From Bilateral Investment Treaties to Cooperation and Facilitation Investment Agreements: A Study of the Brazilian Experience

By

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AUTHOR'S DECLARATION

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners. I understand that my thesis may be made electronically available to the public.

Abstract

Bilateral investment treaties (BITs) provide rules to the flow of foreign direct investment between two countries. This type of agreement establishes the main terms and conditions under which individuals and companies of one country can make investments in the jurisdiction of another country. Brazil signed a number of BITs in the 1990s but did not ratify any of them. Since 2015, the Brazilian government has signed several new agreements, of which two have been ratified and are already in force. The other agreements seem to be following the same path towards ratification. This thesis seeks to explain this change. It argues that three factors have been crucial in bringing the success in ratification of this latest wave of agreements: 1) the reformulation of the investment agreements from the traditional template of BITs to the new template of Cooperation and Facilitation Investment Agreements (CFIAs); 2) the changing role of Brazil from an importer to both an importer and an exporter of capital; and 3) the extensive political organization, both inside and outside the government, to support the ratification of the agreements.

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Dedication

This thesis is dedicated to my father, Samuel de Almeida Filho, who was always the most supportive person to all my accomplishments and dreams (no matter how crazy they were), but unfortunately could not see this thesis being completed. Dad, I miss you every single day.

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List of Abbreviations

ACFI – Bilateral Investment Treaty (from the Portuguese translation *Acordo de Cooperação e Facilitação de Investimento*)

APEX – Brazilian Trade and Investment Promotion Agency

BACEN – Brazilian Central Bank

BIT – Bilateral Investment Treaty

CAMEX – Brazil's Council of Ministers of the Foreign Trade Chamber

CFIA – Cooperation and Facilitation Investment Agreement

CNI –Brazil's National Confederation of Industry

CSR – Corporate Social Responsibility

FDI – Foreign Direct Investment

FCN – Friendship, Commerce, and Navigation Treaties

FIESP – Federation of Industries of the State of São Paulo

FTA – Free Trade Agreement

GTEX – Foreign Trade Strategic Studies Technical Group

IIA – International Investment Agreement

ICSID – International Centre for Settlement of Investment Disputes

IISD – International Institute for Sustainable Development

Lula – Luís Inácio da Silva

MIA – Multilateral Investment Agreement

MDIC – Ministry of Industry and Foreign Trade

MF – Ministry of Finance

MRE – Ministry of Foreign Relations

MNCs – Multinational corporations

NIEO – New International Economic Order

OECD – Organization for Economic Co-operation and Development

SECEX – Secretariat of Foreign Trade

TRIMS – Agreement on Trade-Related Investment Measures

UNCTAD – United Nations Conference on Trade and Development

WTO – World Trade Organization

Chapter 1: Introduction

International bilateral investment treaties can be considered an important tool to protect and stimulate foreign investments between the two signatory countries since they establish the main terms and conditions under which individuals and companies of one country can make investments in the jurisdiction of another country. These treaties can be understood to facilitate foreign investments, since they create a more regulated environment for such investment.

Bilateral investment agreements have been signed for more than fifty years. However, only in the nineties was there a significant expansion in the number of signed agreements. As of September 2018, a total of 2952 Bilateral Investment Agreements (BITs) have been signed, in which 2358 are in force (UNCTAD - United Nations Conference on Trade and Development, n.d.). As any international treaty, bilateral investment agreements must be ratified by the signatories so that they can produce the expected effects within the national territory of each signatory country. For this reason, once signed, these agreements will have to follow a ratification process, which will vary between the countries since it is established by each country's internal legal systems.

The main purpose of this thesis is to investigate what major factors lead Brazil to ratify the first bilateral investment agreement in 2017 and the second one very recently, in September 2018, which has definitely inserted the country into the international arena of investment treaties. This research will focus on Brazil's perspective in regards to bilateral investment treaties due to Brazil's curious and unique scenario. Brazil's perspective regarding BITs can be divided into two different waves, in which the first one, in the 1990s, was characterized by a total failure in terms of implementation of BITs: none of the BITs signed by the Brazilian executive was ratified by the National Congress. The second wave, however, in which Brazil is still inserted, has a different perspective: two of the new signed agreements were finally ratified and incorporated into Brazil's internal laws, respectively in 2017 and 2018, and new other agreements seem to be following the same path. Specifically, the research will focus on the second wave mentioned above in order to clarify what could be the main reasons that potentially made those new treaties' ratification a reality. For this purpose, this thesis will search for internal and external factors that influenced the Brazilian legislative and executive officials to alter their position to finally approve the signed agreements and incorporate them into the Brazilian legislation.

