146] In addition, as it will be further seen in chapter 5, it is also present on Brazil's 2018 draft proposal for a potential multilateral agreement on investment facilitation on the WTO's General Council; and a monitoring and review mechanisms for IF is the number 6 action line on UNCTAD's 2017 Global Action Menu for IF, the only action line that is absent from the CFIA model.[147]

3.5.2 The Energy Charter Investment Facilitation Toolbox

The Energy Charter Investment Facilitation Toolbox[148] will gradually address ground level obstacles to investment in the energy sector in the pre and post-establishment phases. The toolbox is intended to progressively identify a variety of barriers which impede investment in the energy sector and illustrate a set of actions and best practices

[146] TFA (2017) WT/L/940, supra note 102, art. 23.2.
[147] UNCTAD (May 2017), *supra* note 50.
[148] Energy Charter Secretariat (2017), *supra* note 63.

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which countries can choose and incorporate into their own regulations and investment promotion efforts in order to improve their overall investment climate and attract energy investors.

Though made for the energy sector the toolkit also translates to investment facilitation in a general sense. It is based on the Implementation Group and expert consultations meetings in 2017 and contains a checklist of policy options for removing obstacles to the establishment and maintenance of energy investments.

This policy checklist Guidance for investment facilitation in the pre-establishment of the energy investment: a) Long-term and predictable energy and investment objectives; b) Efficient institutional governance and policy-making; c) Effective bureaucracy; d) Transparent administrative and regulatory regimes; e) Favourable investment rules and conditions; f) Effective national judiciary.

A. Long-term and Predictable Energy and Investment Objectives

Regarding the energy sector, there is the incentive program for alternative energy by the Brazilian Development Bank (BNDES) new framework for subsidized loans, offering up to 80% of the investment to be financed by the bank.[149] There is also in the country's North, Northeast and Midwest regions the financing for the acquisition and installation of photovoltaic panels in residences or residential condominiums is facilitated while interest rates are below market rates and offer longer payment terms.[150] Moreover, the program RenovaBio, launched at the end of 2016, that incentivizes biofuel production

[149] BNDES, *A energia solar no Brasil* (Aug. 24, 2018), https://www.bndes.gov.br/wps/portal/site/home/conhecimento/noticias/noticia/energia-solar.

[150] MI, *Fundos Constitucionais financiam uso de energia solar para pessoa física,* news (April 04, 2018), http://www.integracao.gov.br/web/guest/area-de-imprensa/todas-as-noticias/-/asset_publisher/YEkzzDUSRvZi/content/fundos-constitucionais-ja-podem-financiar-uso-de-energia-solar-para-pessoa-fisica.

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based on predictability and environmental, economic and social sustainability. Its objectives are to increase the role of biofuels in the energy matrix, the economic and financial equilibrium of the market, the definition of marketing rules and the new biofuels.

B. Efficient Institutional Governance and Policy-making

Strong institutions and effective coordination are key to maintain a predictable and transparent environment for investors, decreases the risk of policy duplication, and contradictory objectives. As seen in the previous chapter, Brazil has the recent 2017 Brazilian Governance Policy Act that sets directives for proposals evaluation, evidence-based decision-making, to edit and review normative acts on investment policy-making. However, the practical application is not so easy, according to a recent study from the World Economic Forum, Brazil ranks 109th between 137 countries on the institutions component, showing that there is below low confidence on Brazilian institutions.[151]

C. Effective Bureaucracy

Bureaucracy refers to a specialized system and processes designed to maintain uniformity and controls within an organization, by itself, is not a problem and often necessary. However, since creation, it has gained a negative connotation, often synonymous with redundancy, arbitrariness, and inefficiency; as bureaucracy ensures procedural correctness, not the circumstances or final objectives of the situation. In addition, bureaucratic structures, by nature, are created to standardize and maintain the *status quo*, as circumstances change over time, they can reduce operational efficiency and lose its purpose, becoming a vexing procedure. The problem happens on over-

[151] WEF (2018), *supra* note 87.

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bureaucracy generating duplication and redundancy of work for both government and the private sector, with unnecessary added costs resulting in red tape, long procedures and uncertain outcomes.

Brazil ranks in the 72nd position in the overall Global Competitiveness Index of the World Economic Forum 2018 Report, the position is below average from the total of 140 countries studied, presenting poor integration of policies and the lack of coordination between the public and private sectors. However, the situation worsens when a closer look is taken as it is the worst from all the 140 in the burden of government regulation component, ranking below Venezuela that is facing a man-made humanitarian crisis.[152]

D. Transparent Administrative and Regulatory Regimes

Transparency in decision-making and accessibility of the investors to engage in the consultations on regulatory change are the key determinants for predictability and the entry of new investment. The information has not only to be accurate but also up-to-date on any aspect of investment activity.

Transparency mechanisms of CFIAs can also serve to mitigate risks. Rather than setting a standard for transparency and publicity, CFIAs define the Ombudsman that is in charge of providing the necessary information and consultation to the foreign investor. However, as just seen above, this is still under slow implementation. To make matters worse, the practical application is also not so easy, according to a recent study from the World Economic Forum, Brazil ranks 127th between 137 countries on the transparency of government policymaking component, showing that there is below low confidence on Brazilian institutions.[153]

[152] *Id*. (The methodology used were asking multinational high-executives to rank 1 to 7 about the burden of government regulation, e.g. permits, regulations, reporting, etc.)
[153] *Ibid.*

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E. Favorable Investment Rules and Conditions

The investment climate is key in determining a country's ability to attract foreign investment and develop small and medium enterprises. That demands robust and clear investment rules that give assurance to investors that the host state is committed to attracting and maintaining foreign investment. As seen before, Brazil possesses a complex government structure that contributes to the over-bureaucracy, in an attempt to counter that there are Brazilian Initiatives to Edit and Review Normative Acts and to establish governance policy reforms. However, they are young projects still doing their first steps.

On the international context, there is the CFIAs, but its effectiveness is uncertain as this treaty model does not provide any legally binding provisions, greatly depending on the political wiliness of each Party to move things forward.

F. Effective National Judiciary

The Brazilian tribunals are separate and independent; it allows any individual or legal person, national or foreign to demand the jurisdictional spheres for the settlement of disputes involving property and rights of their ownership, and to exercise the contradictory and full defense in all instances. Although heavily congested because of cultural issues and the incentives provided in the norms themselves, most conflicts are referred directly to the Judiciary, without previous attempts at a friendly settlement between the parties. Therefore, Brazil still ranks 52 from a total of 113 countries on measures of rule of law adherence, although being considered in front of most LATAM countries, it still has much to improve.[154]

[154] The World Justice Project, *WJP Rule of Law Index 2017-2018*. Washington, D.C.: WJP, at 62 (2018), https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018.

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For companies, both domestic and international, the de-characterization of legal personality, for reasons incompatible with the spirit of the law (good faith), occurs frequently in judicial decisions, as the public sector interest often takes precedence. Contract breaches done by courts occur especially in areas such as the environment, consumer law, regulation of public services and labor, social security and tax issues; that are additional sources of legal uncertainty, at the risk of causing more harm than good.

Reforms have been adopted aiming at enhancing the transparency and efficiency of the national judiciary. Among them, there is the creation of the binding precedent, the requirement of general repercussion of extraordinary appeals (binding precedents established by the highest court to all organs of the judiciary and public administration),[155] and the use of electronic means on the legal process.[156]

As for arbitration, Brazil is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[157] Brazil submits to the award of arbitration on commercial disputes when so provided by the contractual instrument. In the absence of an international cooperation agreement, foreign arbitral awards can be submitted to the homologation process before the Brazilian Superior Court of Justice (STJ). Also, the Brazilian Arbitration Law n. 9.307 of 1996, amended in 2015, allows the public administration to be part in arbitration clauses on private contracts.[158]

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[155] Emenda Constitucional nº 45 de 2004 [Constitutional Amendment nº 45 of 2004], amended art. 103-A of CF/88 (Brazil).

[156] Código Civil [Civil Code], art. 154 (Brazil); and Lei de Informatização do Processo Judicial [Computerization of Legal Process Act], Law n. 11.419 of 2006. (Brazil). (Such as the use of the Official Gazette, citations and subpoenas by electronic means, digital certification, electronic requisition of instructional documents and compliance with sentences through exchange of databases).

[157] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, United Nations Treaty Series, vol. 330, n. 4739, www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en

[158] Dispõe sobre a Arbitragem. [Arbitration Act], Law n. 9.307 of 1996, art. 1 ¶ 1 (Brazil).

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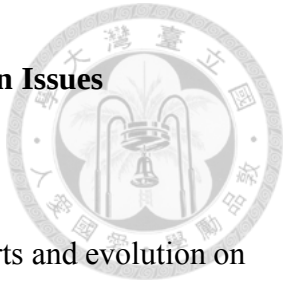

4. Brazil's CFIA and Possible Investment Facilitation Issues

This chapter will discuss Brazil's investment facilitation efforts and evolution on bilateral and regional agreements. At the global level, there is a widespread perception that in the current investment regime is not suitable as the rights protection of foreign investors take precedence over the policy space of host countries, making many countries to start questioning it. In this context, the CFIA model, with the cooperation and facilitation on investments agenda play a central role as an alternative, providing a new balance and investment facilitation provisions. While investment protection limits the scope of host state actions by restricting it under the threat of infringing investor rights, in turn, investment facilitation positively prescribes actions that the host state must preemptively adapt to secure such rights, creating a more balanced, sustainable and feasible contractual model.

This chapter will introduce Brazil's history of opposition to the current global investment standards and present their CFIA model alternative that seeks to solve most of the prior opposition reasons that led to the non-ratification of BITs in the '90s. To cross-compare the main differences between the already signed CFIAs as they present larger flexibility on the negotiation stage of the treaty. Followed by a closer discussion on the investment facilitation elements present on the CFIA model. In the end, will be done a general assessment of the Brazilian investment facilitation policy using the OECD's Policy Framework for Investment User's Toolkit,[159] and the Energy Charter Investment Facilitation Toolbox,[160] each dealing with different aspects of IF.

[159] OECD (2011), *supra* note 48.
[160] Energy Charter Secretariat (2017), *supra* note 63.

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4.1 Brazil's Experience with International Investment Agreements

First, a brief introduction to the international investment context and past Brazilian IIA experience must be made to understand the context for the Cooperation and Facilitation Investment Agreement (CFIA).

In 1992, Brazil partially ratified the MIGA Convention[161] and began to sign bilateral investment protection agreements between 1994 and 1998. From the 14 signed investment treaties, only six of them went through Congress but none were ratified.[162] The reasons for the non-ratification given by Congress were the: a) broad definition of investments; b) free transfer of resources clause (lack of exceptions for currency protection mechanisms);[163] c) indirect expropriation and the forms of compensation, that are deemed incompatible with CF/88;[164] and d) ISDS.[165]

After the non-ratification of BITs in 2002, the Brazilian Ministry of Industry, Foreign Trade and Services (MDIC) through its Chamber of Foreign Affairs (CAMEX) established guidelines for future negotiations on IIAs according to Congress's

[161] Promulga a Convenção que Estabelece a Agencia Multilateral de Garantia para Investimentos (MIGA) [Promulgates the Multilateral Investment Guarantee Agency (MIGA) Convention], Decree n. 698 of 1992 (Brazil). (MIGA's partial approval by Brazil only has the role of "directives" for the parties).

[162] Portugal (PDC 365/1996), Chile (PDC 366/1996), United Kingdom (PDC 367/1996), Switzerland (PDC 348/1996), France (PDC 395/2000) and Germany (PDC 396/2000). http://www2.camara.leg.br/.

[163] Chamber of Deputies Journal, *Report of the Constitution and Justice and Drafting Committee to the Draft Legislative Decree n. 395 of 2000*, Brasilia: CCJR, at 14 (Jan. 20, 2000), https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=13763. (This provision was deemed to limit the autonomy to regulate international transfers and payments, and contradicting obligations already assumed to IMF and WTO with stricter definitions and exceptions. In the report of the Commission for the Constitution of Justice and Drafting, that was in charge of analyzing the recently signed BITs for ratification, as there were no exceptions to the free transfer clause, to renounce the currency protection mechanisms that are used to prevent short-term currency speculations or to curb illicit activities was seen as reckless given the complicated scenario of globalized financial capital and volatility of the economy).

[164] *Id.* at. 15. (Immediate and prompt, convertible and freely transferable currency indemnification for direct and indirect expropriation was deemed as conferring more favorable treatment to the foreign than domestic investor, contradicting the Constitution that provided non-immediate payment, in the form of public debt or agrarian reform bonds).

[165] *Id.*; *see also* Débora Bithiah de Azevedo, *Os APPRIs Assinados pelo Brasil*. Brasília: Chamber of Deputies, at 3-11 (2001), http://www2.camara.leg.br/documentos-epesquisa/publicacoes/estnottec/tema3/pdf/102080.pdf.

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understanding[166] this resulted in Brazil not participating in any other existing treaty regulating international investment on a bilateral or regional basis, being the MIGA Convention the only exception. Although the BITs were not ratified, alternative measures were taken in the 1990s – after pressure from international investors – through regulation and institutional reforms, such as interpretation changes from regulation and supervision agencies, privatization of some public companies, constitutional amendment n. 6, and the tax-free remittance of capitals. Ironically, all these reforms led to the accomplishment of almost all the BIT provisions, being ISDS the single BIT provision that was never addressed.[167]

In this scenario, the Brazilian international investment participation remained static until the growing volume of Brazilian investments overseas (South-South investments) that transformed Brazil into both receiver and exporter of FDI capital;[168] added with some bitter foreign investment experiences, such as the expropriations of Brazilian investments of Bolivia in 2006 with the nationalization on oil & gas sector,[169]

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[166] *Resolution nº 30 of 2012*, Grupo Técnico de Estudos Estratégicos de Comércio Exterior (GTEX), Brasília: CAMEX (2012), http://www.camex.gov.br/investimentos.

[167] *Accord* Daniela Campello & Leany Barreiro Lemos. *The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation*. Review of International Political Economy, v. 22, n. 5, at 1084 (2015).

[168] *See* Fabio Morosini & Ely Caetano Xavier Junior, *Regulação do Investimento Estrangeiro Direto no Brasil: Da Resistência aos Tratados Bilaterais de Investimento à Emergência de um Novo Modelo*, 12 RDI, at 400-428 (2015). (The higher internationalization of Brazilian companies can be explained by the policy of incentives for outward investment such as low-interest loans from the governmental Brazilian Development Bank (BNDES), and the 2014 crisis, that made domestic companies to branch out in order to diversify and reduce loses); *See also* BCB. *Historical Series of the International Investment Position*, (2017), http://www.bcb.gov.br/htms/Infecon/seriehistposintinv.asp. (According to records from the Central Bank of Brazil (BCB), there has been a growth of more than 600% in the last decade on Brazilian overseas FDI, by the end of 2017 it amounts to US$ 358.915 billion, that number is close to half of the FDI inflow that was of US$ 778.521 billion).

[169] *See* Fernando de Mello Barreto, *A política Externa após a redemocratização*. vol. 2. Brasília: Alexandre de Gusmão Foundation (2012). (In 2006, Bolivia nationalized the oil and gas exploration, which included two refineries and various assets of Petrobras International Braspetro BV (PBR), a Brazilian State-owned Enterprise subsidiary that had heavily invested since 1996, being the major Foreign Investor in the Oil and Gas sector. Though corporate planning, PBR was based in the Netherlands, beneficiary of the Netherland-Bolivia BIT that include a ISDS provision. Agreement was reached in May 10, 2007, transferring the two refineries to Bolivia, in return for US$ 12 million. Deal made by the Brazilian Minister of Mines and Energy (Silas Rodeau), amount that had been reduced three times from the original requested price of US$ 200 million. 12 days after Minister Silas Rodeau delivered his resignation due to an unrelated involvement in fraud schemes on public infrastructure bids).

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and Ecuador in 2008 with the expropriation of a hydroelectric power plant[170] made the country rethink its foreign investment strategy based on a more balanced investment system of cooperation and facilitation with a different set of models, practices, and principles such as solidarity, the absence of conditions, horizontality in relations and respect for sovereignty.

This need for international rules that would protect Brazilian investors and safeguard the country's policy space gave birth to the Cooperation and Facilitation Investment Agreement (CFIA) in 2015, created by the Technical Group for Strategic Studies in International Trade (GTEX) of the Foreign Trade Chamber (CAMEX) under the Brazilian Ministry of Industry, Foreign Trade and Services (MDIC).[171] The CFIA investment treaty model addresses past issues that prevented the ratification of the previous BITs and takes into account discussions on IF by several international organizations and economic forums.

Therefore, on March 30th of 2015, Brazil signed its first CFIA with Mozambique on March 30 of 2015,[172] closely followed by Angola (April 01, 2015),[173] Mexico (May

[170] *See* Carina Costa de Oliveira & Nitish Monebhurrun, *As implicações de um investimento no setor hidrelétrico equatoriano tiradas da experiência da Odebrecht.* Sao Paulo: Casoteca GV Law (2011), http://direitosp.fgv.br/sites/direitogv.fgv.br/files/odebrecht_-_narrativa.pdf. (In 2008, the private Brazilian engineering and construction company Odebrecht was forced to close its operations at the San Francisco hydroelectric power plant, by means of an executive decree from the Ecuadorian government, determining the custody of the contractor's works and the military occupation of the company's camps and offices, as well as the termination of all agreements with Ecuador and the revocation of visas for directors and employees. This case resulted in no settlement or compensation).

[171] Fábio Morosini & Michelle Ratton Sanchez Badin. *The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?* Investment Treaty News, IISD (Aug. 04, 2015), https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/.

[172] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Mozambique* [hereinafter Mozambique CFIA], Maputo (March 30, 2015), https://concordia.itamaraty.gov.br/detalhamento/11636.

[173] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Angola* [hereinafter Angola CFIA], Luanda, Angola (April 01, 2015), https://concordia.itamaraty.gov.br/detalhamento/11651.

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26, 2015),[174] Malawi (June 25, 2015),[175] Colombia (Oct. 9, 2015),[176] Chile (Nov. 23, 2015),[177] Brazil-Peru Economic and Trade Expansion Agreement (April 29, 2016),[178] Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (PCFI) on April 07, 2017,[179] Federal Democratic Republic of Ethiopia (April 11, 2018),[180] Suriname (May 2, 2018),[181] and Guyana (Dec. 13, 2018).[182] Reaching a total of 14 countries, seven of them being the main internationalization destinations of Brazilian companies,[183] there are also negotiations ongoing with Jordan, Morocco, Tunisia, and the United Arab Emirates. All of the CFIAs were ratified by the Brazilian Congress except for the ones with Colombia, Ethiopia, Suriname, and Guyana; while the Angola and Mexico CFIAs are the only ones fully in effect as both parties of the agreement ratified it.[184]

The Brazilian CFIA model, as defined by UNCTAD, is comprised into three main pillars: a) improvement of institutional governance; b) thematic agendas for cooperation and facilitation of investments; and c) mechanisms for risk mitigation and prevention of controversy.[185] The CFIA model also contains 9 of the 10 action lines in the UNCTAD's

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[174] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Mexico* [hereinafter Mexico CFIA], Mexico City, Mexico (May 26, 2015), https://concordia.itamaraty.gov.br/detalhamento/11623.
[175] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Malawi* [hereinafter Malawi CFIA], Brasilia, Brazil (June 25, 2015), https://concordia.itamaraty.gov.br/detalhamento/11650.
[176] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Colombia* [hereinafter Colombia CFIA], Bogotá, Colombia (Oct. 9, 2015), https://concordia.itamaraty.gov.br/detalhamento/11736.
[177] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Chile* [hereinafter Chile CFIA], Santiago, Chile (Nov. 23, 2015), https://concordia.itamaraty.gov.br/detalhamento/11766.
[178] MRE. *Economic and Trade Expansion Agreement Brazil-Peru* [hereinafter Peru ETEA], Lima, Peru (April 29, 2016), https://concordia.itamaraty.gov.br/detalhamento/11810.
[179] *See* PCFI (April 07, 2017), *supra* note 9.
[180] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Ethiopia* [hereinafter Ethiopia CFIA], Adis Abeba, Ethiopia (April 11, 2018), https://concordia.itamaraty.gov.br/detalhamento/12117.
[181] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Suriname* [hereinafter Suriname CFIA], Brasilia, Brazil (May 2, 2018), https://concordia.itamaraty.gov.br/detalhamento/12128.
[182] MRE. *Cooperation and Investment Facilitation Agreement Brazil-Guyana* [hereinafter Guyana CFIA], Brasilia, Brazil (Dec. 13, 2018), https://concordia.itamaraty.gov.br/detalhamento/12234.
[183] Dom Cabral Foundation. *Ranking FDC das Multinacionais Brasileiras 2017*. (2017), https://www.fdc.org.br/conhecimento/publicacoes/relatorio-de-pesquisa-16375.
[184] MRE. Electronic Treaty Database. https://concordia.itamaraty.gov.br. (Updated until Jan 05, 2019).
[185] UNCTAD. *World Investment Report 2015: Reforming international investment governance*. New York; Geneva: United Nations, at 108 (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

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Global Action Menu for Investment Facilitation.[186] Mentioned in G20 debates, that contribute to the topic with the creation of the G20 Trade and Investment Working Group (TIWG) and the adoption of the G20 Guiding Principles for Global Investment Policymaking.[187] However, it must be noted that policies are just the first step, while countries have reformed their regulations governing foreign investments, they often lack follow through in the application stage.[188]

Therefore, CFIAs represent a tailor-made alternative to the Brazilian needs and their geo-economic position, with a focus on facilitating investments abroad, retaining policy space for pursuing the development needs of the parties, and adopts a constructive and proactive view aimed at bridging potential differences between investors and the host country, fundamentally changing the IIA's purpose.