The remainder of this thesis is organized as follows. The second chapter will introduce the research with the subject of bilateral investment agreements: the foreign direct investment. The concept of foreign direct investment and some relevant discussions involving the theme will be presented, in addition to a brief analysis of Brazil's perspective in terms of FDI flows. The third chapter will focus on the main topic of this thesis: the bilateral investment agreements. Besides a brief historical evolution, the chapter will present some important critiques and challenges faced by this type of international treaty. A focus on Brazil will also be part of this chapter, with an introduction to Brazil's development in terms of bilateral investment agreements and some highlights of Brazil's internal ratification process of BITs, which will be extremely relevant to understand the analysis and conclusions of this research, in addition to the current status of the CFIAs ratification process. The fourth chapter will introduce to the reader the new wave of bilateral investment agreements signed by Brazil: the Cooperation and Facilitation Investment Agreements (CFIAs). The main characteristics of this new type of BIT will be presented, together with a comparison to the previous nineties' agreements, for a better understanding of the changes in the new Brazilian framework of bilateral investment agreements.

Chapter 5 of the thesis will provide the core analysis of this research: the possible explanations for the alteration in Brazil's decision in ratifying bilateral investment agreements. It will be argued that three main factors have been crucial in bringing the success in ratification of this latest wave of bilateral investment agreements signed by Brazil. The first factor is the reformulation of the investment agreements, from the traditional template of BITs to the new template of Cooperation and Facilitation Investment Agreements signed after 2015. The second factor is the changing role of Brazil from an importer of foreign capital to both an importer and an exporter of capital. And the third factor is the extensive political organization in Brazil, both inside and outside the government, to support the ratification of the new agreements. Finally, this chapter will be followed by a brief conclusion, with some expected outcomes of the new Cooperation and Facilitation Investment Agreements signed by Brazil and some possible research topics that could be developed in the future.

Chapter 2: Outlining Foreign Direct Investments

The main objective of this chapter is to introduce a brief overview of the bilateral investment treaty's main focus – the foreign direct investment. For this purpose, the chapter is divided into three parts. The first one will introduce the reader to the concept of foreign direct investment and some perspectives involving this type of investment. The second section of this chapter will provide some relevant discussions regarding the effects of foreign direct investment on the host country's development. Finally, the last section will provide the reader with the Brazilian perspective and relevance in terms of foreign direct investment, as the study subject of this research.

2.1 The concept of foreign direct investment

Foreign Direct Investment ("FDI") is the type of expenditure in which the investor makes a longstanding investment in another country to produce goods and services. It can be defined as any capital contribution with the purpose of increasing the productive capacity of a country, both in the creation or extension of a company. The investment through stock or currency in the short term, for fast profit, is not considered an FDI (Castro J. R., 2017).

In other words, FDI is an investment that corporations make to produce goods and services in other countries rather than their country of origin (Pandya, 2014, p. 1). It includes "all industries, from agriculture to advanced manufacturing to high-skill services like banking and law" (Pandya, 2014, p. xi). This type of investment offers the possibility of companies entering into new markets to expand their net of consumers or to guarantee a lower cost of production (Collins, 2013, p. 6), when the expansion is based on states with lower production costs, including wages and raw material.

The FDI is a capital investment in the domestic productive structure of another country, which can occur in the form of stock investment: that is, the investor participates in the corporate structure of an existing company by the acquisition of shares or by the creation of a new corporation. In terms of type of investments, FDI is notably interesting since the resources will remain in the host country for a longer period and will increase the host country's productive capacity, in opposition to the speculative investment that will be introduced to the domestic market and might leave at any moment (Wolffenbüttel, 2006).

The Brazilian Central Bank (BACEN) is the agency responsible for regulating the operations of foreign direct investments in Brazil. The public or private actors that aim to invest in Brazil have a legal obligation to register themselves in the BACEN systems, according to the Brazilian Laws number 4.131/1962 and number 11.371/2006 (Banco Central do Brasil, 2018). The role of BACEN in FDI is established by the Regulation of the Exchange Market and International Capitals, under the BACEN administrative memorandum number 3.689/2013, specifically Chapter II[1]. Besides the mandatory registration process at BACEN, foreign investors must follow some additional procedures:

> Foreigners investing in Brazil must register their investment with the BCB within 30 days of the inflow of resources to Brazil. Registration is done electronically. Investments involving royalties and technology transfer must be registered with Brazil's patent office, the National Institute of Industrial Property (INPI). Investors must also have a local representative in Brazil. Portfolio investors must have a Brazilian financial administrator and register with the Brazilian Securities Exchange Commission (CVM) (U.S. State Department's Office of Investment Affairs' Investment Climate Statement, 2017).