4.2 Investment Facilitation Initiatives on CFIAs

The CFIA model contains almost all the UNCTAD's Global Action Menu for Investment Facilitation action lines, except for the number 6 "Monitoring and review mechanisms for IF",[189] being the only new generation of IIAs that attends 9 of the 10 UNCTAD's guidelines.[190]

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[186] UNCTAD (May 2017), *supra* note 50.
[187] G20 (July 9–10, 2016), *supra* note 42.
[188] Pravakar Sahoo, Geethanjali Nataraj & Ranhan Kumar Dash, *Foreign Direct Investment in South Asia: Policy, Impacts, Determinants and Challenges,* Delhi: Springer India, at 40-53 (2014). (A common criticism is that policies made to foster FDI are often superficial, missing the supplementary legislation, rules, procedures, and institutions to make it fully operational. Even in cases that this support infrastructure exists, there is still the need for clarification, simplification, or improved coordination among the different levels and sectors of government in order to increase efficiency and effectiveness).
[189] UNCTAD (May 2017), *supra* note 50.
[190] UNCTAD (May 2017), *supra* note 50, at 14. (Action line 6: Establish monitoring and review mechanisms for investment facilitation; Action line 8: Strengthen investment facilitation efforts in developing-country partners, through support and technical assistance).

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The provisions regarding investment facilitation are scattered throughout the CFIA, but they can be grouped in institutional governance and risk mitigation; thematic agendas for cooperation and facilitation of investments; and transparency.

4.2.1 Transparency

Transparency is a fundamental principle of any legal regime. Investment law regime is no exception and involves many issues of public interest. The presumption should be that in the formulation, implementation and enforcement of investment law, stakeholders should have no obstacles to be informed about critical elements of the investment process. This component is a common IF provision in several traditional BITs, but it is only presented on a limited form. Provisions on transparency typically require that the parties publish measures or laws that affect investments.[191] Such transparency provisions have become more prominent over time, with 59% of BITs during the 2011-2016 period containing a provision furthering transparency.[192]

The CFIA model further reinforces that idea and ensures that the Parties shall promptly publish all "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".[193] This Brazilian treaty adopts practices that ensure foreign investors greater trust and predictability in order to ensure increased investment flows. To achieve this goal, the access to prompt, clear and accurate information is essential.

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[191] ITU World Telecommunication/ICT Regulatory Survey 2015. *Working Together to Connect the World by 2020. Reinforcing Connectivity Initiatives for Universal and Affordable Access*. Discussion paper for the Broadband Commission Special Session at the World Economic Forum (Jan. 21, 2016), www.broadbandcommission.org.

[192] UNCTAD (2017), *supra* note 14, at 124-125.

[193] CFIA model (2015), *supra* note 4, art. 9.1. (*Infra* Annex 3)

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The ACFI model establishes the Parties commitment to the promotion of mechanisms of transparency of its agencies and institutions. Under the agreement, the duty of transparency involves the exchange of information, best practices and technologies between countries on the opportunities for investment in their territories and the exchange of information on laws, regulations and administrative practices. Thus, it is the duty of each Party to make available, to foreign investors and stakeholders, information about its internal procedures and regulations, whether of judicial or extrajudicial nature. Besides the transparency provisions in the CFIA model, new institutions are also created, the Ombudsman and the Joint Committee, that serve to better improve transparency and the information provided to investors, which will be further discussed in the following chapter.

In addition, transparency is considered one of the vital elements to achieve investment facilitation, according to the Global Action Menu developed by UNCTAD, its the first action line, to "Promote accessibility and transparency in investment policies and regulations and procedures relevant to investors".[194]

4.2.2 Institutional Governance and Risk Mitigation

The premise is that countries must cooperate to assist in the realization and expansion of reciprocal investments, thus the CFIAs reduces the centrality on investment protection and proposes the development of institutions that create a dialogue and facilitates investments between the Parties and stakeholders. Risk mitigation includes traditional investment and investor protection provisions, as well as diplomatic and cooperation mechanisms for the implementation, supervision, and compliance of the

[194] UNCTAD (May 2017), *supra* note 50, at 5.

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agreement. In this sense, CFIA provisions reflect the international movement for reform of the investment regime and its supplementation on the domestic investment strategy.

Recognized as innovation in the CFIA model, it aims to address a common criticism that IIAs lack a governance instance for their own implementation. It creates the institution of: a) Focal Point or Ombudsman; and b) Joint Committee. The first provides government assistance to investors, dialogue with the government to address suggestions and complaints from the other party's Ombudsmen and investors. The second is in charge of the application of CFIAs and their thematic agendas operating at the state-to-state level. Therefore, the roles of both are, primarily, to promote cooperation, communication and risk management, and, if a dispute cannot be avoided, implement a state-state dispute settlement mechanism, based on consultations, negotiations, and mediation.

A. Ombudsman or Focal Point

In CFIAs Ombudsman and Focal Point are treated as synonyms, the Ombudsman is part of the administrative structure designated by the country to deal with administrative or judicial complaints and claims against actions by the government, acting with independence, competence, impartiality, accessibility and exercise persuasion instead of control to resolve the complaints.[195] It also provides investment information, resolves doubts and seeks solutions for investors in its area of competence, serving as an important channel of communication and support between investors and the host country. In sum, it is a sort of one-stop-shop for the initial stage of foreign investment.

In the case of Brazil, CAMEX executive secretariat is responsible for performing

[195] Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*. Ohio State Journal on Dispute Resolution. v. 12, n. 1, at 95–145 (1996), http://heinonline.org/HOL/Page?handle=hein.journals/ohjdpr12&div=10&g_sent=1&casa_token=&collection=journals#.

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the functions of the Ombudsman for Direct Investments. In addition, the Focal Point may recommend, when necessary, changes in legislation, "for the continuous improvement of the investment environment",[196] and serve as data collection agent necessary for the improvement of the legislation and administrative procedures.[197]

It was based on the Commission for Environmental Cooperation under the North American Free Trade Agreement (NAFTA),[198] and South Korea's Office of the Foreign Investment Ombudsman (OFIO), which operates under the Korea Trade-Investment Promotion Agency (KOTRA).[199]In South Korea IIAs, the Ombudsman consists of a commissioned post, designated by the President of the Republic, and requires high knowledge and experience in international investment or trade, being advised by a range of experts in several related fields. Its service does not have costs for those who seek it and its function is to collect and analyze information regarding the problems faced by foreign companies, request cooperation and request the recommendation of implementation to the relevant administrative bodies and agencies, propose new policies to improve the system of promoting investment and performing the tasks necessary to solve the problems of foreign investors.[200]

In the CFIA case, the ombudsman is still in the implementation stage as only the Angola and Mexico CFIAs are fully in force, and, to make matters worse, the only way to contact the Brazilian Ombudsman is through an e-mail address as the website is still under design 4 years after its conceptualization.

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[196] Dispõe sobre a criação, a estrutura e as atribuições do Ombudsman de Investimentos Diretos [Direct Investment Ombudsman Act], Decree n. 8.863 of 2016, art. 4 (Brazil).
[197] *Id*., art. 7.
[198] An institute that assists in the prevention of potential trade and environmental conflicts and which can be adapted to potential investment disputes.
[199] UNCTAD. *Series on International Investment Policies for Development. Investor-State Disputes: Prevention and Alternatives to Arbitration*, at 87-93 (2010), http://unctad.org/en/docs/diaeia200911_en.pdf.
[200] South Korea. *Foreign Investment Ombudsman Annual Report 2017*, at 30-33 (2018), http://www.alio.go.kr/informationResearchView.do?seq=2366283.

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B. Joint Committee

A Joint Committee is created for a state–state cooperation and dispute prevention. The dispute prevention component works through a system in which representatives of both States, appointed by their respective governments, share their views on the issue raised by investors and search for a solution on common ground. According to the CFIA model, they shall meet at least once a year, at a time and place to be designated by both countries, with alternating presidencies, which contribute to the dynamism of this institute.

The scope of Joint Committee consists of: a) monitoring the implementation of CFIA; b) discuss and share reciprocal investment opportunities; c) coordinate the implementation of cooperation and facilitation agendas;[201] d) solicit and welcome the participation of the private sector and civil society, as appropriate, in specific related issues; and e) amicably resolve any investment issues or disputes. Furthermore, several CFIAs, explicitly mention the establishing of a specific forum, and technical channels to act as facilitators between governments and the private sector.[202]

In addition, CFIAs also establish that the parties may establish *ad hoc* working groups, which will work together with the Joint Committee or autonomously, and the private sector may be invited to join these groups upon authorization from the Joint Committee. It should also be noted that Angola CFIA expressly allows the Joint Committee to invite non-governmental organizations (NGOs) to represent civil society

[201] The thematic agenda is intended to be fluid, which can be adapted according to mutual interest.

[202] *Brazil–Mozambique CFIA* (March 30, 2015), *supra* note 172, art. 17.1 (Own translation: "Considering the thematic scope that investment issues demand, the Parties conclude that the major purpose of the creation of the aforementioned Joint Committee and Focal Points is to foster institutional management in this area, through the establishment of specific forum and technical channels that act as facilitators between governments and the private sector."); *Brazil-Angola CFIA* (April 01, 2015), *supra* note 173, art 17.1 (identical text in the *Brazil–Mozambique CFIA,* art. 17.1); *Brazil–Mexico CFIA* (May 26, 2015), art. 14.4.c; *Brazil–Malawi CFIA* (June 25, 2015), Art. 3.4.iv (Own translation: "Consult the private sector and civil society, where appropriate, on specific issues related to the work of the Joint Committee").

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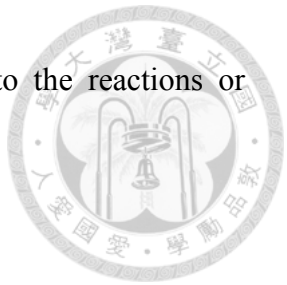
on certain issues, this gives the Committee a better perspective to the reactions or concerns from the local community.[203]



4.2.3 Thematic Agendas for Cooperation and Facilitation

The thematic agendas for cooperation and facilitation should be developed jointly by countries as a series of activities to be carried out that stimulate and provide economic growth and improve the bilateral environment for doing business, promoting a long-term and durable relationship between the parties.[204] With a focus on the CFIA preamble "to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Parties",[205] and interconnected with sustainable economic development and the objectives of a transparent, predictable and efficient business environment.[206]

They are a response to demands of the private sector, that want solutions for the day-to-day obstacles and the amount of red tape faced by foreign investors, such as barriers to the remittance of foreign exchange and capital, visa difficulties, environmental certifications and other legal problems regarding the implementation and compliance of sector legislation requirements. It may also contain provisions on the regulatory and administrative framework relating to national legislation, or on the transparency of the system and the reduction of barriers to obtaining licenses.[207]

In the CFIA model, thematic agendas for further investment cooperation and facilitation are located in the annex I, serving as an illustrative list for the initial

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[203] MRE. *Brazil-Angola CFIA* (April 01, 2015), *supra* note 173, art. 4.7. (Own translation: "Representatives of non-governmental entities may be invited by the Joint Committee to present studies related to matters of interest to the Parties").
[204] Fábio Morosini & Michelle Ratton Sanchez Badin (Aug. 04, 2015), *see supra* note 171.
[205] CFIA model (2015), *supra* note 4, Preamble. (*Infra* Annex 3)
[206] OECD. Ana Novik & Alexandre de Crombrugghe (2018), *supra* note 46, at 3.
[207] *Cf.* Felipe Hees & Henrique Choer Moraes. *Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements.* AJIL Unbound, 112, 197-201 (2018), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/breaking-the-bit-mold-brazils-pioneering-approach-to-investment-agreements/5ED7690A4775619CEA584743D1E02FE2.

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negotiation of CFIA agreements: a) Payments and transfers (facilitation of remittances and foreign capital exchange between the parties); b) Visas (facilitation of the temporary entry and stay of managers, executives, and skilled employees of economic operators, entities, firms, and investors of the other party); c) Technical and environmental regulations (facilitation of the issuance of documents and certificates, licenses relating to the investment of the other party); and d) Cooperation on Regulation and Institutional Exchange.[208] Therefore, depending on what is agreed upon by the Parties, they can focus on particular issues creating a framework that can be adapted over time to accommodate the countries evolution and development needs.

The Brazil-Colombia CFIA has a slightly different pre-established agenda, without considering issues of payments and transfers[209] and adding two new topics on supply chains: a) parties shall cooperate in promoting strategic alliances, including production linkages between private enterprises of the parties favoring alliances with micro, small, and medium-sized enterprises; and b) investment in logistics and transport.[210] While the CFIAs with Chile, Ethiopia, Peru, and Suriname create the Joint Committee but do not establish a preliminary thematic agenda in the CFIAs.

In conclusion, the thematic agendas reinforce the understanding that the FDI benefit should not come exclusively from the home country to the host country, being a joint effort. The overall impact that the investment will have, raising the level of cooperation in the most diverse areas and consequently, bringing benefits in the economic, social, legislative, logistical and even energy spheres.

[208] CFIA model (2015), *supra* note 4, annex I.
[209] MRE. *Brazil-Colombia CFIA* (Oct. 9, 2015), *supra* note 176, art. 9. (Better addressed on the art. 9 and its four subsections).
[210] *Id*., annex I, item "d" and "e". (Own translation)

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4.3 CFIA Main Features, Flexibility and BIT Comparison

The main characteristics of the CFIA model take into account the previous negative perceptions of the traditional BITs, the needs of investors in Brazil, and of Brazilian companies investing overseas. Therefore, it is a more balanced model that focuses on investment facilitation, institutional enhancement, risk mitigation, and dispute prevention; aiming for a more balanced international investment system of cooperation and facilitation with different set of models, practices, and principles such as solidarity, the absence of conditions, horizontality and respect for sovereignty.

Hence, the CFIA model brings forward many provisions that are different from the BIT model, this chapter aims to introduce some of the main differences and peculiarities: a) a more extensive preamble; b) emphasis on the protection of policy space; c) narrower investor and investment definitions; d) different perspective on the most-favored-nation clause and national treatment; e) removal of indirect expropriation; and f) State-State Dispute Settlement (SSDS).

For the purposes of a first CFIA assessment, it will be used the "Brazil Model BIT 2015" on UNCTAD's IIA database, hereafter CFIA model,[211] with some references to other CFIAs that present greater peculiarities due to the larger flexibility on negotiations of the CFIA treaty model.]

On a broad general view, it is noted that, on the 11 CFIA treaties signed so far, policy space, sustainable and social development aspects, transparency and SSDS are common elements in all CFIA treaties, leaving some details such as environmental protection, technology cooperation and capacity building not adopted in some few

[211] CFIA model (2015), *supra* note 4. (*Infra* Annex 3).

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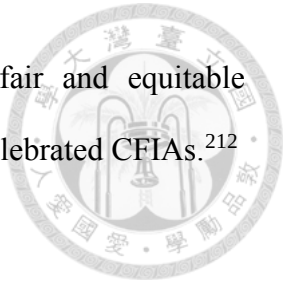
exceptions. Furthermore, full protection, indirect expropriation, fair and equitable treatment (FET), and ISDS provisions are not present in any of the celebrated CFIAs.[212]



4.3.1 A More Extensive Preamble

The Preamble constitutes an introduction to expressing the political and moral ideas that the treaty intends to promote. It is clear that it does not stipulate norms, thus lacking a legally relevant content, having a more ideological than legal nature, so much so that, if the Preamble were suppressed, the actual content of the legal document would be unchanged.[213]

Although this preliminary part of the agreement only contains comprehensive and abstract provisions, its importance is revealed by the fact that it defines the regulatory regime that governs the interpretation and application of the contract. As a result, these provisions are recurrently used as a means of interpreting intentions in the resolution of disputes,[214] in accordance with the general rule of interpretation in treaties on article 31 of the Vienna Convention on the Law of Treaties (VCLT).[215]

Traditional BITs only briefly state the creation of favorable conditions for foreign investments and the need to promote and protect investments against non-commercial risks, to "stimulate entrepreneurial initiatives and promote economic prosperity", and "the transfer of capital and technology between countries in the interests of their economic development".[216] While the CFIA model, on the other hand, is far more extent in

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[212] *Infra* Annex 4.
[213] *Cf*. Hans Kelsen, *Teoria geral do Direito e do Estado*. 2. ed. São Paulo: Martins Fontes, at 255 (1995).
[214] *See* Muthucumaraswamy Sornarajah, *The International Law of Foreign Investment*. 3rd ed. New York: Cambridge University Press, at 232 (2010).
[215] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31. (1969). ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes").
[216] *See supra* note 162. (Common expressions used on Brazilian BITs signed with Switzerland, UK, Germany, Chile and Portugal).

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comparison, aiming at perfecting bonds of friendship and the spirit of cooperation; create and maintain favorable conditions for investment; create a mechanism for technical dialogue; opportunities for better integration between the parties, and the quest for sustainable development in the promotion and facilitation of investment. Being the Preamble differences a clear indication in a fundamental shift on the purpose of each IIA.

Therefore, CFIAs are more balanced, since it aims to contemplate not only the interests of investors but also those of the host country, tendency viewed in the new generation of IIAs, also creating obligations to the foreign investors. In the same view are international organizations like OECD and UNCTAD, affirming that "the IIA universe is evolving about substantive provisions: pre-establishment commitments and sustainable development-oriented clauses are on the rise."[217]

4.3.2 Emphasis on the Protection of Policy Space

CFIAs recognizes each State autonomy to define public policy space if it is not discriminatory. This is stated on its preamble and repeated throughout the body of the agreement. It is concerned with safeguarding the regulatory capacity of the country to adopt measures of public interest, even if they directly or indirectly affect the interests or expectations of the investor.

Furthermore, article 16 of the CFIA model expresses that it shall not "prevent a Party from adopting maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health legislation of that Party" if it is not an "arbitrary or unjustifiable discrimination or a disguised restriction."[218] Despite the conditional factors, it is

[217] UNCTAD. *Recent trends in IIAs and ISDS*, n. 1. Genebra: United Nations, at 1 (2015), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=929.
[218] CFIA model (2015), *supra* note 4, art. 16. (*Infra* Annex 3)

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important to notice the "it deems appropriate" expression as it grants the Parties a wide margin of subjectivity in the implementation of the public policy space. In analyzing the insertion of policy space in the preamble of bilateral investment treaties, Aikaterini argues about the importance of this prediction:

> [R]ather than the preservation of regulatory space (it would be incongruous to claim the opposite, since, in any event, the parties have more regulatory space in the absence of an IIA), it may be apposite to include regulatory interests in the preamble to ensure that investment promotion and protection are not the only considerations when interpreting a treaty.[219]

In addition, article 16.2 of the CFIA model contains a provision forbidding the lowering of standards of protection to attract foreign investment (de-regularization):

> Article 16.2. The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor and environmental legislation or measures of health. Therefore, each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards. If a Party considers that another Party has offered such an encouragement, the Parties will address the issue through consultations.[220]

This clause or similar is also present on 111 out of the 980 mapped treaties that were concluded in the 21st century, the new generation of IIAs that seek to prevent the de-regularization and the race to the bottom effect.[221]

[219] Aikaterini Titi, *The right to regulate in international investment law*. Baden: Nomos, at 119 (2014).
[220] CFIA model (2015), *supra* note 4, art. 16.2.
[221] UNCTAD. *IIA Mapping project*. (2001), http://investmentpolicyhub.unctad.org/IIA/mappedContent.

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4.3.3 Narrower Investor and Investment Definitions

The definitions in any agreement are one of the most critical material aspects, especially when dealing with IIAs, with different countries that have different legal systems, and different interpretations. The traditional liberal IIA system mainly adopts a broad concept of investment and foreign investor in order to englobe a broader spectrum of definitions, on opposite side, the new generation of IIAs and the domestic definition on developing countries use a narrower definition as a way to limit the range of application of agreements and, by default, enlarge the host country policy space.

The term "investment" receives diverse treatment on each Brazilian BIT signed in the '90s, possessing a wide range, some broader than others. This diversity reflects the lack of attention in the celebration of such treaties, some examples are: a) "all types of assets";[222] b) "all properties, such as assets, rights and interests of all kinds";[223] c) "all types of properties, such as assets and rights of any nature, acquired or exercised in accordance with the law of the receiving party";[224] d) "all types of assets invested or reinvested by an investor of one contracting party in the territory of the other, in accordance with the latter's legislation";[225] and e) "all kinds of goods and rights acquired by the application or reapplication of resources, carried out in accordance with the law of the contracting party".[226] Definition followed by a non-exhaustive exemplary list, such as movable or immovable property, real rights, shares or other forms of equity interest, credit rights, copyrights, intellectual property rights, concessions and so on.

On traditional IIAs, the term "investment" receives varied but similar definitions, especially regarding its range, covering more modalities and demonstrating a

[222] *See supra* note 162. (Brazil BITs with UK, art. 1.a. and Switzerland, art. 1.2).
[223] Chamber of Deputies Journal (Jan. 20, 2000), *supra* note 165.
[224] *See supra* note 162. (Brazil-Chile BIT, art. 1.4).
[225] *See supra* note 162. (Brazil-Germany BIT, art. 1).
[226] *See supra* note 162. (Brazil-Portugal BIT, art. 1.1.III).

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comprehensive approach, naming various operations as "investments", including exploratory or predatory investments that are favorable to investors but contrary to the interests of the host state.

While in the CFIA model, there is a more restrictive definition as “a direct investment of an investor of one Party, established or acquired in accordance with the laws and regulations of the other Party, that s, directly or indirectly, allows the investor to exert control or significant degree of influence over the management of the production of goods or provision of services in the territory of the other Party”.[227] There appears to have no significant difference, but, upon a closer look, this definition restricts the investment definition to the “production of goods or provision of services”.[228] To reinforce this limitation the text continues, adding a negative list, excluding “i) an order or judgment issued as a result of a lawsuit or an administrative process; ii) debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of a State-owned enterprise of a Party that is considered to be public debt under the legislation of that Party; ii) portfolio investments (…); and iii) claims to money that arise solely from commercial contracts for the sale of goods or services by an investor in the territory of a Party to a national or an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money”.[229]

As for the definition of “investor”, CFIAs and most BITs adopt the same nationality criteria for individuals (a national of one of the Parties and who invests in another Party), and the connection elements criteria for legal entities (where the company

[227] CFIA model (2015), *supra* note 4, art. 3.1.3.
[228] This limitation to goods and services in the investment definition is present on all the CFIAs except for the one celebrated with Angola that defers these definitions to the domestic legal system on art. 3. (Own translation: “For the purposes of this Agreement, the definitions of investment, investor and other definitions in this regard shall be governed by the respective legal systems of the Parties”).
[229] CFIA model (2015), *supra* note 4, art. 3.1.3.

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is structured according to the law of one of the Parties). With exceptions found on the Brazil-Switzerland and Brazil-France BITs that also use the control criteria for the establishment of investor's origin.[230]

In addition, note that the Colombia CFIA explicitly clarifies that the definition of investor will not only be restricted to the private investor but also includes the public sector.[231] Furthermore, the Malawi CFIA also uses the domiciliary criteria, increasing the existing protection standard in this case. For example, if a national from a third country resided permanently in Brazil and decided to invest in Malawi, this person would also be considered as a Brazilian investor according to the Malawi CFIA.[232]

Another peculiarity can be found in the Colombia CFIA, where the question of dual nationality from both parties of the bilateral agreement is addressed, so that the agreement will not apply to the investments of natural persons who are nationals of the two contracting parties, unless the dual nationality person have been domiciled, without interruption, outside the territory of the host state.[233]

However, complexity occurs in the Angola CFIA, the only CFIA treaty that does not have investor and investment definitions in the text of the agreement, where the definitions, in article 3, are referred to the domestic legal system: "For the purposes of this Agreement, the definitions of investment, investor and other definitions in this regard shall be governed by the respective legal systems of the Parties".[234] This atypical

[230] *See supra* note 162.
[231] MRE. *Brazil-Colombia CFIA* (Oct. 9, 2015), *supra* note 176, art. 3.1.3. (Own translation: "'Investor' means a natural person, legal entity or an independent asset of a Party which has made an investment in the territory of the other Part").
[232] MRE. *Brazil-Malawi CFIA* (June 25, 2015), *supra* note 175, art. 2.1.a ("[A]ny individual who is a national or a permanent resident of a Party, according to its laws, that makes an investment in the other Party").
[233] MRE. *Brazil-Colombia CFIA* (Oct. 9, 2015), *supra* note 176, art. 3.1.4.1 (Own translation: "This Agreement shall not apply to investments of natural persons who are nationals of both Parties, unless such natural persons at the time of the investment and thereafter without interruption have been domiciled outside the Territory of the Party in which they made the investment").
[234] MRE. *Brazil-Angola CFIA* (April 01, 2015), *supra* note 173, art. 3. (Own translation).

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agreement intends to guarantee that there are no contradictions on terminology between the domestic and international law, restricting the international treaty only to domestic interpretation. Although it is not specified which domestic system it applies, if that of the investor's home state or host state, as it is silent on this detail, it is assumed that it refers to the host state of the investment.

This arrangement can create definition confusion and allows countries to change the scope of the application at any time by changing the existing definition in national laws or the interpretation used by the domestic courts. Furthermore, national definitions may not be the most appropriate with the current context of the CFIAs, since they are designed for specific purposes of that countries' legal regime.

4.3.4 Different Perspective on the MFN and NT Clauses

The Most-Favored-Nation (MFN) clause and National Treatment (NT) clauses originate from the principle of non-discrimination and figure as one of the crucial components of IIAs. Both guarantees represent the country's commitment not to treat the foreign investor in a discriminatory manner, either with equal treatment as national investors or that is granted to other foreign investors.

NT and MFN clauses are present in the earlier BITs signed by Brazil, such as the article 4 of the Brazil-France BIT that assures a "no less favourable treatment" and the "most favored nation, if it is more advantageous".[235] This standards origin comes from the articles I:1 and III:4. of the WTO's GATT, making compliance obligatory for WTO members, including Brazil. Due to their direct relationship on the basing of some

[235] Investment Policy HUB. Brazil-France BIT (March 21, 1995), art 4. https://investmentpolicyhub.unctad.org/IIA/country/27/treaty/647. (Own translation: "Each Contracting Party shall apply in its territory and in its maritime area to investors of the other Contracting Party, in respect of its investments and related activities, treatment no less favorable than that accorded to its own investors or to investors of the most favored nation, if it is more advantageous").

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publicized ISDS cases,[236] the CFIA model opts to maintain some distance from the traditional investment standard and attempts not to use the same expressions.

To comply with WTO, they bring a new wording, restricting to "treatment no less favourable" to foreign investors in "like circumstances" granted to domestic investors or to other foreign investors.[237] In addition, the use of the term "like circumstances" admits exceptions to the principle, admitting the distinction between investors or investments as on the basis of public welfare objectives dealing with health, environment, national security, etc.[238] These exceptionalities are found in article 6.4:

> For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.[239]

To reinforce the worries of MFN effects on ISDS cases, the CFIA model and the ones celebrated with LATAM countries emphasize that both NT and MFN will not be interpreted as preferential treatment standards or privileges "relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement",[240] or under "any agreement for regional economic integration, free trade area, customs union or common market, of which a Party is a member"[241] so that there is no room for extension of the MFN treatment granted on CFIA to other treaties.

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[236] ICSID. Emilio Augustin Maffezini v. The Kingdom of Spain, ICSID Case n.ARB/97/7, Award on Nov. 13, 2000. (Argentina and Spain BIT required the exhaustion of internal instances prior to ISDS procedures. However, such provision was absent in other BITS with third countries 'Chile and Spain BIT'. Using the MFN principle, the Argentinian investor gained direct access to ISDS, without exhaustion of domestic remedies).
[237] CFIA model (2015), *supra* note 4, arts. 5 and 6. (*Infra* Annex 3).
[238] Specific cases on arts. 5.2 and 6.3 of the Ethiopia CFIA; arts. 5.4 and 6.4 of the Suriname CFIA.
[239] *Id*.
[240] CFIA model (2015), *supra* note 4, art. 6.3.i.
[241] *Id.* art. 6.3.ii.

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4.3.5 Removal of the Indirect Expropriation Provision

Expropriation has been one of the main reasons for the existence of IIAs. Since the beginning of an international investment regime, capital-exporting countries searched for ways to protect their overseas property, designing IIA provisions that would limit the causes and providing for the due compensation when expropriation is unavoidable. On traditional IIAs these provisions are intentionally drafted broadly to encompass more situations. According to UNCTAD, most of the clauses in the IIAs provide for various similar terms as expropriation, taking, nationalization, deprivation, and dispossession, not defining nor distinguishing them from each other and often using them interchangeably, this is mostly due to parties domestic legal system tradition and translation differences.[242]

Expropriation clauses are provisions that recognize the right of the host state to expropriate or nationalize private foreign property if: a) for a public purpose; b) non-discriminatory; c) with due process of law; d) accompanied by compensation. Moreover, they are separated into direct and indirect expropriations. Direct takings involve the transfer of title and/or outright physical seizure of the property. On the other hand, indirect expropriations, are measures, intentional or not, that also amount to expropriation if they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property.[243]

In this regard, the exact meaning of indirect expropriation remains so far elusive, in this sense, the determination, if there is or not indirect expropriation, is a matter of a case-by-case analysis on arbitral tribunals, differing from treaty to treaty and on the interpretations given by different arbitral tribunals.

This international investment standard of indirect expropriation protection

[242] UNCTAD, *Expropriation. Series on Issues in International Investment Agreements II*, at 16-18 (2012), http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.
[243] *Id.,* at 20.

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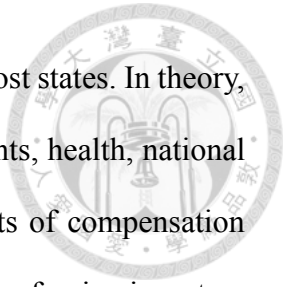

became the basis for many ISDS cases and an unpredictable risk for host states. In theory, any enacted policy, even those related to the protection of human rights, health, national security, environmental and so on. These are subject to requirements of compensation from the foreign investor if they remotely affect the investment, making foreign investors take the issue on UNCITRAL or another international arbitral tribunal. In this matter, OECD defines that:

> The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have used to distinguish these concepts: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.[244]

ISDS cases and even fewer cases of IIAs try to verse on this line between "indirect expropriation and non-compensable regulatory governmental measures".[245] Even on these case-by-case analyses, the great majority of publicized arbitral tribunals recognize this line of distinction between indirect expropriation and government policies for public welfare, but the practical implementation of it remains elusive to standardization. Given the uncertainty, some tribunals define a "blanket exception for regulatory measures would create a gaping loophole in international protection against

[244] OECD, *"Indirect Expropriation"and the "Right to Regulate"in International Investment Law,* OECD Working Papers on International Investment, at 22 (April 2004). http://dx.doi.org/10.1787/780155872321.
[245] *See* CME (Czech Republic) BV v. The Czech Republic, award of September 13, 2001, ¶ 603; Marvin Roy Feldman Karpa v. The United Mexican States (ARB(AF)/99/1), award of December 16, 2002, ICSID Rev.-FILJ, vol. 18, 2003, at 488 *et seq*., ¶ 103; Azurix Corp. v. The Argentine Republic (ARB/01/12), award of July 14, 2006, ¶ 310; Emmanuel Too v. Greater Modesto Insurance Associates and the United States of America, award of December 29, 1989, Iran-US CTR, vol. 23, 1989-II, at 378. ("State is not responsible for loss of Property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory").

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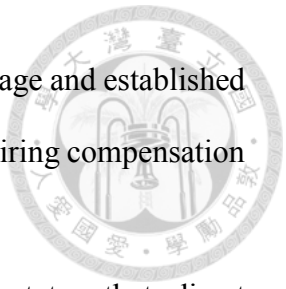

expropriation."[246] Recently, a new IIAs has introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred, criteria consistent with those from arbitral awards.[247]

Therefore, the CFIA model, on its article 7 expressly states that direct expropriations are not allowed, unless made in public interest, non-discriminatory, with due process and on payment of adequate compensation. In addition, the compensation uses the terms "without undue delay" and "equivalent to the fair market value of the expropriated investment, immediately before the expropriating measure has taken place"[248] in place of traditional IIA's "prompt, adequate and effective compensation for expropriation of foreign investments" (the Hull Formula).[249] A modification that is more adequate with the dispositions with the Calvo Doctrine and in the Brazilian CF/88.

On the signed CFIAs, it can be observed an evolution line on the matter of indirect expropriation, in the first generation of CFIAs that were signed with African countries, the issue of indirect expropriation was not mentioned. Later on, the ones signed with LATAM countries, show some evolution and adopt a more active dismissal of such investment standards, such as the article 5.3.b of the Colombia CFIA[250] and article 6.3.b of the Chile CFIA,[251] that excludes from dispute settlement those standards agreed with

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[246] Pope & Talbot Inc. v. Canada, award of June 26, 2000, ¶ 99.
[247] OECD (April 2004), *supra* note 244, at 22.
[248] CFIA model (2015), *supra* note 4, art. 7.2. (*Infra* Annex 3).
[249] OECD. *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law"*, OECD Working Papers on International Investment, 2004/04, OECD Publishing, at 2 (2004), http://dx.doi.org/10.1787/78015587232. (Hull formula, defining that international law requires "prompt, adequate and effective" compensation for the expropriation of foreign investments. Confliting with the Calvo doctrine that requires only "appropriate compensation". In 1974, the UN General Assembly decisively rejected the Hull formula in favour of the Calvo doctrine in adopting the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the "appropriate compensation" standard, it goes on to provide that "in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals").
[250] MRE. *Brazil-Colombia CFIA* (Oct. 9, 2015), *supra* note 176, art. 5.3(b). (Own translation: "This Article should not be interpreted as: the possibility of invoking, in settling disputes, standards of treatment contained in an international investment agreement with a third party").
[251] MRE. *Brazil- Chile CFIA* (Nov. 23, 2015), *supra* note 177, art. 6.3(b). (Own translation: "This Article shall not be construed as: the possibility of invoking in any dispute settlement mechanism treatment standards contained in an international investment agreement or in an agreement containing a chapter of

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a third Party although still not directly mentioning them.

Finally, on the 2017's intra-Mercosur PCFI,[252] on the matter of indirect expropriation, it is expressively written that the treaty does not cover indirect expropriation. Clarifying, beyond any doubt, that this controversial international investment standard is not, directly or indirectly, applied on CFIAs.

4.3.6 State-State Dispute Settlement (SSDS)

In case of a dispute between a foreign investor and the host country, CFIAs provides for a two-stage system. First focusing on mechanisms of mandatory prevention and negotiation, and in case of failure, it can be followed by a State-State Dispute Settlement (SSDS) if the country decides to pursue this avenue.

The first stage is dealt with by the focal point, who is designated solely to foster relations between investors and the host state, hence, it will endeavor to resolve the conflict based on dialogue and bilateral consultation, always taking in account the interest and concerns of the Parties; acting on conflict mitigation by requiring the cooperation of government authorities to achieve improvements in investment policies, administrative procedures or the regulatory regime of the host country. If the complaint is not resolved in the preventive phases, the country, according to its discretion, can activate the SSDS. On it is possible to observe two distinct versions separated by the first generation of CFIAs with African countries, where there is no express consent from the Parties to submit into arbitral proceedings, meaning that if a SSDS case emerges, the Parties have the discretion to decide if it applies or not. While the later CFIAs with LATAM countries,

investments of which one of the Parties is a party before entry into force of this Agreement").

[252] PCFI (April 07, 2017), *supra* note 9, art. 6.6. (Own translation: "For greater certainty, this Protocol only provides for direct expropriation, in which an investment is expropriated directly through the formal transfer of title or domain right, and do not cover indirect expropriation").

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arbitration procedures are much more detailed in the body of the agreement and do not present such omission. What this dispute prevention and resolution system brings to the table is that countries will be more selective at filter out those cases that really deserve to be brought to a controversial solution, where there is substantial evidence of discrimination against the investors of their country, excluding cases ruled by opinion that the investor has on the legislation of the other country.

As for the arbitral procedure, the CFIA model sets as default the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), having the Parties flexibility to elect their own arbitral tribunal, rules, and place. If there is a refusal of any party on nominating an arbiter it will fall into the competency of the President of the International Court of Justice (ICJ) in case of the Mexico CFIA,[253] and the Secretary-General of the Permanent Court of Arbitration of The Hague in the Colombia CFIA.[254]

The critics of the SSDS system is that the second stage of the preventive phase does not involve the foreign investor, that is the main affected party. In addition, it demonstrates a lack of institutional coordination between the Ombudsman and the Joint Committee as it is not clear that one can refer investment complaint cases to the other in case of failure in dispute prevention by the Ombudsman. If that is the case or if the Ombudsman decides not to forward the case to the Joint Committee for the SSDS, the investor has to redo the same procedure a second time with the responsible department

[253] MRE. *Brazil-Mexico CFIA* (May 26, 2015), *supra* note 174, art. 19.6. (Own translation: "This Article shall not apply to any dispute that has arisen or to any measure that has been adopted prior to the date of entry into force of this Agreement").

[254] MRE. *Brazil-Colombia CFIA* (Oct. 9, 2015), *supra* note 176, art. 23.7. (Own translation: "If the necessary appointments have not been made, either Party may request the Secretary-General of the Permanent Court of Arbitration of The Hague to make the necessary appointments. If the Secretary-General of the Permanent Court of Arbitration in The Hague is a national of one of the Parties or is prevented from exercising that function, the member of the highest permanent Hague Arbitration Court, who is not a national of either Party, shall be invited to make the necessary assignments").

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that deals with the Joint Committee, so that the country take the investor grievance as their own, proceeding to the SSDS.

Moreover, SSDS subjects the investor to possible state abuses resulting from institutional weaknesses and political instability,[255] and there is no predictability whether the issue will indeed be taken up and carried forward. It is common knowledge that in the diplomatic field, countries tend to avoid conflict and have other interests to safeguard. In this, the backlash from the ISDS system repulsion can make countries to try to overcorrect it and make the new generation of IIAs lack of investment protection provisions. In this framework, what can be affirmed is that CFIAs do not directly affect the investor's power to include arbitration clauses - or any other form of dispute settlement - on private contracts in accordance with each host country's national legislation.

4.4 Intra-MERCOSUR Cooperation and Facilitation Investment Protocol

Mercosur is a South American trade bloc,[256] composed of Argentina, Brazil, Paraguay, and Uruguay. Venezuela is a full member but has been suspended since December 1 of 2016, for non-compliance with the adoption of a common external tariff. It was created by the Treaty of Asunción on April 26, 1991, and the Protocol of Ouro Preto, of December 17, 1994. Its objectives are: a) free movement of goods, services, workers and capital, though, inter alia, reduction of tariff and non-tariff barriers and measures having equivalent effect; b) common commercial policy with third countries/blocs, with the adoption of a common external tariff; c) coordination of macroeconomic policies and harmonization of customs, tax, fiscal, exchange, monetary,

[255] José Augusto Fontoura Costa & Vivian Daniele Rocha Gabriel. "Brazil, ACFIs and investment arbitration," *in* ed. Portuguese Arbitration Association. *International Journal of Arbitration and Conciliation*. 1st ed. year 8. Lisboa: Almedina, v. 1, at 63-82 (2015).
[256] Also known as *Mercosul* in Portuguese or *Ñemby Ñemuha* in Guarani.

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investment, foreign trade, services, transport, communications, agricultural, industrial, labor and other policies; d) harmonization of the legislative codes of the member countries in the areas defined as relevant to the integration process.

On investment, in 1992, the Common Market Group (GMC) developed two treaties: a) the Cologne Protocol for the promotion and reciprocal protection of investments in Mercosur, and b) the Protocol of Buenos Aires on the Promotion and Protection of Investments from States Not Members of Mercosur. Creating an investment regime within and outside Mercosur. Both treaties conditioned their entry into force to the ratification of the four signatory members. However, not one country ratified it, leaving it as non-enforceable. Overall, considering the small flow of investments among members of Mercosur, the signature of Cologne and Buenos Aires Protocol was probably just a political gesture of Mercosur members.[257]

The investment issue just returned on April 07 of 2017, in Buenos Aires, members of Mercosur, composed of Argentina, Brazil, Paraguay, and Uruguay, signed the Cooperation and Facilitation Investment Protocol to the Treaty of Asunción (PCFI).[258] The instrument encourages reciprocal investments through the adoption of treatment standards for investors and investments, cooperation among signatories in promoting a favorable business environment and facilitating investments, having the Brazilian CFIA model as a basis.

The protocol impacts the investment policy of all the Mercosur members regionalizing the Brazilian CFIA model, among the main elements: a) gives investors between the signatories legal guarantees of non-discrimination and equal treatment as

[257] *See* Facundo Perez Aznar & Henrique Choer Moraes, *The MERCOSUR Protocol on Investment Cooperation and Facilitation: regionalizing an innovative approach to investment agreements*. EJIL: Talk! Blog of the European Journal of International Law, (Sept. 12, 2017), https://www.ejiltalk.org/the-mercosur-protocol-on-investment-cooperation-and-facilitation-regionalizing-an-innovative-approach-to-investment-agreements/.

[258] *See* PCFI (April 07, 2017), *supra* note 9.

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domestic investors (art. 4 and 5); b) limits the expropriation of assets, and guarantees adequate compensation (art. 6); c) guarantees the freedom of transfers of financial assets (art. 9); d) incentives for sustainable development and corporate social responsibility (art. 14); e) emphasis on dispute prevention with each focal point/ombudsman (art. 18) and investment facilitation agendas (preamble and art. 25) that will create mechanisms and channels for direct dialogue with governments to help investors solve practical difficulties faced on a day to day basis. As previously seen, these provisions are similar - if not equal - to the Brazilian CFIA model. In this section, we will discuss some of the main differences between the intra-Mercosur protocol from the CFIA model.

First, it does use the same SSDS system, referring to the already established 2002 Mercosur Olivos Protocol for the Settlement of Disputes. Where there is a choice between a State-State *ad hoc* arbitration or the WTO's Dispute Settlement Understanding (DSU),[259] automatically excluding the other to avoid duplication of procedures and potentially contradictory results, as defined on the article 1.2. of the Mercosur Protocol:

> Disputes within the scope of this Protocol, which may also be submitted to the dispute settlement system of the World Trade Organization or other preferential trade arrangements of which MERCOSUR member States are parties, may submit to one or another forum, at the choice of the applicant. Notwithstanding this, the parties to the dispute may, by mutual agreement, define the forum. (...) Once a dispute settlement procedure has been initiated in accordance with the preceding paragraph, neither party may have recourse to dispute settlement mechanisms established in the other forums in respect of the same subject matter. [260]

[259] DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[260] Protocolo de Olivos para la Solución de Controversias en el Mercosur [Protocol of Olivos for the Solution of Controversies], signed by Argentina, Brazil, Paraguay and Uruguay on February 18 of 2002 and ratified by all signatories (Paraguay), http://www.sice.oas.org/Trade/MRCSR/olivos/polivos_p.asp.

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As for private persons, such as investors affected by the Mercosur decisions, the only option is to have their complaint forwarded to the Mercosur's Common Market Group according to articles 39 to 44 of the Mercosur Olivos Protocol, that conveys a three experts panel from a pre-determined group to decide on the matter in 30 days that can have 3 outcomes:

> i) If, in a unanimous opinion, a complaint is made against a State Party, any other State Party may request the adoption of corrective measures or the annulment of the measures in question. If the request does not succeed within a period of fifteen (15) days, the State Party that made it may resort directly to the arbitration procedure, under the conditions established in Chapter VI of this Protocol.
> ii) Having received an opinion rejecting the unanimous complaint, the CMG shall immediately terminate it within the scope of this Chapter.
> iii) If the group of experts does not reach unanimity to issue an opinion, it will submit its different conclusions to the Common Market Group, which will immediately terminate the complaint under this Chapter.[261]

Another point of distinction is the explicit exclusion of indirect expropriation, pre-establishment phase, fair and equitable treatment and full protection and security that were not mentioned on past CFIAs, in article 4.3 and article 6.6:

> Article 4.3. For greater certainty, the standards of 'fair and equitable treatment,' 'full security and protection' and the pre-establishment phase are not covered by this Protocol. (…)
> Article 6.6. For greater certainty, this Protocol only provides for direct expropriation, in which an investment is expropriated directly through the formal transfer of title or domain right, and do not cover indirect expropriation. [262]

[261] *Id.* Article 44.1.
[262] PCFI (April 07, 2017), *supra* note 9. (Own translation. Original version: "Artigo 4.3. Para maior certeza, os padrões de 'tratamento justo e equitativo', de 'plena segurança e proteção' e a fase de pré-estabelecimento não são cobertos pelo presente Protocolo." and "Artigo 6.6. Para maior certeza, o presente Protocolo prevê somente a desapropriação direta, em que um investimento é desapropriado diretamente mediante a transferência formal do título ou do direito de domínio, e não cobre a desapropriação indireta").

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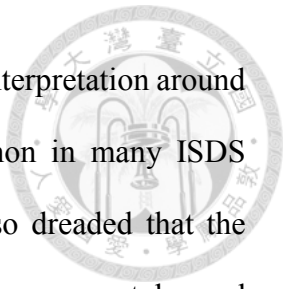

These clarifications made in the PCFI seek to put to rest the interpretation around the implicit use of such international investment standards, common in many ISDS cases.[263] Apparently, these international investment standards are so dreaded that the previous BITs refusals by Congress and being silent on previous CFIAs were not deemed sufficient, making the PCFI legislator put blatant direct exclusion clarifications.

[263] *See* Daniel Tavela Luís, *A Proteção do Investimento Brasileiro no Exterior: uma reflexão a partir do caso africano*. Thesis of Doctorate, Faculty of Law, University of São Paulo, at 137-139 (2017); and Jonathan C. Hamilton & Michelle Grando, *O modelo de proteção de investimentos do Brasil: os novos acordos internacionais*. ICTSD. Pontes, vol. 12, n. 1 (March 02, 2016), https://www.ictsd.org/bridges-news/pontes/news/o-modelo-de-prote%C3%A7%C3%A3o-de-investimentos-do-brasil-os-novos-acordos.

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5. Multilateral Framework on Investment Facilitation Discussion at the WTO

Multilateralism fosters visions and expectations in the potential for cooperation among the actors involved; in fact, the fundamental characteristics that distinguish multilateralism from other institutional arrangements are the indivisibility of rights and diffuse reciprocity. In other words, unlike bilateral or regional arrangements that incentivize competition between each negotiating party and excludes non-members, multilateralism is inclusive, making everybody work together instead of competing with each other. In the same line, World Bank states that clear and transparent rules, less bureaucracy and more supportive institutions would enable efficient transactions and provide investors with added security.[264]

Therefore, it is no surprise that multilateralism is at the top of the Brazilian agenda of international economic insertion for foreign trade and investment on the PNE program, both due to the geographic distribution of Brazilian foreign trade and the characteristics of its industry thematic interests.[265] In the author's opinion, the multilateral framework on investment (MFI) is the most significant, if not the main, investment facilitation measure that would establish an international investment law, setting definitions, implementing single international standards and adopting an action plan aimed at improving transparency, information sharing, and administrative procedures.[266] The rationale for the negotiation of a multilateral investment facilitation

[264] *See* Pierre Guislain, Kusisami Hornberger & Peter Kusek. *Removing Barriers to FDI, World Finance* (April 2011). http://www.worldfinance.com/special-reports/removing-barriers-to-fdi; *see also* Karl P. Sauvant, *The International Investment Law and Policy Regime: Challenges and Options*. E15Initiative. Geneva: ICTSD and World Economic Forum, at 15-16 (2015), www.e15initiative.org/.

[265] *Cf*. CNI. *Prioridades da Indústria para a OMC e para a Reunião Ministerial da OMC em Buenos Aires*. CNI: Brasília (2017); MDIC. *Coming to Terms: Estudo do Plano Nacional de Exportações 2015-2018: Mapa Estratégico de Mercados e Oportunidades Comerciais para as Exportações Brasileiras*. Brasilia: ABIQUIFI (2015), http://abiquifi.org.br/artigos/plano-nacional-de-exportacoes-2015-2018/.

[266] WTO, Business Focus Group 2: *Market Access, Trade in Services and Investment Facilitation*, (2017), https://www.b20germany.org/fileadmin/user_upload/documents/BFG2_recommendations_FINAL_logos.pdf.

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agreement relates to the objective of relating national policy measures to facilitate investments in multilateral commitments, becoming binding (not necessary in the legal sense), even though there will be variations in the levels of commitments required of countries, according to their own degree of commitment and development.

The benefits are many and it is viewed favorably by most countries, with 70 WTO Members issuing a Joint Ministerial Statement on Investment Facilitation for Development at WTO's 11th Ministerial Conference at the end of 2017.[267] However, this is only the initial step, as it aims for the IF discussion to be reinserted at WTO, not being the discussion itself. In addition, there is still no consensus on the structure of a future MFI agreement, such as legally binding effects, voluntary guidelines, best practices, soft or hard law, and so on.[268]

Therefore, in this final chapter, the discussion will be on the developments in the renewed investment facilitation discussions at the WTO. Followed by a closer analysis of the Brazilian investment facilitation agreement platform draft that was circulated on the WTO's General Council at the beginning of 2018.[269]

5.1 WTO's Current Investment Framework

Established in January of 1995, WTO currently possess 164 members that represent more than 98% of world trade,[270] and a mandate to raise the "standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while

[267] WTO, 11th Ministerial Conference (Dec. 13, 2017), *supra* note 11.
[268] *See* Kinda Mohamadieh. *Reflections on the Discussion of Investment Facilitation.* Investment Policy Brief, at 6 (March 2017), https://www.southcentre.int/wp-content/uploads/2017/03/IPB8_Reflections-on-the-Discussion-of-Investment-Facilitation_EN-1.pdf.
[269] *See supra* note 10.
[270] Understanding the WTO: *The History of Multilateral Trading System*, https://www.wto.org/english/thewto_e/history_e/history_e.htm. (Updated until Oct. 11, 2018).

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allowing for the optimal use of the world's resources in accordance with the objective of sustainable development".[271] In other words, it aims to foster global development and commerce through trade liberalization in goods and services.

Even though WTO does not deal exclusively with investment, trade and investment are related and some of its agreements refer to the investment issues that have distorting effects on the liberalization goal on the trade in goods, especially the Agreement on Trade-Related Investment Measures (TRIMs)[272] that is not intended to be a comprehensive regulation on investment, just limiting certain investment measures that can cause distorting effects on trade.[273] These agreements and their relation to investment are to be further discussed on the following subchapters to better understand WTO's role, or lack of it, in the current global investment regime.

5.1.1 General Agreement on Tariffs and Trade (GATT)

GATT[274] entered into force in 1995 as a result of the Uruguay Round negotiations, which recognized that the increased inflow of capital flows, especially to developing countries, would facilitate the objects stipulated in the General Agreement. It further recommended that the capital contracting parties and the parties interested in obtaining them should make the best efforts to create conditions to stimulate the flow of

[271] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994). [hereinafter Marrakesh Agreement or WTO Agreement].
[272] TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (1994) [hereinafter TRIMS]. [Not reproduced in I.L.M.].
[273] WTO, Ministerial Declaration on the Uruguay Round of 20 September 1986, GATT/1394, Part I.D. (1986). https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf. ("Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade").
[274] GATT: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

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capital, including security conditions, avoiding double taxation and providing conditions for the transfer of profits of investment. The main influence on the current investment regime are the articles I:1, III:4[275] and XI:1.

The first article I:1, establishes the Most-Favoured-Nation Treatment (MFN), where "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"[276], in other words, countries must grant to foreign investors the same treatment granted to other foreign investors on "like products", however, common markets, customs unions, and free trade areas are exempt from MFN provisions. Following, article III:4, sets the National Treatment (NT) prohibiting discrimination between domestic and imported goods, and article XI:4 determines the general elimination of quantitative restrictions, that are further detailed on TRIMs.

5.1.2 Agreement on Trade-Related Investment Measures (TRIMs)

TRIMs [277] agreement has the objective to "promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners".[278] It limits certain

[275] WTO. European Communities – Regime for the Importation, Sale and Distribution of Bananas WT/DS27/R [EC – Bananas III], Panel report, 25 September 1997, § 7.185 (1997). ("the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters").
[276] *Id*.
[277] TRIMS (1994), *supra* note 272.
[278] *Id*. Preamble.

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investment measures[279] that can cause trade-restrictive and distorting effects[280] on the trade in goods.[281] It regulates the use of investment measures or performance requirements that impose certain conditions or requirements on foreign investments in the country or certain conditions for the granting of benefits - limited in the TRIMs illustrative list[282] - that impose or encourage the use of domestic products in the production process (local content rules)[283] or that restrict the importation of products (trade balancing[284] or foreign exchange balancing[285]).

This agreement is only concerned with the trade effects of investment measures in the trade in goods,[286] therefore it is not intended to be a comprehensive regulation of investment, and, as such, does not impact directly on members ability policy space to regulate and place conditions upon the entry and establishment of FDI. In this sense, the agreement essentially restated existing GATT obligations such as NT and elimination of quantitative restrictions on article 2 establishing a fair treatment of domestic and foreign products of similar origin, providing equal competition for both types of goods in the domestic market. This principle prohibits the imposition of barriers to import and export, other than tariffs. Regarding the principle of national treatment, it prohibits countries from

[279] WTO. *Indonesia – Autos*, Panel report, 2 July 1998, § 14.73) ("we note that the use of the broad term 'investment measures' indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to foreign investment"); *see also* WTO. *Indonesia – Autos*, Panel report, 2 July 1998, § 14.80) ("our characterization of the measures as 'investment measures' is based on an examination of the manner in which the measures at issue in this case relate to investment").
[280] WTO. *Indonesia – Autos*, Panel report, 2 July 1998, § 14.72 e 14.82. (The panel specifically considered that the adoption of local content requirement established a preference over domestic product over imported product and had an obvious effect on trade).
[281] *Supra* note 273.
[282] *Id*. (The list do not extend to export performance requirement. However, it is important to stress that a requirement to export is inconsistent with article 3.1(a) of the SCM, if it is combined with a subsidy within the meaning of article 1 of that agreement).
[283] Measures requiring the aggregation of domestic content in the manufactured product.
[284] Trade balancing, refers to measures requiring an investor to import less than what it exports, or maintain a proportion of exports, or that demanded a minimum of positive trade.
[285] Foreign exchange balancing refers to measures that restrict the import of materials used in local production, though limiting access to foreign currency in an amount equivalent to the inflow of funds made by the investor.
[286] TRIMS (1994), *supra* note 272, art. 1.

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obliging companies established in their territories to purchase locally manufactured products, both in terms of volumes and values. The agreement also prohibits host governments from requiring corporations to limit their imports to amounts related to the volume or value of their local production.[287]

Brazil has a long tradition of industrial policy, through which it used the most diverse instruments. In the 1970s, for example, the country adopted a program to encourage the export of industrialized products. This incentive package was called Fiscal Benefits and Special Export Programs (Befiex) and was responsible for the first exports made by the automotive industry, which until that moment had produced only to supply the domestic market. Befiex allowed multinationals in the country to import capital goods, inputs and raw materials without the payment of the federal Tax Over Industrialized Products (IPI) and others, regardless of whether there is a national similar or not, provided that they undertake to export part of production over a given for ten years. Attracted by this industrial policy, numerous automakers and auto parts manufacturers came to the Brazilian market and installed their subsidiaries, a process begun in the late 1950s.[288]

For this reason, almost all developing countries, including Brazil, are opposed to the TRIMs, since the policies banned in the illustrative list, in the annex to the agreement, have been considered as important instruments to stimulate the country's development. Whatever may be the case, the measures in the TRIMs illustrative list are no longer an option. However, the need for development, industrialization, balanced trade, and local sourcing are still a high priority for developing countries. This scenario raises the importance of policymaking that helps to achieve these objectives, without violating

[287] *See* Eugenia Cristina Godoy de Jesus Zerbini. "Regras multilaterais sobre o investimento internacional." In *Regulamentação internacional dos investimentos: algumas lições para o Brasil*, eds. Alberto Amaral Júnior & Michelle Ratton Sanchez, São Paulo: Aduaneiras, at 323-353 (2007).
[288] *Cf.* L. A. C. Lago, "A retomada do crescimento e as distorções do milagre: 1967-1973". *In* M. P. Abreu (ed.). *A ordem do progresso*. Rio de Janeiro: Campus, (1999).

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internationally-agreed principles, such as IF policies.

It is clear that the TRIMS agreement has the merit of bringing the investment issue to the multilateral trade agenda, but the polarization between developed and developing countries throughout the negotiations led to a rather narrow agreement. Investment negotiations in the Uruguay Round have not even come close to establishing a comprehensive set of investment rules, to the point where TRIMS has been characterized as an agreement that does not go much further than the rules laid down in the GATT. The final text of the TRIMS is criticized for not covering specific examples of investment measures related to export requirements, and to permit that developing countries would still adopt which were temporarily prohibited by the GATT through the forecast implementation periods.[289]

5.1.3 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS[290] establishes the protection for the intellectual property of legal or physical persons of other WTO Members and establishes the minimum standards of protection that should be available in the domestic regulation of each member. The Agreement covers the areas of copyright, trademarks, patents, geographical indications, industrial design, the topography of integrated circuits, and confidential business information. And also sets out the procedure and resources that each member must provide to secure intellectual property rights, through judicial channels, customs action or criminal prosecution.

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[289] *Cf*. Thomas L. Brewer & Stephen Young. *Investment issues at the WTO: the architecture of rules and the settlement of disputes*. Journal of International Economic Law, v. 1, n. 3, at 466-470 (1998).

[290] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

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The provisions in TRIPS on standards of protection, compliance procedures, and international dispute settlement process, although not specifically addressing foreign investment, indirectly covers an important class of foreign assets of multinational enterprises, namely their intangible assets such as patents, trademarks, etc.[291] If intellectual property is a form of foreign asset that can be constituted as a foreign investment, then the TRIPS Agreement, as a whole, is to be considered one of the most comprehensive sets of multilateral rules regarding investments.

5.1.4 General Agreement on Trade in Services (GATS)

The GATS[292] is the only WTO treaty that displays the elements of a traditional investment architecture, with modalities for progressive liberalization and provisions for dispute settlement. The integration of investment and cross-border trade is most evident in the GATS, which treats one of the four modes of service as an investment in article I.2.c (mode 3): "the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member",[293] which defines commercial presence as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service".[294]

The Member States have negotiated commitments in the four modes of provision,

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[291] OECD. *The investment architecture of the WTO*. TD/TC/WP(2002)41/FINAL (April 14, 2002), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP(2002)41/FINAL&docLanguage=En. (E.g., 20% of the assets of the UK pharmaceutical company GlaxoSmithKline consist of intangible assets and approximately 35% of these are located outside of the its home country).
[292] GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].
[293] *Id.* article I.2c.
[294] *Id.* article XXVIII.

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which oblige governments to ensure market access conditions with respect to the modes of delivery and the sectors indicated in the schedules of commitments of each country. If there are no provisions against, members guarantee the foreign investor the right to enter, MFN in all service sectors and NT treatment just to the sectors set out in the concession lists, and. In the end, the concept of market access allows countries to condition the entry of foreign providers of service.

In contrast to the other investment agreements, GATS does not contain provisions for investment protection, nor does it contain a direct access mechanism for the settlement of disputes for private investors. However, it treats investment as an element of the trade in services, GATS includes the terms and conditions of entry into the market, such as post-investment conditions of operation, market-access commitment, and market-access limitations.

5.1.5 Agreement on Subsidies and Countervailing Measures (SCM)

SCM[295] defines the concept of subsidy and sets rules for the granting of such subsidies by governments. In matters of investment, there are the implications of granting specific incentives to certain industries. It separates subsidies into three categories: a) prohibited subsidies such as export subsidies; b) allowable subsidies, such as those for regional development, research and development, and environmental protection; and c) actionable subsidies, that is, subject to investigation and compensation if they cause repercussions to the local industry. Such subsidies should involve a financial contribution from a government or public agency and should confer a benefit in relation to other companies established in the country.

[295] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (1994) [hereinafter SCM]. [Not reproduced in I.L.M.]

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The concepts in SCM are oriented to trade in goods and do not apply directly to investment since they refer only to the flows of goods that occur after the investment process. The adverse effects are defined in terms of distortions in the trade of subsidized goods, such as if subsidies increase the level of exports or reduce the level of imports from the subsidizing country, disadvantaging similar products from another country. In tune with other WTO treaties, its concerns are focused on market access limitation, commitment, admissibility (pre-establishment), and exceptions to the NT principle.

5.2 Investment Facilitation on the WTO

The question remains if the investment issue is a matter to be discussed at the WTO, as seen on chapter 2, its current investment framework only deals with the distorting effects that investment can have on trade in goods and services. Hence, its concerns are mostly focused on the limitation and commitment of market access, and exceptions to the national treatment principle. In the absence of a MFI, the current 2.958 BITs[296] act as the *de facto* international multilateral regime of investments.[297]

Many believe that WTO is the best international organization forum to discuss, negotiate and implement a future MFI agreement when one takes into account the relationship between trade and investment and the already existing structure of assistance, support, and enforcement in the international trade. It is understood that trade and investment possess a close relation, being intertwined, more so in the current international trade scenario where global value chains (GVCs) have fragmented production processes across countries making design, manufacturing, and assembly borderless, directing those to the most cost-efficient locations. As a result, enterprises view trade and investment as

[296] UNCTAD, *supra* note 3.
[297] *Cf.* Stephan Schill, *The multilateralization of the international investment law*. Cambridge University Press, at 11 (2009).

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interdependent elements of a single strategy when deciding the FDI destination.

In WTO's structure, while "regulation" or any similar term is not present on the WTO mandate, nonetheless, this international organization is a multilateral forum for the negotiation and administration of trade agreements that constitute the fundamental rules of international trade, bounding its signatory members and enforced by WTO's Dispute Settlement Body (DSB) and regulated by the DSU, that make WTO function as the *de facto* international trade regulatory body. Moreover, there is a lack of options, the other possible international organizations with mandates covering global investment and economic development (UNCTAD, OECD,[298] and G20), unfortunately, are far less suitable, as research analysis and technical assistance are their main focus.

The investment issue was raised before on WTO agenda with the Singapore Issues[299] on the 1996 Ministerial Conference that dealt with trade and investment, competition policy, transparency in government procurement, and trade facilitation. It resulted in the Working Group on Trade and Investment (WGTI), tasked to analyze how trade relates to investment and competition policies.[300] However, the "Relationship between trade and investment" topic was later removed after the 2003 Ministerial Conference in Mexico, as there was no consensus due to strong opposition from developing countries that mainly wanted the end of the agricultural subsidies.[301]

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[298] *Multilateral Agreement on Investment*, Draft Consolidated Text, April 22, 1998, DAFFE/MAI (98)7/REV1. (OECD attempted twice to set a multilateral investment protection treaty, the first was the 1967 Draft Convention on the Protection of Foreign Property. The second on 1992 with the Multilateral Agreement on Investment-MAI).

[299] WTO, *Singapore Ministerial Declaration of 18 December 1996*, WT/MIN(96)DEC, ¶¶ 20-22 (1996), https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

[300] Understanding the WTO: *Cross-cutting and New Issues. Investment, competition, procurement, simpler procedures*. https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm.

[301] *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WT/L/579 (2004), https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm. ("Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in ¶¶ 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round").

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Discussion on investment only resumed in October 2016, when India circulated a possible Trade Facilitation in Services (TFS) draft on 22 February 2017.[302] This concept was molded on the existing WTO's Trade Facilitation Agreement (TFA), being an equivalent agreement for the IF on the sector of services in order to reduce transaction costs associated with administrative barriers and unnecessary regulatory changes in the trade of services. Separate from the TFS discussion that is only focused on services, in 2017, there were five different communications from Russia,[303] the MIKTA group,[304] China,[305] FIFD,[306] and Argentina and Brazil[307] in favor of reinserting IF negotiations on WTO to reach a multilateral framework on investment. These different communications worked together on the objective of inserting an IF proposal of "trade and investment facilitation" on the WTO agenda, being later approved by the General Council chair, understanding that "the proponents seek to share information on informal dialogues on investment facilitation" and were not negotiation proposals, calling it "informal dialogues on investment facilitation".[308]

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[302] Communication from India: *Trade Facilitation Agreement for Services*, S/C/W/372, TN/S/W/63, S/WPDR/W/58 (Feb. 22, 2017), www.goo.gl/C6ztNS.

[303] Communication from the Russian Federation: *Investment Policy Discussion Group*. JOB/GC/120 (March 30, 2017), www.goo.gl/iue5cn.

[304] Communication from Mexico, Indonesia, Korea, Turkey and Australia (MIKTA)*, Investment Workshop Reflections.* JOB/GC/121 (April 04, 2017), www.goo.gl/vz9oPu.

[305] Communication from China: *Possible Elements of Investment Facilitation.* JOB/GC/123 (April 21, 2017), www.goo.gl/eanXu8.

[306] Joint Communication from the Friends of Investment Facilitation for Development: *Proposal for a WTO Informal Dialogue on Investment Facilitation for Development.* JOB/GC/122 (April 21, 2017), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=236954,236782,236668,236429,236189,236149,235960,235961,235962,235526&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True. (The Friends of Investment Facilitation for Development (FIFD) group, at the time of the Joint Communication JOB/GC/122 was comprised of Argentina; Brazil; China; Colombia; Hong Kong, China; Mexico; Nigeria and Pakistan. Their members are growing, having the addition of 9 countries: Chile; Gambia; Guatemala; Kazakhstan; Republic of Korea; Liberia; Mauritania; Qatar; and Uruguay since the end of 2018. On Sept 28, 2018, the Kazakh government and FIFD jointly held a High-Level Forum on Advancing Trade and Investment Facilitation for Development: A Eurasian Perspective, to raise awareness on the ongoing initiative on Investment Facilitation for Development among participating WTO Members, explore the prospects and value added of further multilateral cooperation).

[307] Communication from Argentina and Brazil: *Possible Elements of a WTO Instrument on Investment Facilitation.* JOB/GC/124 (April 24, 2017), www.goo.gl/FRsEDi.

[308] WTO, *Minutes of the Meeting Held in the Centre William Rappard*, WT/GC/M/167, §65 (May 18, 2017).

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All this culminated at WTO's 11th Ministerial Conference (MC11) in December of 2017, where the investment facilitation topic was inserted. Despite failure on a consensus decision, 70 WTO Members recognized the "dynamic links between investment, trade and development" and issued a signed a Joint Ministerial Statement on Investment Facilitation for Development,[309] calling for "structured discussions with the aim of developing a multilateral framework on investment facilitation" that seeks to "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention".[310] Moreover, it is noted that it has a negative definition that leaves market access, investment protection, and ISDS out of the investment discussion, which is a point of attrition with the developing countries.

Between these 70 countries there are members of practically all the informal groupings operating in the WTO, such as the developed and developing countries, the Least Developed Countries (LDCs), BRICS, the African Group, the Bolivarian Alliance, African, Caribbean, and Pacific Group of States (ACP), and the Small, Vulnerable Economies. Small, vulnerable economies (SVEs). This number of co-signers and diversity of co-sponsors dispels any doubts as to the limitation on the interest or lack of legitimacy of the IF topic.

Finally, Brazil circulated a draft proposal for a potential multilateral agreement on investment facilitation in January of 2018,[311] that is based on the CFIA model, to further the discussion on investment facilitation, although it is only a draft, it is the only of its kind, providing the much-needed structure of a future MFI.

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[309] WTO, 11th Ministerial Conference (Dec. 13, 2017), *supra* note 11.
[310] *Id.*
[311] *See supra* note 10.

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5.2.1 Investment Facilitation in the 11th Ministerial Conference

The opposition found to the ongoing efforts in MC11 for the investment agenda were led by India and South Africa, which did not participate with the other 70 proponent countries in the IF Joint Ministerial Statement.[312] India was not in a position of opposition *per se*. Instead, the official reason cited was the "premature nature of discussions, inconclusive settlement of the commitments at past ministerial conference meetings, and lack of preparedness in the investment issue",[313] arguing that the WTO has no mandate to negotiate investment issues, being limited to trade-related issues. Such countries also argue that such "structured discussions" should occur before specialized international bodies such as UNCTAD.

Unofficially, the reason for non-adhesion was that India refused to budge on the agricultural subsidies on public stocking issue[314] in the face the expiration of the peace clause, and the need to reach a permanent solution,[315] rejecting the farm subsidy with a cap system proposed by Brazil, Colombia, Peru, Uruguay, and EU, using the IF issue as a bargaining chip on MC11 negotiations.

Many reports, after the MC11 also indicate that India's opposition was the main

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[312] ICTSD. *Brazil Circulates Proposal for WTO Investment Facilitation Deal*, Bridges Weekly, vol. 22, n. 4, (Feb. 8, 2018), https://www.ictsd.org/bridges-news/bridges/news/brazil-circulates-proposal-for-wto-investment-facilitation-deal.

[313] WTO, *Address by Mr. Suresh Prabhu*, Minister of Commerce and Industry of India at the Plenary Session of the 11th Ministerial Conference of the WTO (11 December 2017), https://www.wto.org/english/thewto_e/minist_e/mc11_e/statements_e/ind_e.pdf.

[314] WTO, *Food Security*, Agriculture, https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm. (Public stockholding programmes are used by some governments to purchase, stockpile and distribute food to people in need, while food security is a legitimate policy objective, some are considered to distort trade when they involve purchases from farmers at prices fixed by the governments, known as "supported" or "administered" prices).

[315] At the 2013 Bali Ministerial Conference, ministers agreed that, on an interim basis, public stockholding programmes in developing countries would not be challenged legally (especially at WTO`s DSB) even if a country's agreed limits for trade-distorting domestic support were breached (peace clause). They also agreed to negotiate a "permanent solution" to this issue.

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reason for the failure to achieve a consensus and issue a Ministerial Declaration at the MC11.[316] In the news reports there are anonymous comments of a senior Indian commerce ministry official: "As the draft lacked emphasis on issues close to India's concern such as multilateralism, Doha Development Agenda, special and differential treatment of developing countries, India refused to budge. No ministerial declaration is better than a bad one".[317]

On India's perspective, they blame the US, with its open position against the special and differential treatment enjoyed by large developing countries like India, not agreeing on a permanent solution for the agricultural subsidies issue that was promised in the 2013 Bali Ministerial Conference. Part of India's opposition to the addition of new issues such as investment facilitation is not that they do not deem them relevant, but they firmly defend that the old issues must be solved first, instead of being diluted and postponed *ad infinitum*.

Other factors also point to dissatisfaction of the US with the WTO, in particular with them systematically blocking the nomination of new members to fill the three open vacancies in the seven members of the DSB's Appellate Body, in view of their dislike of the decisions made, believing that members are too liberal in their treaty interpretation.[318] The US was one of the founders of the WTO and aided to implant its system of rules. However, it refuses to abide by them.

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[316] Martin Dietrich Brauch, *A Risky Tango? Investment facilitation and the WTO Ministerial Conference in Buenos Aires*. IISD (Dec. 2017), http://www.iisd.org/library/risky-tango-investment-facilitation-and-wto-ministerial-conference-buenos-aires.

[317] Asit Ranjan Mishra, *WTO Buenos Aires meet ends with no consensus on key issues*. India Livemint Online Portal (Dec. 15 2017), https://www.livemint.com/Politics/gEIZALjPC16StkiH4VNh8H/WTO-Buenos-Aires-meet-ends-with-no-consensus-on-key-issues.html.

[318] *See* Priti Patnaik, *Why Has the US Launched an Offensive Against WTO's Dispute Settlement System?* The Wire, External Affairs (Oct. 27, 2017), https://thewire.in/external-affairs/us-launched-offensive-wtos-dispute-settlement-system.

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The continuity of the Doha Round, already in the 16th year, is put into doubt. Some defend the end of it through the abandonment of the negotiation structure and the single undertaking system.[319] The whole idea of this type of negotiation rounds tends to be questioned, as usual, every Doha Round starts with an ambitious agenda that demands a long-term negotiation, in which, along with the negotiations, several issues have to be abandoned, while others gain relevance without being included on the agenda putting a halt to the whole process.

5.2.2 Relation Between Trade and Investment

The FIFD Proposal for a WTO informal dialogue on investment facilitation for development [320] and the draft ministerial decision on investment facilitation for development, [321] argues that there are "increasing inter-linkages between trade and investment", being the investment issue included in the WTO's mandate of trade liberalization.

Opponents of this argument defend that although there is a relation on some investment and trade cases, the two topics cannot be confused with each other, so much so, countries regulate these issues as separate topics and apply different policies, the same also applies to international organizations. Furthermore, in the same fashion, it can be said that finance, human rights, sustainable development, labor, and environmental issues are also related to trade but you do not see WTO also dealing with these matters.[322]

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[319] *See* David A. Gantz, *The Doha Round Failure and the Likely Demise of the "Single Undertaking."* Cambridge International Trade and Economic Law, Cambridge: Cambridge University Press, at 30-49 (2013); and Erik M. Dickinson, *The Doha Development Dysfunction: Problems of the WTO Multilateral Trading System*, 3 Global Bus. L. Rev. 229 (2013), https://engagedscholarship.csuohio.edu/gblr/vol3/iss2/6/.

[320] *See supra* note 306.

[321] WTO, 11th Ministerial Conference (Dec. 13, 2017), *supra* note 11.

[322] *Accord* Kavaljit Singh, *Do We Need a Multilateral Instrument on Investment Facilitation?* New Delhi: Madhyam, Briefing Papers # 19, (May 2017), http://www.madhyam.org.in/do-we-need-a-multilateral-instrument-on-investment-facilitation/; *See also* OWINFS, *Investment Facilitation for Development:*

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In addition, the investment issue is more complex than trade. Trade in goods and services is defined as change in ownership of material resources and services between one economy and another, being usually finished after the exchange has been completed, while foreign investment generates a more lasting relationship, since, after the pre-establishment phase, a foreign investor enters the host state exercising control of its investment that sometimes can mean control over national assets, socially sensitive matters or resources that can generate social unrest.

In the author's perspective, both positions deserve merit, there is a relationship between trade and investment and they are also two separate topics that do not always walk together as there are cases of trade without foreign investment and vice-versa but the real question is if this relation warrants the IF issue to be negotiated and implemented under WTO's mandate of trade liberalization.

As previously seen, the main obstacle to prevent the insertion of IF in WTO's negotiations is the concern that the addition of new topics will muddle the waters and prevent a resolution on older issues already being discussed for decades, such as food security. India, that is the leading opposition on the MC11 already shows signs of subsiding on their opposition.[323] Furthermore, there is the Indian proposal for a possible Trade Facilitation in Services (TFS) for IF on services. [324]

All this factors and taking into account that IF focuses on "improvements in transparency and information available to investors, more efficient and effective

Opening the doors of the WTO for hard rules on investment, Our World is Not for Sale (2017), http://ourworldisnotforsale.net/2017/Investment_rebuttal.pdf.

[323] Asit R. Mishra, *WTO: India may drop opposition to investment facilitation treaty*, livemint (2018), https://www.livemint.com/Politics/rlXUVoVh7lRUypYqfHZlxJ/WTO-India-may-drop-opposition-to-investment-facilitation-tr.html.

[324] Communication from India: *Trade Facilitation Agreement for Services*, S/C/W/372, TN/S/W/63, S/WPDR/W/58 (Feb. 22, 2017), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249937,249726,239902,234683,232684,232651,231413,134742,128381,120078&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

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administrative procedures for investors, or enhanced predictability and stability of the policy environment for investors"[325] demonstrated that IF actions and policies easily englobes trade facilitation efforts and, most times, do not distinguish foreign or domestic investors, benefitting all - at least on this initial stage – both have overlapping effects.

5.2.3 Soft and Hard Law

Even among countries that adopt similar positions, there is no consensus on the negotiation forum or the nature of a future multilateral framework on investments (MFI), such as legally binding effects, voluntary guidelines, best practices, etc.[326] On a path towards MFI, OECD's proposes three options to be explored: a) defining national principles and actions for IF to be adopted by host countries on a voluntary basis; b) to adopt principles, policies and initiatives at the global level as a "soft" or "hard" law under the WTO; and c) to supplement host countries commitments by additional ones to be taken by home countries and other sectors such as private sector, civil society etc.[327]

Soft law is an expression used to designate a comprehensive and varied reality. In a more general sense, it refers to any regulatory instrument with limited normative force, in a sense that it has a nature of not binding, does not create legal obligations, but can still produce specific effects for the participants. While "hard law" have greater enforcement, sanctioning capacity and, consequently, greater effectiveness. On the other side, "soft law" is flexible, have less legal consequence, and a faster elaboration process. Although soft and hard law standards have antagonistic characteristics, in practice they complement each other, precisely because each has its strengths and functions in the development of international law.

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[325] UNCTAD (2017a), *supra* note 15.
[326] Kinda Mohamadieh (March 2017), *supra* note 268.
[327] OECD. Ana Novik & Alexandre de Crombrugghe (2018), *supra* note 46, at 8.

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The current international environment is not favorable to multilateralism, it is full of stagnation, multi-polarization and reversion to protectionism policies make many believe that if there is a MFI, it will take the form of a soft law instrument, such as best practices, guidelines, and voluntary codes of conduct.[328] Meaning it would not be legally binding, nor need for a ratification process.

5.3 Brazil's Structured Discussion on Investment Facilitation

On 31 January of 2018, in order to further the multilateral IF discussion, Brazil circulated the Structured Discussion on Investment Facilitation - an extensive draft proposal for a potential multilateral agreement on investment facilitation - on the WTO's General Council,[329] that is not a negotiation proposal, instead it is just meant as a "concrete illustration" of what a future multilateral agreement on investment facilitation could look like, providing a "more focused and text-based discussion"[330] along with supporting efforts towards bringing more WTO Members on the IF discussions.[331] This Brazilian draft proposal is extensively based on its previous experience with the Cooperation and Facilitation Investment Agreement (CFIA) that presents a new set of principles such as solidarity, the absence of conditions, horizontality and respect for sovereignty in the global investment regime.

Unlike traditional BITs, which are more focused on protecting the interests of foreign investors, the Brazilian draft is anchored in establishing a more balanced and sustainable partnership between investors and governments on rights and obligations, taking into account the interests both from host states and countries exporters of FDI

[328] *Id*.
[329] *See supra* note 10.
[330] *Id.*
[331] *Infra* Annex 5.

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capital. The text suggested by Brazil allows IF provisions that target to improve transparency (article 5), predictability, and efficiency of regulatory and administrative frameworks related to IF policies and initiatives, such as the identification and establishment of thematic agendas of common interest, as well as the creation of the national focal point, the WTO committee on IF to deal with issues of interest to different groups of stakeholders.

Brazil, while not being the ideal practical example, on paper, with the draft proposal for a multilateral agreement on IF based on the CFIA model offers the main advantages of: a) based on the most complete IIA on investment facilitation elements, containing 9 of the 10 action lines from UNCTAD's Global Action Menu for Investment Facilitation;[332] and b) ratified by Brazil, a country that does not participate in the traditional international investment regime, showing greater promise of this investment model to be accepted by similar countries that are opposed to the current investment regime standards.

5.3.1 Scope and General Principles

This draft starts on section I defining its scopes and general principles, its article 1.1. defines IF as "facilitation measures by Members affecting the admission, establishment, acquisition, and expansion of investments in services and non-services sectors",[333] followed by a negative definition on article 1.3 excluding government procurement, public concessions, and market access that have been long considered controversial issues for a MFI. Moreover, article 1.4. prevents to act upon dispute resolution procedure not covered by WTO's DSU, and investment protection rules, being

[332] UNCTAD (May 2017), *supra* note 50.
[333] *See supra* note 10, art. 1.

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clear that it does not conflict with rights and obligations on other WTO treaties.

A point of surprise can be found in article 1.2. that includes the "facilitation measures" definition including "those of general application and sector-specific that affect investors and their investment." Brazil, since the non-ratification of BITs and the creation of the CFIA model, has made more than clear its concerns regarding the sovereign policy space of host states, so it is strange the addition of the 1.2 article that broadens the IF definition and can encompass public policies (such as on health, environment, etc.) that can "affect" the investor and their investments, issue that made many countries warry of BITs and its ISDS provisions.

The right to policy space is guaranteed on article 3 "Members shall retain the right to regulate in the public interest and to introduce new regulations within their territories so as to achieve legitimate public policy objectives" but it is not clear the definition on "public interest" and "legitimate public policy objectives".

Different from the CFIA model, the circulated draft uses the expression "Most-Favoured-Nation Treatment" on its article 2 and confers NT and MFN to foreign investors and their investments "of any other Member and their investments". This shows a concern to conform with WTO's MFN principle found on the article 1 of the GATT 1994, article 2 of GATS, and article 4 of the TRIPS, although each with slight differences, the intent here is to give the same treatment to the investment issue.

5.3.2 National Focal Point

The proposal also includes articles 6 and 7 that would establish a national focal point, meaning a government delegated authority that would possess the main functions to: a) inform, b) assist in the obtainment of information, c) assist on solving difficulties with public authorities, d) prevent disputes, e) recommend improvements, and f) operate

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the single electronic window (SEW). Also, there is a command for inter-cooperation with the national focal point of other members with the wording "shall", including but not limiting to data compilation and technical assistance to MSMEs.

According to UNCTAD, national focal point acts as a one-stop-shop for complaints, providing investors with the solutions to all complaints received so that they can achieve fruitful results and be dissuaded. Thus, the success of this institution lies in the fact that the ombudsman provides an institutional interlocutor to the investors who resort to it, an official way to deal with issues and problems still at an early stage. [334] Therefore, this preventive mechanism can be a less costly, faster and friendlier way to preliminary resolve a FDI related problem.

The main difference with the CFIA model is that the Investment facilitation agreement platform draft stop using the "ombudsman" definition, while the CFIA uses focal point and ombudsman as synonyms. This is a reaction to some critics that point out that the functions exerted by the focal point, although related, are not the same as the classic definition of ombudsman, the Merriam-Webster dictionary defines it as "a government official (as in Sweden or New Zealand) appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials" or "one that investigates, reports on, and helps settle complaints".[335]

The two main differences are that the national focal point focuses on receiving complaints from foreign investors, and it does not have the power to "settle complaints", acting more as a mediator between the investor and the host state. This is a different understanding from the OECD Guidelines for the Multinational Enterprises[336] where it

[334] UNCTAD (2010), *supra* note 199.
[335] "Ombudsman." Merriam-Webster Online Dictionary (Jan. 13, 2018), https://www.merriam-webster.com/dictionary/ombudsman.
[336] OECD, *OECD Guidelines for Multinational Enterprises,* OECD Publishing. (2011), http://dx.doi.org/10.1787/9789264115415-en.

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stipulates, a different institution, the National Contact Points (NCPs) to handle issues from stakeholders related to the foreign investment.

Finally, the draft also predicts an appeal and review system of administrative and judicial decisions on the article 11, that provides the foreign investor another tool to have the aforementioned decisions to be, at last, reconsidered.

5.3.3 WTO Committee on Investment Facilitation

A WTO Committee on Investment Facilitation is recommended on its article 19, including reviews on the implementation of the MFI, setting cooperation and facilitation agendas, and the possible establishment of subsidiary bodies. Responsible with communication with other international organizations covering global investment and economic development (such as UNCTAD, OECD, World Bank etc.) that contribute with research analysis, technical assistance, and best practices.

The establishment of investment facilitation and cooperation agendas in areas where further work might improve the investment environment. These agendas could address more to day-to-day technical issues such as payments and transfers, visa concessions, environmental regulations, and institutional exchanges.

5.3.4 Single Electronic Window (SEW)

The draft establishes the bases of an IF Single Electronic Window (SEW) on its article 9 covers the whole section III of electronic governance. In terms of the challenges to set up a SEW, it should be remembered that it is nothing more than an official electronic site with different functionalities.

The objective is the replacement of the current multiple investor interactions

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with the different government agencies by a single form of interaction, in other words, a single entry point. For example, according to Global Enterprise Registration portal (GER.co), a full SEW should contain the following functions: "1) apply for all mandatory registrations through a single online form; 2) pay all fees through an electronic website included in the platform; 3) receive online all the certificates documenting the business was successfully registered; and 4) contact a competent institution with any problems that may occur during the registration process".[337]

For foreign investors, the identification and fulfillment of all administrative procedural requirements are time-consuming and highly bureaucratic. Large multinational companies can hire consultants but for MSMEs, it is not a viable option. Also, for governments, there is no unified, detailed, and complete statistical data on inward FDI flows that aid them to make better investment policies and improve the regulatory environment to make it more investor-friendly.

The SEW will reduce the need for the physical presence in the early stages of the investment, cutting costs. It will not remove or assume authority or agencies involved in the investment cycle, as it will only connect the different agencies and distribute the electronically uploaded documents between them, simplifying the process and removing the necessity of repetition on the same procedure.

The benefits reach both sides as for governments, SEW is less expensive and a better tool to concentrate data and a single entry point for documentation in the investment cycle. Furthermore, it centralizes the information providing a general vision upon its national regulatory framework, useful for cutting red-tape, removing duplication, transparency, and making the country more investment-friendly.

[337] Global Enterprise Registration (GER.co) Portal. Online Single Windows. https://ger.co/how-it-works/single-windows.

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In conclusion, an IF SEW would: a) not require removing, changing or merging the competences of different government departments involved in the investment cycle; b) supply the necessary metadata on continuous efforts to establish investment facilities framework or policy; and c) help to comply with the inquiry and contact points defined by WTO under articles 3.4. and 4.2. of the GATS.[338] According to UNCTAD, five countries already operate a fully developed SEW (Denmark, New Zealand, Oman, Estonia, and Switzerland), possessing all, aforementioned, four elements recommended by the Global Enterprise Registration portal for a complete SEW. These elements may look simple at first glance, but, unlike trade facilitation, where few agencies dealing with cross-border trade and customs compliance are involved, IF requires the integration and cooperation of many agencies at all government departments, raising crucial challenges in the implementation process.

In some countries, such as Brazil, a SEW "may not be effective in countries where setting up a business requires approvals from national, regional and local authorities that may not cooperate in implementing binding commitments under a multilateral agreement".[339] Besides Brazil's different federal, state and municipal legal regimes the difficulty is increased taking into account its over-bureaucracy. However, there is no doubt that the implementation of a SEW is a starting point to level the plain field for foreign investors.

[338] *Cf*. Felipe Hees; Pedro Mendonça Cavalcante & Pedro Paranhos. *Key aspects for a multilateral outcome on investment facilitation: A Brazilian perspective*, ICTSD: Opinion and analysis from ICTSD's network of experts (May 8, 2018), https://bit.ly/2rr3kZK. (Except for Malawi, Tunisia, Senegal and Uganda; all remaining WTO Members have notified at least one enquiry and contact point for all services sectors and subsectors).

[339] Kavaljit Singh, *Investment Facilitation: Another Fad in the Offing.* Columbia FDI Perspectives, at 26 (13 August 2018). http://ccsi.columbia.edu/files/2016/10/No-232-Singh-FINAL.pdf.

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5.3.5 Dispute Settlement

There is no dispute settlement system as this topic is sensitive to many countries and can contribute to the failure of future IF discussions. Dispute settlement issues are also not related to IF, belonging to the field of investment protection. However, the Brazilian draft makes some minor references, such as the right to consultation (GATT, article XXII) and the nullification or impairment (GATT, article XXIII) according to disposition on articles 4(a) and 20.6.

The draft also excludes from DSU the assessment of processing of applications decisions on article 10.5, in this, there is an attempt from the drafter to separate the DSU rules on the pre-establishment or market access issues that is also another point of conflict. It also excludes from the application the article 22.3(c) of the DSU that allows applying the penalties to suspend concessions or other obligations under another WTO treaty.

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6. Conclusion

The analysis in this paper clearly shows that investment contributes to the development of a country and a critical component of the UN's SDGs. Thus, countries participating in the international investment regime to make an investment friendlier environment and be a competitive investment destination. When foreign investments are in line with the country's interests, it benefits with know-how, best practices, increased innovation, productivity, and higher quality jobs.

In the lack of a MFI and WTO only limiting to deal with investment issues that distort trade relations, the number of BITs exploded with the notion that they are essential in attracting FDI. BITs were signed indiscriminately on a join or leave basis, without negotiation or due risk assessment. This resulted in an unbalance in favor of the investor, made worse with ISDS provisions that made host countries liable for millions if not billions of US dollars. This created an unpopularity and legitimacy crisis on the international investment regime, where countries are adopting conservative protectionist policies, such as tightening controls of outward FDI, screening M&A, lack of market access reciprocity, etc., reversing the liberalization tendency in the last decades.

Rather than worrying about the existence of protectionism, it is in the author's view that focus should be directed on reform alternatives on the investment cycle, from the traditional investment protection and promotion towards investment facilitation provisions, being one of the examples the CFIA model. Moreover, there is a renewed interest in investment facilitation and a MFI on WTO negotiations as 70 Members signed a Joint Ministerial Statement on Investment Facilitation for Development at the end of 2017, followed by Brazil's Structured Discussion on Investment Facilitation - a draft proposal of a MFI based on the CFIA model - to further IF discussions on the WTO.

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Furthermore, investors have a higher interest in solving difficulties in day-to-day operations and establishing themselves in the host country rather than worrying about concerns of compensation in case of an expropriation that may never come.

Despite IF being regarded as the most cost-effective and simplest tool for growth and development, seldom are the cases of IF application on the domestic and international context. Brazil has the common difficulties of over-bureaucracy, vexing administrative and regulatory system that are worsen by its federalism dividing into federal, state and municipal entities with regulation and procedures of their own. It also ranks last in the burden of government regulation component of the 140 countries studied on the WEF 2018 report[340] making IF ever more important as the room for improvement is abysmal. In the author's opinion, investment facilitation appears to be a tailor-made solution to the Brazilian chaotic scenario that makes it one of the costlier places in the world to live in.

Some trade facilitation initiatives that have spillover effects to IF have been taken since 2017 to comply with WTO's TFA, such as the single trade portal project to facilitate customs procedures, and on the centralization of the IPAs that have a possibility of expansion on its core functions, budget and personal making it a one-stop-shop. Although Brazil's domestic investment facilitation scenario is bleak, there is the recent adoption of a 2017's public governance act that aims to evaluate proposals, maintain evidence-based decision-making and review normative acts.

On the international context, Brazil created the CFIA model that is probably the IIA most equipped with IF provisions so far containing 9 of the 10 action lines recommended by UNCTAD,[341] just missing the number 6, the monitoring and review mechanisms for IF, but as good as it may be is hard to translate it from paper into practice.

[340] WEF (2018), *supra* note 87, at 117.
[341] UNCTAD (May 2017), *supra* note 50.

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In theory, the CFIA model, on the perspective of investment facilitation, represents a bilateral, plurilateral or even multilateral alternative for the much-needed reform of the international investment regime. It institutes the Ombudsman that provides information, resolve doubts and seek solutions, serving as an important channel of communication and support between investors and the host country, and the Joint Committee, cooperation between both Parties to ensure the application of the treaty and set the flexible thematic agendas. Both working on risk mitigation and dispute prevention. However, in practice, only two CFIAs are in force, and the only way to contact the Brazilian Ombudsman is through e-mail as the website is still under design since 2016.

On the multilateral context, it fosters visions and expectations for the cooperation among the actors involved, by nature; it presents indivisibility of rights and diffuse reciprocity. Unlike bilateral or regional arrangements that incentivize competition between each negotiating party and benefits by exclusion, multilateralism is inclusive, making everybody work together instead of competing with each other. On the other side of investment multilateralism, there is the vision that the investment facilitation issue requires a functional rather than a normative approach offered by a MFI, what may be required is a bottom-up unilateral approach starting with local administrative best practices, rather than a top-down multilateral approach on investment facilitation.[342] Whatever may be the case, stagnation, multi-polarization and the reversion to protectionism compose the current international environment that is not favorable to multilateralism. However, even if there is no consensus on the structure of a MFI (legally binding effects, voluntary guidelines, best practices, soft or hard law, etc.), it still represents the best option for sustainable investments and achieving the UN's SDGs.

[342] *Cf.*, Rodrigo Polanco. *Facilitation 2.0: Investment and Trade in the Digital Age. The RTA Exchange*. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and Inter-American Development Bank (IDB), at 17 (2018), https://www.ictsd.org/themes/global-economic-governance/research/facilitation-20-investment-and-trade-in-the-digital-age.

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Brazil's recent policies reformulation to promote an alternative development framework remain uncertain for some time as the newly elected president Jair Bolsonaro just assumed on January 1st of 2019, a traditional conservative hard-liner on international relations and foreign investment. However, despite his personal declarations and controversies, some predict that he will be an economic neo-liberal, as its chief economist, Paulo Guedes, maintains a position with the Chicago school of economics, a neoclassical school of economic thought that defends a free market, reduction of the government structure, privatization, etc.[343]

Finally, the author emphasizes that the present research did not have the objective of exhausting the theme. On the contrary, it expects that it will allow the opening of new research fronts regarding IF. With the recent developments brought forward by global South countries becoming not only receivers but also exporters of capital for investment demonstrates that there are space and necessity for a genuine reformulation of the investment regime, where the interests of investors are balanced with the development concerns of host countries developing alternatives that go beyond investments.

[343] Luiz Antônio Araujo, *Bolsonaro presidente: Investidor ultraliberal, polemista e investigado: as faces de Paulo Guedes, guru econômico de Jair Bolsonaro*, BBC Brasil (Oct. 29, 2018), https://www.bbc.com/portuguese/brasil-45770911.

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Annex 1: Provisions about Investment in Brazil

Federal Constitution of 1988		
Article 5	All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:	
	XXIV – the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution;	
Article 170. (Modified) (CA 6, 1995)	The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:	
	IX – preferential treatment for small Brazilian enterprises of national capital. (Before CA 6, 1995)	IX – preferential treatment for small enterprises organized under Brazilian laws and having their head-office and management in Brazil. (After CA 6, 1995)
~~Article 171.~~ (Revoked) (CA 6, 1995)	~~It is considered:~~ ~~I - a Brazilian company, one that is organized under Brazilian laws and has its head office and management in Brazil;~~ ~~II - a Brazilian company of domestic capital, one whose effective control is directly or indirectly held permanently either by individuals resident and domiciled in Brazil or by domestic public entities, the effective control of the company being understood as the ownership of the majority of its voting capital and de facto and legal exercise of the decision-making power to manage its activities.~~ ~~Paragraph 1 - The law may, with regard to a Brazilian company of domestic capital:~~ ~~I - grant special temporary protection and benefits for the development of activities deemed strategic for the national defense or vital to the development of the country;~~ ~~II - establish, whenever it deems a sector vital to national technological development, the following conditions and requisites, among others:~~ ~~a) the requirement that the control mentioned in item II of the caption be extended to the company's technological activities this being understood as de facto and legal exercise of the decision-making power to develop or absorb technology;~~ ~~b) percentages of capital participation by individuals domiciled and resident in Brazil or by domestic public entities.~~ ~~Paragraph 2 - In the procurement of goods and services, the Government shall give preferential treatment to Brazilian companies of domestic capital, as established by~~	

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	~~law.~~
Article 172.	The law shall regulate, based on national interests, the foreign capital investments, shall encourage reinvestments and shall regulate the remittance of profits.
Article 182.	The urban development policy carried out by the municipal government, according to general guidelines set forth in the law, is aimed at ordaining the full development of the social functions of the city and ensuring the well-being of its inhabitants.
	Paragraph 3. Expropriation of urban property shall be made against prior and fair compensation in cash. Paragraph 4. The municipal government may, by means of a specific law, for an area included in the master plan, demand, according to federal law, that the owner of unbuilt, underused or unused urban soil provide for adequate use thereof, subject, sucessively, to: I – compulsory parceling or construction; II – rates of urban property and land tax that are progressive in time; III – expropriation with payment in public debt bonds issued with the prior approval of the Federal Senate, redeemable within up to ten years, in equal and successive annual installments, ensuring the real value of the compensation and the legal interest.
Article 184.	It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue, and the use of which shall be defined in the law. Paragraph 1. Useful and necessary improvements shall be compensated in cash. Paragraph 2. The decree declaring the property as being of social interest for agrarian reform purposes empowers the Union to start expropriation action. Paragraph 3. It is incumbent upon a supplementary law to establish special summary adversary proceeding for expropriation action. Paragraph 4. The budget shall determine each year the total volume of agrarian debt bonds, as well as the total amount of funds to meet the agrarian reform programme in the fiscal year. Paragraph 5. The transactions of transfer of property expropriated for agrarian reform purposes are exempt from federal, state and municipal taxes. Article 185. Expropriation of the following for agrarian reform purposes is not permitted: I – small and medium-size rural property, as defined by law, provided its owner

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	does not own other property; II – productive property. Sole paragraph. The law shall guarantee special treatment for the productive property and shall establish rules for the fulfillment of the requirements regarding its social function.
Decree-Law n. 2.627, of September 26, 1940 (Companies Act)	
Art. 60 (Own Translation)	Companies organized in accordance with Brazilian law and which have the seat of their administration in the country are national.
Law n. 4.131 of September 03, 1962 (Foreign Capital Act)	
Article 1	Are considered foreign capital for the purposes of this law, goods, machinery and equipment that enter Brazil with no initial disbursement of foreign currency, for the production of goods or services as well as financial or monetary resources brought into the country for investment in economic activities since, in both cases they belong to individuals or legal entities resident, domiciled or headquartered abroad.
Article 2	The foreign capital invested in the country will be waived legal treatment identical to that granted to the national capital on equal terms, being prohibited any unforeseen discrimination in this law.
Law n. 9.279, of May 14, 1996 (Industrial Property Act)	
Art. 2 (Own Translation)	The protection of the rights related to industrial property, considering its social interest and the technological and economic development of the Country, is effected through: I - grant of patents of invention and of utility model; II - concession of industrial design registration; III - concession of trademark registration; IV - repression of false geographical indications; and V - repression of unfair competition.
Law n. 9.307, of September 23, 1996 (Arbitration Act)	
Article 1 (Own Translation)	Persons able to contract may use arbitration to settle disputes relating to available property rights. § 1 The direct and indirect public administration may use arbitration to settle disputes relating to available property rights. (Amended by Law n. 13.129/2015) § 2 The competent authority or body of the direct public administration for the conclusion of an arbitration agreement is the same for the execution of agreements or transactions. (Amended by Law n. 13.129/2015)
Law n. 11.371 of November 28, 2006 (Profit Remittance and Foreign Exchange Act)	
Art. 5	The foreign capital invested in legal entities in Brazil, not yet registered and not

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(Own Translation)	subject to another form of registration with the Central Bank of Brazil, is subject to registration in the national currency at the Central Bank of Brazil.
Circular n. 3.689 of December 16, 2013 (BCB's Foreign Capital Circular)	
Art. 11. (Own Translation)	For the purposes of this section, Brazilian direct investment abroad is the direct or indirect participation by a natural or legal person, resident, domiciled or headquartered in the country, in a company incorporated outside Brazil.
Art. 15. (Own Translation)	Transfers from and to abroad in national or foreign currency, related to investment abroad, by investment funds, shall comply with the limits and other norms prescribed by the CVM in the exercise of its attributions.
Resolution n. 4.373 of September 29, 2014 (BCB's Foreign Investor on Capital Market)	
Art. 2 (Own Translation)	Prior to the beginning of its operations, the non-resident investor must: I - constitute one or more representatives in the Country; II - obtain registration with the Securities and Exchange Commission; and III - constitute one or more custodians authorized by the Brazilian Securities and Exchange Commission.
Decree n. 9.203 of November 22, 2017 (Public Governance Act)	
Art. 4 (Own Translation)	The following are guidelines for public governance: I - direct actions to search for results for society, finding timely and innovative solutions to deal with resource constraints and changing priorities; II - to promote administrative simplification, the modernization of public management and the integration of public services, especially those provided by electronic means; III - monitor performance and evaluate the design, implementation and results of policies and priority actions to ensure that strategic guidelines are followed; IV - articulate institutions and coordinate processes to improve integration between the different levels and spheres of the public sector, with a view to generating, preserving and delivering public value; V - to incorporate high standards of conduct by senior management to guide the behavior of public agents, in line with the functions and attributions of its organs and entities; VI - implement internal controls based on risk management, which will focus on strategic prevention actions before sanctioning processes; **VII - evaluate proposals for the creation, expansion or improvement of public policies and the granting of tax incentives and, whenever possible, assess their costs and benefits;** **VIII - to maintain evidence-based decision-making, legal compliance, regulatory quality, de-bureaucracy and support for the participation of**

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	society; **IX - to edit and review normative acts, based on good regulatory practices and the legitimacy, stability, and coherence of the legal system and conducting public consultations whenever appropriate;** X - formally define the roles, responsibilities and responsibilities of institutional structures and arrangements; and XI - promote open, voluntary and transparent communication of the organization's activities and results, in order to strengthen public access to information.
Art. 5 (Own Translation)	The following are mechanisms for the exercise of public governance: I - leadership, which comprises a set of practices of a human or behavioral nature exercised in the main positions of organizations, to ensure the existence of minimum conditions for the exercise of good governance, namely: a) integrity; b) competence; c) responsibility; and d) motivation; II - strategy, which includes the definition of guidelines, objectives, plans and actions, as well as criteria of prioritization and alignment between organizations and stakeholders, so that the services and products of responsibility of the organization achieve the desired result; and III - control, which comprises processes structured to mitigate possible risks with a view to achieving institutional objectives and to ensure the orderly, ethical, economic, efficient and effective execution of the activities of the organization, with preservation of legality and the economical use of resources the public.
Art. 6 (Own Translation)	The top management of the organs and entities, observing the specific norms and procedures applicable, implementing and maintaining mechanisms, instances and practices of governance in accordance with the principles and guidelines established in this Decree. Single paragraph. The mechanisms, instances and governance practices dealt with in the caput will include, as a minimum: I - ways of monitoring results; II - solutions to improve the performance of organizations; and III - instruments to promote evidence-based decision-making.

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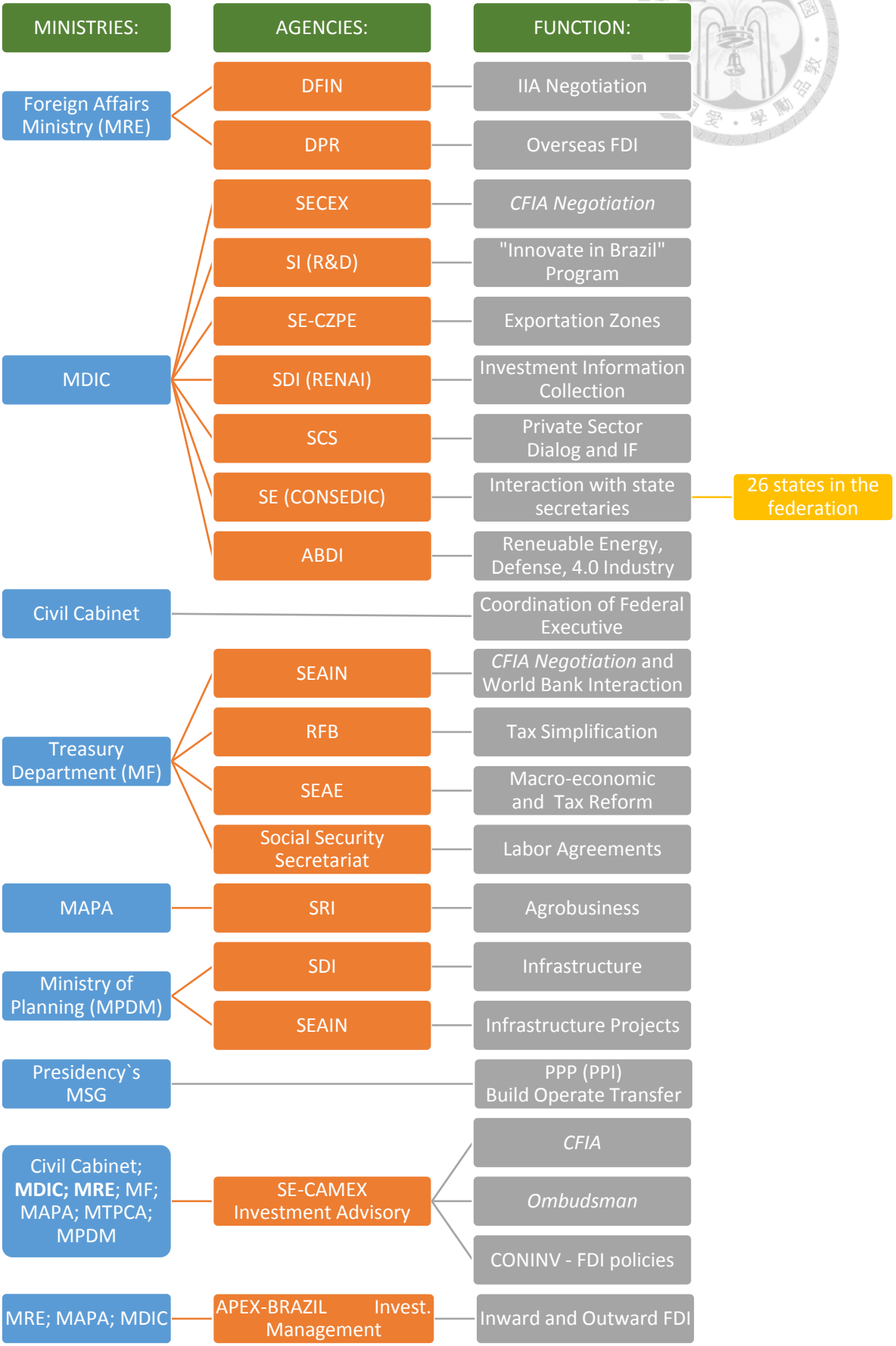
Annex 2: Structure of the Investment Cycle in Brazil



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Annex 3: Cooperation and Facilitation Investment Agreement Model

COOPERATION AND FACILITATION INVESTMENT AGREEMENT BETWEEN THE FEDERATIVE REPUBLIC OF BRAZIL AND

The Federative Republic of Brazil and

(hereinafter designated as the "Parties" or individually as "Party"),

PREAMBLE

Wishing to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Parties;

Seeking to create and maintain favourable conditions for the investments of investors of a Party in the territory of the other Party;

Seeking to stimulate, streamline and support bilateral investments, thus opening new integration opportunities between the Parties;

Recognizing the essential role of investment in promoting sustainable development;

Considering that the establishment of a strategic partnership between the Parties in the area of investment will bring wide-ranging and mutual benefits;

Recognizing the importance of fostering a transparent and friendly environment for investments by investors of the Parties;

Reassuring their regulatory autonomy and policy space;

Wishing to encourage and strengthen contacts between the private sectors and the Governments of the two countries; and

Seeking to create a mechanism for technical dialogue and foster government initiatives that may contribute to a significant increase in mutual investment;

Agree, in good faith, to the following Cooperation and Facilitation Investment Agreement, hereinafter referred to as "Agreement", as follows:

PART I – Scope of the Agreement and Definitions

Article 1: Objective

1. The objective of this Agreement is to promote cooperation between the Parties in order to facilitate and encourage mutual investment, through the establishment of an institutional framework for the management of an agenda for further investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on by the Parties.

Article 2: Scope and Coverage

1. This Agreement shall apply to all investments made before or after its entry into force.

2. This Agreement shall not limit the rights and benefits which an investor of a Party enjoys under national or international law in the territory of the other Party.

3. For greater certainty, the Parties reaffirm that this Agreement shall apply without prejudice to the

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rights and obligations derived from the Agreements of the World Trade Organization.

4. This agreement shall not prevent the adoption and implementation of new legal requirements or restrictions to investors and their investments, as long as they are consistent with this Agreement.

Article 3: Definitions

1. For the purpose of this Agreement:

1.1 Enterprise means: any entity constituted or organized under applicable law, whether or not for profit, whether privately owned or State-owned, including any corporation, trust, partnership, sole proprietorship, joint venture and entities without legal personality;

1.2 Host State means the Party where the investment is made.

1.3 Investment means a direct investment of an investor of one Party, established or acquired in accordance with the laws and regulations of the other Party, that s, directly or indirectly, allows the investor to exert control or significant degree of influence over the management of the production of goods or provision of services in the territory of the other Party, including but not limited to:

a) an enterprise;

b) shares, stocks, participation and other equity types in an enterprise;

c) movable or immovable property and other property rights such as mortgages, liens, pledges, encumbrances or similar rights and obligations;

d) concession, license or authorization granted by the Host State to the investor of the other Party;

e) loans and debt instruments to a company:

f) intellectual property rights as defined or referenced in the Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPS)

For the purposes of this Agreement and for greater certainty, "Investment" does not include:

i) an order or judgment issued as a result of a lawsuit or an administrative process;

ii) debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of a State-owned enterprise of a Party that is considered to be public debt under the legislation of that Party;

ii) portfolio investments, i.e., those that do not allow the investor to exert a significant degree of influence in the management of the company; and

iii) claims to money that arise solely from commercial contracts for the sale of goods or services by an investor in the territory of a Party to a national or an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in sub-paragraphs (a)-(e) above.

1.4 Investor means a national, permanent resident or enterprise of a Party that has made an investment in the territory of the other Party;

1.5 Income means the values obtained by an investment, including profits, interests, capital gains, dividends or "royalties".

1.6 Measure means any measure adopted by a Party, whether in the form of law, regulation, rule, procedure, decision, administrative ruling, or any other form.

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1.7 National means a natural person that has the nationality of a Party, according to its laws and regulations.
1.8 Territory means the territory, including its land and aerial spaces, the exclusive economic zone, territorial sea, seabed and subsoil within which the Party exercises its sovereign rights or jurisdiction, in accordance with international law and its internal legislation.

PART II – Regulatory Measures and Risk Mitigation

Article 4: Admission and treatment

1. Each Party shall admit and encourage investments of investors of the other Party, according to their respective laws and regulations.
2. Each Party shall grant to investments and investors of the other Party treatment according to the due process of law.
3. In line with the principles of this Agreement, each Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with their respective laws and regulations.

Article 5: National Treatment

1. Without prejudice to the exceptions in force under its legislation on the date of entry into force of this Agreement, each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Without prejudice to the exceptions in force under its legislation on the date of entry into force of this Agreement, each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the expansion, management, conduct, operation, and sale or other disposition of investments.
3. For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public interest objectives.
4. For greater certainty, this Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the investor or investments.

Article 6: Most-Favoured-Nation Treatment

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 with respect to the expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the expansion, management, conduct, operation, and sale or other disposition of

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investments.

3. This Article shall not be construed to require a Party to grant to an investor of another Party or their investments the benefit of any treatment, preference or privilege arising from:

(i) provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement; or

(ii) any agreement for regional economic integration, free trade area, customs union or common market, of which a Party is a member.

4. For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 7: Expropriation

1. Each Party shall not directly nationalize or expropriate investments of investors of the other Party, except:

a) for a public purpose or necessity or when justified as social interest;

b) in a non-discriminatory manner;

c) on payment of effective compensation, according to paragraphs 2 to 4; and

d) in accordance with due process of law.

2. The compensation shall:

a) Be paid without undue delay;

b) Be equivalent to the fair market value of the expropriated investment, immediately before the expropriating measure has taken place ("expropriation date");

c) Not reflect any change in the market value due to the knowledge of the intention to expropriate, before the expropriation date; and

d) Be completely payable and transferable, according to Article 9.

3. The compensation to be paid shall not be inferior to the fair market value on the expropriation date, plus interests at a rate determined according to market criteria accrued since the expropriation date until the date of payment, according to the legislation of the Host State.

4. The Parties shall cooperate to improve the mutual knowledge of their respective national legislation regarding investment expropriation.

5. For greater certainty, this article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or ownership rights.

Article 8: Compensation for Losses

1. The investors of a Party whose investments in the territory of the other Party suffer losses due to war or other armed conflict, revolution, state of emergency, insurrection, riot or any other similar events, shall enjoy, with regard to restitution, indemnity or other form of, compensation, the same treatment as the latter Party accords to its own investors or the treatment accorded to investors of a third party, whichever is more favourable to the affected investor.

2. Each Party shall provide the investor restitution, compensation, or both, as appropriate, in

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accordance with Article 6 of this Agreement, in the event that investments suffer losses in its territory in any situation referred to in paragraph 1 resulting from:

(a) requisitioning of its investment or part thereof by the forces or authorities of the latter Party;

(b) destruction of its investment or any part thereof by the forces or authorities of the latter Party.

Article 9: Transparency

1. 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.

2. Each Party shall endeavour to allow reasonable opportunity to those stakeholders interested in expressing their opinions on the proposed measures.

3. Whenever possible, each Party shall publicize this Agreement to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment in the territory of the other Party.

Article 10: Transfers

1. Each Party shall allow that the transfer of funds related to an investment be made freely and without undue delay, to and from their territory. Such transfers include:

(a) the initial capital contribution or any addition thereof in relation to the maintenance or expansion of such investment;

(b) income directly related to the investment;

(c) the proceeds of sale or total or partial liquidation of the investment;

(d) the repayments of any loan, including interests thereon, relating directly to the investment;

(e) the amount of a compensation.

2. Without prejudice to paragraph 1, a Party may, in an equitable and non-discriminatory manner and in good faith, prevent a transfer if such transfer is prevented under its laws relating to:

(a)bankruptcy, insolvency or the protection of the rights of creditors;

(b)criminal infractions;

(c)financial reports or maintenance of transfers' registers when necessary to cooperate with law enforcement or with financial regulators; or

(d) the guarantee for the enforcement of decisions in judicial or administrative proceedings.

3. Nothing in this Agreement shall be construed as to prevent a Party from adopting or maintaining temporary restrictive measures in respect of payments or transfers for current account transactions in the event of serious difficulties in the balance of payments and external financial difficulties or threat thereof.

4. Nothing in this Agreement shall be construed as to prevent a Party from adopting or maintaining temporary restrictive measures in respect of payments or transfers related to capital movements:

(a) in the case of serious difficulties in the balance of payments or external financial difficulties or threat thereof; or

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(b) where, in exceptional circumstances, payments or transfers from capital movements generate or threaten to generate serious difficulties for macroeconomic management.

5. The adoption of temporary restrictive measures to transfers if there are serious difficulties in the balance of payments in the cases described in paragraphs 1 and 2, must be non-discriminatory and in accordance with the Articles of the Agreement of the International Monetary Fund.

Article 11: Tax Measures

1. No provision of this Agreement shall be interpreted as an obligation of one Party to give to an investor from the other Party, concerning his or her investments, the benefit of any treatment, preference or privilege arising out of any agreement to avoid double taxation, current or future, of which a Party to this Agreement is a party or becomes a party.

2. No provision of this Agreement shall be interpreted in a manner that prevents the adoption or implementation of any measure aimed at ensuring the equitable or effective imposition or collection of taxes, according to the Parties´ respective laws and regulations, so long as such a measure is not applied as to constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.

Article 12: Prudential Measures

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining prudential measures, such as:

(a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) ensuring the integrity and stability of a Party's financial system.

2. Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of circumventing the commitments or obligations of the Party under this Agreement.

Article 13: Security Exceptions

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures aimed at preserving its national security or public order, or to apply the provisions of their criminal laws or comply with its obligations regarding the maintenance of international peace and security in accordance with the provisions of the United Nations Charter.

2. Measures adopted by a Party under paragraph 1 of this Article or the decision based on national security laws or public order that at any time prohibit or restrict the realization of an investment in its territory by an investor of another Party shall not be subject to the dispute settlement mechanism under this Agreement.

Article 14: Corporate Social Responsibility

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.

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2. The investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:

a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;

b) Respect the recognized human rights of those involved in the companies' activities;

c) Encourage local capacity building through close cooperation with the local community;

d) Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers to;

e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;

f) Support and advocate for good corporate governance principles, and develop and apply good practices of corporate governance;

g) Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which its operations are conducted;

h) Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programs for professional training;

i) Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;

j) Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and

k) Refrain from any undue interference in local political activities.

Article 15: Investment Measures and Combating Corruption and Illegality

1. Each Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations.

2. Nothing in this Agreement shall require any Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.

Article 16: Provisions on Investment and Environment, Labor Affairs and Health

1. Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health legislation of that Party, provided that this measure is not applied in a manner which would constitute a means of arbitrary or

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unjustifiable discrimination or a disguised restriction.

2. The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor and environmental legislation or measures of health. Therefore, each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards. If a Party considers that another Party has offered such an encouragement, the Parties will address the issue through consultations.

PART III- Institutional Governance and Dispute Prevention

Article 17: Joint Committee for the Administration of the Agreement

1. For the purpose of this Agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as "Joint Committee").

2. This Joint Committee shall be composed of government representatives of both Parties designated by their respective Governments.

3. 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.

4. The Joint Committee shall have the following functions and responsibilities:

a) Supervise the implementation and execution of this Agreement;

b) Discuss and divulge opportunities for the expansion of mutual investment;

c) Coordinate the implementation of the mutually agreed cooperation and facilitation agendas;

d) Consult with the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee;

e) Seek to resolve any issues or disputes concerning investments of investors of a Party in an amicable manner; and

f) Supplement the rules for arbitral dispute settlement between the Parties.

5. The Parties may establish ad hoc working groups, which shall meet jointly or separately from the Joint Committee.

6. The private sector may be invited to participate in the ad hoc working groups, whenever authorized by the Joint Committee.

7. The Joint Committee shall establish its own rules of procedure.

Article 18: Focal Points or "Ombudsmen"

1. Each Party shall designate a National Focal Point, or "Ombudsman", which shall have as its main responsibility the support for investor from the other Party in its territory.

2. In Brazil, the "Ombudsman"/National Focal Point shall be within the Chamber of Foreign Trade – CAMEX

3. In, the "Ombudsman"/National Focal Point shall be.

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4. The National Focal Point, among other responsibilities, shall:

a) Endeavour to follow the recommendations of the Joint Committee and interact with the National Focal Point of the other Party, in accordance with this Agreement;

b) Follow up on requests and enquiries of the other Party or of investors of the other Party with the competent authorities and inform the stakeholders on the results of its actions;

c) to assess, in consultation with relevant government authorities, suggestions and complaints received from the other Party or investors of the other Party and recommend, as appropriate, actions to improve the investment environment;

d) seek to prevent differences in investment matters, in collaboration with government authorities and relevant private entities;

e) Provide timely and useful information on regulatory issues on general investment or on specific projects; and

f) Report its activities and actions to the Joint Committee, when appropriate.

5. Each Party shall determine time limits for the implementation of each of its functions and responsibilities, which will be communicated to the other Party.

6. Each Party shall designate a authority as its National Focal Point, which shall give prompt replies to notifications and requests by the Government and investors from the other Party.

Article 19: Exchange of Information between Parties

1. The Parties shall exchange information, whenever possible and relevant to reciprocal investments, concerning business opportunities, procedures, and requirements for investment, particularly through the Joint Committee and its National Focal Points.

2. For this purpose, the Party shall provide, when requested, in a timely fashion and with respect for the level of protection granted, information related, in particular, to the following items:

a) Regulatory conditions for investment;

b) Governmental programs and possible related incentives;

c) Public policies and legal frameworks that may affect investment;

d) Legal framework for investment, including legislation on the establishment of companies and joint ventures;

e) Related international treaties;

f) Customs procedures and tax regimes;

g) Statistical information on the market for goods and services;

h) Available infrastructure and public services;

i) Governmental procurement and public concessions;

j) Social and labour requirements;

k) Immigration legislation;

l) Currency exchange legislation;

m) Information on legislation of specific economic sectors or segments previously identified by the Parties; and

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n) Regional projects and agreements related to on investment.

3. The Parties shall also exchange information on Public-Private Partnerships (PPPs), especially through greater transparency and quick access to the information on the legislation.

Article 20: Treatment of Protected Information

1. The Parties shall respect the level of protection of information provided by the submitting Party, according to the respective national legislation on the matter.

2. None of the provisions of the Agreement shall be construed to require any Party to disclose protected information, the disclosure of which would jeopardize law enforcement or otherwise be contrary to the public interest or would violate the privacy or harm legitimate business interests. For the purposes of this paragraph, protected information includes confidential business information or information considered privileged or protected from disclosure under the applicable laws of a Party.

Article 21: Interaction with the Private Sector

Recognizing the key role played by the private sector, the Parties shall publicize, among the relevant business sectors, general information on investment, regulatory frameworks and business opportunities in the territory of the other Party.

Article 22: Cooperation between Agencies Responsible for Investment Promotion

The Parties shall promote cooperation between their investment promotion agencies in order to facilitate investment in the territory of the other Party.

Article 23: Disputes Prevention

1. The National Focal Points, or "Ombudsmen", shall act in coordination with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties.

2. Before initiating an arbitration procedure, in accordance with Article 24 of this Agreement, any dispute between the Parties shall be the object of consultations and negotiations between the Parties and be previously examined by the Joint Committee.

3. A Party may submit a specific question and call a meeting of the Joint Committee according to the following rules:

a) to initiate the procedure, the interested Party must submit a written request to the other Party, specifying the name of the affected investors, the specific measure in question, and the findings of fact and law underlying the request. The Joint Committee shall meet within sixty (60) days from the date of the request;

b) The Joint Committee shall have 60 days, extendable by mutual agreement by 60 additional days, upon justification, to evaluate the relevant information about the presented case and to submit a report. The report shall include:

i) Identification of the Party;

ii) Identification of the affected investors, as presented by the Parties;

iii) Description of the measure under consultation; and

iv) Conclusions of the consultations between the Parties;

c) In order to facilitate the search for a solution between the Parties, whenever possible, the following

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persons shall participate in the bilateral meeting:

i) Representatives of the affected investors;

ii) Representatives of the governmental or non-governmental entities involved in the measure or situation under consultation.

d) The procedure for dialogue and bilateral consultations may be concluded by any Party, after the sixty (60) days referred to in subparagraph b). The Joint Committee shall present its report in the subsequent meeting of the Joint Committee, which shall be held no later than fifteen (15) days after the date of the submission of the request of a Party to conclude the procedure for dialogue and bilateral consultations.

e) The Joint Committee shall, whenever possible, call for special meetings to review matters that have been submitted.

f) In the event that a Party does not attend the meeting of the Joint Committee described in subparagraph (d) of this article, the dispute may be submitted to arbitration by the other Party in accordance with Article 24 of the Agreement.

4. The meeting of the Joint Committee and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential, except for reports submitted by the Joint Committee.

Article 24: Settlement of Disputes between the Parties

1. 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.

2. The purpose of the arbitration is to determine the conformity with this Agreement of a measure that a Party claims to be not in conformity with the Agreement.

3. The following may not be subject to arbitration: Article 13 - Corporate Social Responsibility; Paragraph 1 of Article 14 – Investment Measures and Combating Corruption and Illegality; and paragraph 2 of Article 15 - Provisions on Investment and Environment, Labor Affairs and Health.

4. This Article shall not apply to any dispute concerning any facts which have occurred, nor any measures which have been adopted before the entry into force of this Agreement.

5. This Article shall not apply to any dispute if more than five (5) years have elapsed since the date on which the Party knew or should have known of the facts giving rise to the dispute.

6. The Arbitral Tribunal shall consist of three arbitrators. Each Party shall appoint, within three (3) months after receiving the "notice of arbitration", a member of the Arbitral Tribunal. Within three (3) months of the appointment of the second arbitrator, the two members, shall appoint a national of a third State with which both Parties maintain diplomatic relations, who, upon approval by both Parties, shall be appointed chairperson of the Arbitral Tribunal. The appointment of the Chairperson must be approved by both Parties within one (1) month from the date of his/her nomination.

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7. If, within the periods specified in paragraph 6 of this Article, the necessary appointments are not concluded, either Party may invite the Secretary-General of the International Court of Justice to make the necessary appointments. If the Secretary-General of the International Court of Justice is a national of one Party or is prevented from fulfilling said function, the member of the International Court of Justice who has the most seniority who is not a national of a Party will be invited to make the necessary appointments.

8. Arbitrators must:

(a) have the necessary experience or expertise in Public International Law, international investment rules or international trade, or the resolution of disputes arising in relation to international investment agreements;

(b) be independent of and not be affiliated, directly or indirectly, with any of the Parties or with the other arbitrators or potential witnesses nor take instructions from the Parties; and

(c) comply with the "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes " of the World Trade Organization (WTO / DSB / RC / 1, dated December 11 1996), as applicable to the dispute, or any other standard of conduct established by the Joint Committee.

9. The "Notice of Arbitration" and other documents relating to the resolution of the dispute shall be presented at the location designated by each Party in Annex II (Delivery of Documents of a Party) or any other location that may be informed by the Parties.

10. The Arbitral Tribunal shall determine its own procedure in accordance with this Article or, alternatively, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Arbitral Tribunal will render its decision by majority vote and decide on the basis of the provisions of this Agreement and the applicable principles and rules of international law as recognized by both Parties. Unless otherwise agreed, the decision of the Arbitral Tribunal shall be rendered within six (6) months following the appointment of the Chairperson in accordance with paragraphs 6 and 7 of this article.

11. The decision of the Arbitral Tribunal shall be final and binding to the Parties, who shall comply with it without delay.

12. The Joint Committee shall approve the general rule for determining the arbitrators´ fees, taking into account the practices of relevant international organizations. The Parties shall bear the expenses of the arbitrators as well as other costs of the proceedings equally, unless otherwise agreed.

13. Notwithstanding paragraph 2 of this Article, the Parties may, through a specific arbitration agreement, request the arbitrators to examine the existence of damages caused by the measure in question under the obligations of this Agreement and to establish compensation for such damages through an arbitration award. In this case, in addition to the provisions of the preceding paragraphs of this Article, the following shall be observed:

(a) The arbitration agreement to examine the existence of damages shall be taken as "notice of arbitration" within the meaning of paragraph 6;

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(b) This paragraph shall not be applied to a dispute concerning a particular investor which has been previously resolved and where protection of res judicata applies. If an investor had submitted claims regarding the measure at issue in the Joint Committee to local courts or an arbitration tribunal of the Host State, the arbitration to examine damages can only be initiated after the withdrawal of such claims by the investor in local courts or an arbitration tribunal of the Host State. If after the establishment of the arbitration, the existence of claims in local courts or arbitral tribunals over the contested measure is made known to the arbitrators or the Parties, the arbitration will be suspended.

(c) If the arbitration award provides monetary compensation, the Party receiving such compensation shall transfer to the holders of the rights of the investment in question, after deducting the costs of the dispute in accordance with the internal procedures of each Party. The Party to whom restitution was granted may request the Arbitral Tribunal to order the transfer of the compensation directly to the holders of rights of the affected investment and the payment of costs to whoever has assumed them.

PART IV - Agenda for Further Investment Cooperation and Facilitation

Article 25: Agenda for Further Investment Cooperation and Facilitation

1. The Joint Committee shall develop and discuss an Agenda for Further Cooperation and Facilitation on relevant topics for the promotion and enhancement of bilateral investment. The topics that shall be initially addressed and its objectives are listed in Annex I – "Agenda for Further Investment Cooperation and Facilitation".

2. The agendas shall be discussed between the competent government authorities of both Parties. The Joint Committee shall invite, when applicable, additional competent government officials for both parties in the discussions of the agenda.

3. The results of such negotiations shall constitute additional protocols to this Agreement or specific legal instruments.

4. The Joint Committee shall coordinate schedules of the discussions for further investment cooperation and facilitation and the negotiation of specific commitments.

5. The Parties shall submit to the Joint Committee the names of government bodies and its official representatives involved in these negotiations.

PART V – General and Final Provisions

Article 26: General Amendments and Final Provisions

1. Neither the Joint Committee nor the Focal Points or Ombudsmen shall replace or impair, in any way, any other agreement or the diplomatic channels existing between the Parties.

2. Without prejudice to its regular meetings, after 10 (ten) years of entering into force of this Agreement, the Joint Committee shall undertake a general review of its implementation and make further recommendations, if necessary.

3. This Agreement shall enter into force 90 (ninety) days after the date of the receipt of the second

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diplomatic note indicating that all necessary internal procedures with regard to the conclusion and the entering into force of international agreements have been completed by both Parties.

4. At any time, either of the Parties may terminate this Agreement by providing written notice of termination to the other Party. The termination shall take effect on a date the Parties agree on or, if the Parties are unable to reach an agreement, 365 (three hundred and sixty-five) days after the date on which the termination notice is delivered

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at , on the day of in duplicate in the English and Portuguese languages, both texts being equally authentic.

FOR BRAZIL

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FOR

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ANNEX I

AGENDA FOR FURTHER INVESTMENT COOPERATION AND FACILITATION

The agenda listed below represents an initial effort to improve investment cooperation and facilitation between the Parties and may be expanded and modified at any time by the Joint Committee.

a. Payments and transfers

i. The cooperation between the financial authorities shall aim at facilitating capital and currency remittances between the Parties.

b. Visas

i. Each Party shall seek, whenever possible and convenient, to facilitate the free movement of managers, executives and skilled employees of economic agents, entities, businesses and investors of the other Party.

ii. Respecting national legislation, immigration and labour authorities of each Party shall seek a common understanding in order to reduce time, requirements and costs to grant appropriate visas to investors of the other Party.

iii. The Parties will negotiate a mutually acceptable agreement to facilitate visas for investors with a view to extend its duration and stay.

c. Technical and environmental regulations

i. Subject to their national legislation, the Parties shall establish expeditious, transparent and agile procedures for the issuing of documents, licenses and certificates related to the prompt establishment and maintenance of the investment of the other Party.

ii. Any query from the Parties, or from their economic agents and investors concerning commercial registration, technical requirements and environmental standards shall receive diligent and timely treatment from the other Party.

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d. Cooperation on Regulation and Institutional Exchange

i. The Parties shall promote institutional cooperation for the exchange of experiences on the development and management of regulatory frameworks.

ii. The Parties hereby undertake to promote technological, scientific and cultural cooperation through the implementation of actions, programs and projects for the exchange of knowledge and experience, in accordance with their mutual interests and development strategies.

iii. The Parties agree that the access and the eventual technology transfer shall be carried out, whenever possible, and be aimed at contributing with effective trade of goods, services and related investment.

iv. The Parties shall undertake to promote, foster, coordinate and implement cooperation in professional qualification through greater interaction between relevant national institutions.

v. Fora for cooperation and exchange of experiences on solidarity economy shall be created, evaluating fostering mechanisms for cooperatives, family farms and other solidary economic enterprises related to current and future investment.

vi. The Parties shall also promote institutional cooperation for greater integration of logistics and transports in order to open new air routes and increase, whenever possible and appropriate, their connections and maritime merchant fleets.

vii. The Joint Committee may identify other areas of mutual interest for cooperation in sectorial legislation and institutional exchange.

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Annex 4: Cooperation and Facilitation Investment Agreement Cross-comparison

BRAZIL CFIA-	Model	MOZ	ANG	MEX	MWI	COL	CHILE	PERU ETEA	Mercosur PCFI
Ratified by BRAZIL	N/A	✓	✓	✓	✓	X	✓	✓	X
Ratified by Other	N/A	X	✓	✓	X	X	X	X	X
Right to Policy Space	✓	✓	✓	✓	✓	✓	✓	✓	✓
Sustainable Develop.	✓	✓	✓	✓	✓	✓	✓	✓	✓
Social Aspects	✓	✓	✓	✓	✓	✓	✓	✓	✓
Enviromental Aspects	X	X	✓	X	X	✓	✓	✓	✓
Investment Definition	Asset	Asset	X	Asset	Asset	Asset	Asset	Asset	Asset
NT	Post	Post	Post	Post	Post	Post	Post	Post	✓
MFN	✓	✓	✓	Post	✓	Post	Post	Post	✓
FET	X	X	X	X	X	X	X	X	X
Full Protection	X	X	X	X	X	X	X	X	X
Direct Expropriation	✓	✓	✓	✓	✓	✓	✓	✓	✓
Indirect Expropriation	X	X	X	X	X	X	X	X	X
Umbrela Clause	X	X	✓	X	X	X	X	X	X
Transp. for States	✓	✓	✓	✓	✓	✓	✓	✓	✓
Transp. for Investors	X	X	X	X	X	X	X	X	✓
ISDS	X	X	X	X	X	X	X	X	X
SSDS	✓	✓	✓	✓	✓	✓	✓	✓	✓
SSDS Proceedings	✓	X	X	✓	X	✓	✓	✓	X
Tech. coop./cap. build.	✓	✓	✓	✓	✓	✓	X	X	✓
Valid for	N/A	20y	10y	5y	10y	10y	10y	Indef.	Indef.
Denunciation Notice	N/A	12m	12m	365d	180d	1y	1y	365d	60d

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Annex 5: Brazil's Structured Discussions on Investment Facilitation

STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION
COMMUNICATION FROM BRAZIL

The following communication, dated 31 January 2018, is being circulated at the request of the delegation of Brazil.

On 13 December 2017, on the margins of MC11, 70 Members circulated the Joint Ministerial Statement on Investment Facilitation for Development, calling for the beginning of "structured discussions with the aim of developing a multilateral framework on investment facilitation" (WT/MIN/(17)/59).

In order to contribute to this goal, Brazil submits the attached draft, which contains a concrete illustration of a possible WTO multilateral framework for this topic. This submission is not meant to be a negotiating proposal, but rather (i) a platform (among others) to promote more focused and text-based discussions, as well as (ii) a response to the call made in the Joint Ministerial Statement with regard to the "importance of continuous outreach to WTO Members, especially developing and least developed Members".

INVESTMENT FACILITATION AGREEMENT

Members,

Recognizing the importance of investment for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for facilitating sustainable investment flows as a means of promoting the economic growth of all trading partners and the development of developing countries;

Recalling the importance of ensuring coherence regarding the legal framework applicable to the facilitation of investment in services and in non-services sectors;

Aiming to provide investors with a transparent, predictable and efficient regulatory and administrative framework;

Seeking to facilitate the dialogue between governments and investors on matters related to investments;

Recognizing that the provisions of this Agreement are intended to stimulate mutually-beneficial business activity;

Considering the particular needs of developing and especially least-developed countries and desiring to enhance assistance and support for capacity building in this area;

Desiring to facilitate the increasing participation of developing countries in investment flows including, inter alia, through the strengthening of their domestic regulatory environment and its efficiency and competitiveness;

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Valuing the importance of voluntary corporate social responsibility principles and standards for investors;

Acknowledging the essential role of investment in the promotion of sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development;

Aiming to increase investment, including investment in and by micro, small and medium enterprises; and

Reaffirming the importance of the 2030 Agenda for Sustainable Development of the United Nations;

Hereby agree as follows:

SECTION I

Scope and General Principles

Article 1: Scope

1. This Agreement applies to facilitation measures by Members affecting the admission, establishment, acquisition and expansion of investments in services and non-services sectors.
2. Facilitation measures by Members include those of general application and sector-specific that affect investors and their investment.
3. This Agreement does not apply to:
   a. government procurement;
   b. public concessions and the conditions thereby established, provided that the Agreement applies to investments made as a result of concessions. In case of inconsistencies between this Agreement and the terms of the concession, the latter shall prevail; and
   c. market access and right to establish, provided that nothing in this Agreement shall be construed as to modify Members' obligations and commitments under the General Agreement on Trade in Services (GATS) in that regard.
4. This Agreement does not cover:
   a. any dispute resolution procedure not foreseen under the Dispute Settlement Understanding, according to Article 20.6 of this Agreement; and
   b. investment protection rules.
5. Obligations under this Agreement shall apply to measures adopted or maintained by:
   a. the national government of that Member; and
   b. any entity, including a national state enterprise or any other national body, when it exercises any governmental authority delegated to it by the central government of that Member.
6. In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities, including any entity referred to in paragraph5 (b).

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7. Regional and local governments and authorities are encouraged to comply with the measures of this Agreement.

Article 2: Most-Favoured-Nation Treatment

1. With respect to the implementation of this Agreement, each Member shall accord immediately and unconditionally to investors of any other Member and their investments treatment no less favourable than that it accords to investors of any Member and their investments.

2. The provisions of this Agreement shall not be construed as to prevent any Member from conferring or according advantages to investors of any other Member and their investments in the context of setting a common market or other forms of economic integration.

3. This Agreement does not replace and does not add to nor detract from existing rights and obligations of Members under bilateral or plurilateral investment agreements.

Article 3: Right to Regulate

1. Members shall retain the right to regulate in the public interest and to introduce new regulations within their territories so as to achieve legitimate public policy objectives.

Article 4: Electronic documents

1. For the purposes of this Agreement, electronic documents and electronic signatures shall produce the same legal effects as those of paper documents and handwritten signatures, subject to the Member's domestic laws and regulations on electronic documents and electronic signatures.

2. Members shall endeavour to reach the highest possible level of digitalization of procedures related to investments.

Article 5: Transparency

1. The development, application and review of policies and measures affecting investors and their investment shall be transparent, in a manner consistent with the provisions of this Agreement.

SECTION II

Institutional Governance

Article 6: National Focal Point

1. Each Member shall designate a National Focal Point, which shall have the following responsibilities:

a. to provide investors with all relevant public information regarding: applicable domestic laws and regulations, legal competencies of government agencies or entities with delegated authority relevant to their investments, public policies, statistics and all other matters directly relevant to investment;

b. to assist investors from any other Member in obtaining information from government agencies or entities with delegated authority relevant to their investments and, if applicable, subnational authorities;

c. to assist investors from any other Member by seeking to resolve investment-related difficulties, in collaboration with government agencies, entities with delegated authority relevant to their investments, and, if applicable, with subnational authorities;

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d. to address complaints or grievances regarding measures adopted or maintained by a Member affecting investors and their investments, whether in the form of law, regulation, rule, procedure, decision, administrative ruling, or any other form, in violation of the provisions of this Agreement, with a view to preventing disputes;

e. to recommend to the competent authorities, as appropriate, measures to improve the investment environment; and

f. to operate and maintain the Single Electronic Window provided for in Article 9.

2. Without prejudice to the designation of a National Focal Point, some of the responsibilities provided for in the previous paragraph might be fulfilled through the operation and maintenance of the Single Electronic Window.

Article 7: Cooperation among National Focal Points

1. National Focal Points shall cooperate with each other in matters related to investment facilitation.

2. Areas for cooperation include exchange of information on procedural requirements and documentation associated with investment decisions, sharing of experiences regarding implementation of this Agreement, best practices regarding collection and compilation of data relating to investment and technical assistance and capacity building for micro, small and medium enterprises.

Article 8: Notification

1. Each Member shall notify the Committee for Investment Facilitation established under Art. 6 of:

a. the Uniform Resource Locators (URL) of the website referred to in Article 10; and

b. the contact information of the National Focal Point.

SECTION III

Electronic governance

Article 9: Single Electronic Window

1. The Single Electronic Window (SEW) shall constitute a single entry point for the submission of all documents required by the agencies or regulatory bodies involved in the admission, establishment, acquisition and expansion of investments. Documents uploaded through the SEW shall not be subsequently required by any agency or regulatory body by any other means, except in cases in which the authenticity of the electronic document cannot be established or ensured through electronic means alone.

2. The SEW website shall provide information regarding policy, laws and regulations relating to the admission, establishment, acquisition and expansion of investments. Members shall endeavour to include subnational information regarding policy, laws and regulations relating to the admission, establishment, acquisition and expansion of investments.

3. The SEW shall contain the information referred to in Section IV of this Agreement, and, to the extent possible, in one of the languages of the WTO.

4. The information provided by the SEW shall be sufficiently clear, precise and up-to-date so as to enable an investor, in a manner as simple as possible, to be informed of:

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a. the agencies or regulatory bodies involved in the admission, establishment and expansion of any specific investment decision;

b. the documents required by each agency or regulatory body for specific investment decisions; and

c. the timeframe under applicable legislation within which each agency or regulatory body is required to process an application associated to any specific investment decision.

5. The SEW shall not add to nor detract from the competencies and responsibilities of agencies or regulatory bodies involved in the admission, establishment, acquisition and expansion of investments.

6. The SEW shall not prevent agencies or regulatory bodies from establishing requirements associated to the admission, establishment, acquisition and expansion of investments that cannot be met electronically.

7. The agencies and regulatory bodies connected to the SEW shall have access to the information uploaded to the SEW inasmuch as required by the fulfilment of their legal competencies and responsibilities.

8. All information provided by investors through the SEW shall be protected according to the provisions of the applicable national legislation.

9. Members shall endeavor to make it possible for investors to pay throw the SEW all fees and taxes associated to the admission, establishment, maintenance, acquisition and expansion of investments.

SECTION IV

Procedures

Article 10: Processing of Applications

1. Members may establish criteria for the admission, establishment, acquisition and expansion of investments in services and non-services sectors according to their national policies and to modify such criteria at any time, in accordance with the obligations established under relevant WTO Agreements and their international obligations.

2. If criteria are established, they shall be transparent and objective. No application shall be rejected based on the failure of the investor to fulfil criteria that the investor was not supposed to or could not know before the submission of the application.

3. If criteria are established, each Member shall ensure that competent authorities involved in the admission, establishment, acquisition and expansion of investments:

a. process, in a manner as expeditious as possible, all applications, including applications for investment screening, admission and licensing;

b. establish a timeframe for processing an application;

c. ascertain without undue delay the completeness of an application for processing under domestic laws and regulations;

d. inform the applicant of the decision concerning an application;

e. at the request of the applicant, provide without undue delay information concerning the status of the application;

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f. where authorization is required, the competent authorities of a Member shall permit an applicant to submit an application throughout the year and allow a reasonable period for the submission of an application where specific time periods for applications exist.

4. The obligation set out in paragraph 2 is met by the publication of the criteria.

5. The assessment of an application based upon those criteria or the conclusion reached by the competent authorities regarding the application is not subject to the WTO Dispute Settlement Understanding.

6. Criteria that might entail a subjective analysis by the competent authorities or that might be carried out under confidential terms are to be considered transparent and objective if the investor is aware beforehand that the investment will be required to fulfil those criteria.

7. In case an application is considered incomplete, the applicant shall be:

a. informed without undue delay that the application is incomplete;

b. provided with an explanation of why the application is considered incomplete; and

c. provided with the opportunity to submit the information required to complete the application.

8. In case an application is rejected, the agency or regulatory body shall inform the applicant of the reasons for rejection and, where applicable, the procedures for resubmission of an application. The reasons of rejection that are required to be provided under this paragraph encompass only the unfulfillment of the criteria referred to in this article.

9. Any authorization, once granted, shall enter into effect without undue delay, subject to the applicable terms and conditions, and its duration shall not in itself restrict the investment.

10. Each Member shall ensure that application fees charged by the competent authority are reasonable, transparent and do not in themselves restrict the investment. The requirement of guarantees before an authorization is granted shall not in themselves restrict the investment.

Article 11: Appeals and Review

1. Each Member shall provide that any person to whom a competent authority issues a decision has the right, within its territory, to:

a. an administrative appeal to or review by an administrative authority higher than or independent of the competent authority that issued the decision; and/or

b. a judicial appeal or review of the decision.

2. Each Member shall ensure that its procedures for appeal or review are carried out in a non-discriminatory manner.

3. Each Member shall ensure that the person referred to in paragraph 1(a) of this Article is provided with the reasons for the decision of the competent authority so as to enable such a person to have recourse to procedures for appeal or review where necessary.

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SECTION V

Regulatory Environment

Article 12: Prior Comment

1. Each Member shall, in a manner consistent with its domestic laws and regulations, provide opportunities and an appropriate time period to investors and other interested parties to comment on proposed regulations affecting the admission, establishment, acquisition and expansion of investments.

2. Each Member shall, in a manner consistent with its domestic laws and regulations, seek to ensure that new or amended regulations affecting the admission, establishment, acquisition and expansion of investments are published and made electronically available as early as possible before their entry into force.

Article 13: Publication

1. Each Member shall promptly publish the following information in an easily accessible manner and, to the extent possible, in one of the languages of the WTO:

a. laws and other regulations of general application affecting investments;

b. texts or abstracts of public policies that may affect investments and investors; and

c. fees and charges imposed by agencies or regulatory bodies on or in connection with foreign investors and their investments.

2. Where a Member requires authorization for the admission, establishment, acquisition and expansion of investments, it shall publish the information necessary for the investor to comply with the requirements and procedures for obtaining, maintaining, amending and renewing such authorization. Such information shall include, inter alia, where it exists and applicable:

a. the requirements and procedures;

b. contact information of relevant competent authorities;

c. fees;

d. technical standards;

e. procedures for appeal or review of decisions concerning applications;

f. procedures for monitoring or enforcing compliance with the terms and conditions of licenses;

g. opportunities for the involvement of investors in policy and rulemaking, such as through hearings or comments; and

h. time frames for the processing of an application.

SECTION VI

Implementation

Article 14: Schedule of Implementation

1. The provisions of this Agreement shall be implemented upon entry into force, except for the provisions in Section III, which shall be implemented within 3(three) years of entry into force.

2. Notwithstanding the exception provided for in paragraph 1, Members shall strive for early implementation of the provisions of Section III and, should they not be in a position to do so, seek to

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implement such provisions in a progressive and scheduled manner in the transition to electronic procedures only.

SUBSECTION I

Special and Differential Treatment Provisions

Article 15: General Principles

1. The provisions contained in Articles 1 to 14 of this Agreement shall apply to developing and least-developed country Members in accordance with this Subsection.

2. Least-developed country Members shall not be required to implement the provisions of Sections III, IV and V of this Agreement. Least-developed country Members are nonetheless encouraged to implement these provisions to the extent compatible with their special economic situation and their development, trade and financial needs. Upon graduation from least-developed country status, the schedule of implementation of the provisions of this Agreement established under Article 16 shall apply to the graduated Member.

3. Where circumstances allow for the phased introduction of new requirements, procedures, standards and measures relevant to investment, Members shall consider longer phase-in period for the applicability of such measures in sectors of export interest to developing country Members, and in particular to least-developed country Members.

Article 16:

Schedule of Implementation for developing and least-developed country Members

1. Provisions under Sections I and II of this Agreement shall be implemented upon entry into force of this Agreement;

2. Provisions under Sections IV and V of this Agreement shall be implemented within 4 (four) years after the entry into force of this Agreement; and

3. Provisions under Section III of this Agreement shall be implemented within 8 (eight) years after the entry into force of this Agreement.

4. Notwithstanding the implementation period specified above, developing country Members shall strive for early implementation of provisions and, should they not be in a position to do so, seek to implement such provisions in a progressive and scheduled manner in the transition to electronic procedures only.

5. Developing country Members in a position to fulfil the provisions under sections III, IV and V in a shorter timeframe shall notify the Committee referred to in article 6 the revised timeframes for the implementation of the provisions.

Article 17 Technical Assistance

1. Developed country Members, and to the extent possible, developing country Members in a position to do so, shall provide technical assistance to developing country Members and in particular to least-developed country Members, upon request and on mutually agreed terms and conditions.

2. Technical assistance shall be aimed, inter alia, at developing and strengthening the capacities needed to fully implement the obligations arising under this Agreement.

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SECTION VII

Corporate Social Responsibility

Article 18: Corporate Social Responsibility

1. Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the host Member and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle.

2. Investors and their investments shall endeavour to comply with the following voluntary principles and standards of corporate social responsibility, in accordance with the laws adopted by the host Member and with Members' international commitments on this matter:

a. Respecting the protection of the environment and sustainable development and encouraging the use of technologies that do not harm the environment, in accordance with the national policies of Members, in a way that incentivizes economic, social and environmental progress;

b. Respecting human rights of those involved in the activities of the companies, consistent with the international obligations and commitments of the host Member;

c. Stimulating the strengthening of local capacities through close cooperation with the local community;

d. Incentivizing the formation of human capital, particularly creating job opportunities and facilitating the access of workers to professional qualification;

e. Abstaining from seeking or accepting exemptions other than those established in the law of the host Member with respect to the environment, health, safety, labour, financial incentives or other matters;

f. Supporting and maintaining principles of sound corporate governance, as well as developing and applying good practices in corporate governance;

g. Developing and applying effective self-regulated practices and management systems that foster a relationship of mutual trust between the enterprises and the societies in which they carry out their operations;

h. Promoting the knowledge of workers regarding company policies through the appropriate publication of these policies, including through recourse to professional capacity building programs;

i. Abstaining from discriminatory or disciplinary actions against workers who report severe occurrences to the management or, when appropriate, to the competent public authorities, of practices in breach of the law or standards of sound corporate governance to which the enterprise is subjected;

j. Encouraging, whenever possible, the business partners, including suppliers and outsourced services, to apply principles of business conduct consistent with the principles provided for in this Article; and

k. Respecting local political processes and activities.

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3. Investors are invited to keep the National Focal Point informed about their internal corporate social responsibility policies and practices.

SECTION VIII

Institutional Framework

Article 19: WTO Committee on Investment Facilitation

1. A Committee on Investment Facilitation is hereby established.
2. The Committee shall be open for participation by all Members and shall elect its own Chairperson.
3. The Committee shall meet as needed and envisaged by the relevant provisions of this Agreement, but no less than twice a year, for the purpose of affording Members the opportunity to raise any matters related to the implementation of this Agreement or the furtherance of its objectives.
4. The Committee shall establish its own rules of procedure.
5. It shall be open to any Member to suggest items related to the implementation of this Agreement for inclusion in the agenda of any Committee's meeting.
6. The Committee shall carry out such responsibilities as assigned to it under this Agreement or by the Members, such as:
   a. follow the implementation of this Agreement;
   b. discuss issues related to investment facilitation of general interest;
   c. propose cooperation and facilitation agendas, which may include issues such as: transfer of funds, personnel mobility and logistical matters, among others;
   d. exchange experiences in investment facilitation;
   e. discuss views and requests from investors and other relevant stakeholders, when applicable, on specific issues related to the work of the Committee; and
   f. compile and disseminate international best practices.
7. Subsidiary bodies focused on specific issues may be established.
8. The Committee may develop procedures for Members to share relevant information and best practices.
9. The Committee shall maintain close contact with other international organizations in the field of investment facilitation, such as UNCTAD, World Bank and the OECD, with the objective of securing the best available advice for the implementation and administration of this Agreement and in order to avoid duplication of efforts. To this end, the Committee may invite representatives of such organizations or their subsidiary bodies to:
   a. attend meetings of the Committee; and
   b. discuss specific matters related to the implementation of this Agreement.
10. The Committee shall review the operation and implementation of this Agreement five years from its entry into force, and periodically thereafter. Recommendations arising from the review shall be presented to the General Council.

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11. The Committee may establish open-ended working-groups to discuss specific issues pertinent to the implementation of this Agreement. Any conclusion shall be reported to the Committee.

SECTION IX

Final Provisions

Article 20: Final Provisions

1. For the purpose of this Agreement, the term "Member" is deemed to include the competent authority of that Member.
2. All provisions of this Agreement are binding on all Members.
3. Members of a customs union or a regional economic arrangement may adopt regional approaches to assist in the implementation of their obligations under this Agreement including through the establishment and use of regional bodies.
4. Notwithstanding the general interpretative note to Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994 and GATS. In addition, nothing in this Agreement shall be construed as diminishing the rights and obligations of Members under the Agreement on Trade-Related Investment Measures.
5. All exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement. Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement Establishing the World Trade Organization and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.
6. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided for in this Agreement.
7. Article 22.3(c) of the Dispute Settlement Understanding shall not apply.
8. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

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