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[1] Available at: http://www.bcb.gov.br/Rex/legce/port/Circular3689.asp#TituloIICapituloII.

According to BACEN, the term FDI includes the total or partial capital participation in companies located in Brazil and the inter-company loans issued by a company's headquarter located in another country to its subsidiaries in Brazil or vice-versa (sent by a subsidiary in Brazil to its headquarter located in another country) (Banco Central do Brasil, 2002). Such participation in a foreign market can be created by the establishment of a new firm, as a subsidiary of the international holding company, or through mergers and acquisitions, as mentioned before.

One of the main actors in the foreign investment perspective is multinational corporations (MNCs). Other legal actors could be states, non-governmental organizations, investment funds, and private equity institutions. Corporations choose to become multinationals to expand their goods and services provisions into foreign markets, while in many cases still maintaining some control over their assets. Such assets include technology knowledge and intellectual properties, which are, in most of the cases, the core of these corporations (Pandya, 2014, p. 22). As a strategic decision, multinational corporations prefer to keep the control over their assets, instead of sharing their know-how and secrets under technology-licensing contracts and supplier-producer contracts (Pandya, 2014, p. 27).

The objectives of MNCs will vary depending on the company's strategy in terms of foreign investment: it can be based on export-oriented investments or market-oriented investments. MNCs in "capital-rich economies transfer their assets to capital-poor economies, where, due to the relative scarcity of capital, a higher rental rate for capital prevails" (Pandya, 2014, p. 31). This is the export-oriented investment, which is based mainly on the production and labour costs to enhance the economic return of the MNCs when exporting the goods and services produced. The main strategic function of these companies will be kept with the headquarter in the home company, which may mean that technology transfer will not be in the highest intensity in this type of FDI.

Other firms have a different approach when expanding their operations abroad. These MNCs will organize the production to compete in foreign product markets. This is the market-oriented FDI (Pandya, 2014, p. 31). The services and goods will be produced in the host country and will also be sold in the host country's market. This type of FDI will probably mean a more direct competition to host country's national industry, and it will allow technology, marketing strategies and research knowledge to be shared with the host country's local market.

In a certain way, market-oriented FDI flows will be more present when the host economy has space and opportunities for the company's increase in profits. In other words, the market itself will be decisive to this type of FDI. In larger developing countries, such as Brazil and Mexico, for example, MNCs may choose the market-oriented FDI in order to avoid high trade barriers (Glen & DeRouen Jr., 2006, p. 53). Over the past two decades, most Latin American countries have implemented some market-oriented reforms, even though most economic reforms have shown limited effect on FDI inflows (Glen & DeRouen Jr., 2006).

2.2 Foreign direct investment: academic discussions

The significance of FDI to a country and its economic development is essential to better understand and direct the country's policies in terms of FDI. Understanding if FDI will promote domestic economic growth or if it will produce negative effects on the internal domestic economy is a relevant question to every nation.

Many authors explore the concept of FDI and its relationship with the development of the host country. Considering that the flow of foreign investment has increased over time, understanding the effects and impacts of this type of investment to the host countries is important, not only to define if the FDI is a significant economic ally to the host country, but mainly to explain how it would influence public policies and government decision-making. In other words, should FDI be encouraged by public policies or should FDI be strongly regulated to protect the domestic economy?

The effects of FDI in development still cause a great divergence among scholars. One line of thought argues that FDI has no positive spillover in the host countries' development. Mainly based on quantitative studies, some authors argue that there is no clear influence of FDI on a country's growth, especially, and including, developing countries (Lipsey & Sjoholm, 2005; Carcovik & Levine, 2005). And other authors go beyond: in countries without extensive human capital, FDI can actually slow the rate of human development and cannot be a substitute in the world's poorer countries' development (Kosack & Tobin, 2006, p. 236). Other negative repercussions associated with foreign investment presented by diverse scholars include an increased dependency on capital-exporting countries, the host country's decapitalization, escalations of economic inequality, and a crowding-out of domestic investors (Calvert & Pickup, 2016, p. 202).

Other authors argue that the presence of foreign firms in an economy, which increases the FDI flows in the host country, has positive outcomes for the host economy, including higher productivity of domestic firms in the supplier industries (Javorcik & Spatareanu, 2005). For this line that sustains a positive spillover of FDI, the government has an essential role in the policy-making decisions – a policy well engaged with the private sector can have better results in terms of private investment by foreign investors.

FDI will create a network of investment, especially in developing countries, which will allow these countries to gain high-quality manufacturing jobs and augment their industry capacities (Pandya, 2014, p. 4). At least, this is a positive argument that is used by authors who encourage the FDI flows. An emblematic example is the case study of Costa Rica and the installation of new operations of Intel in the country and how this planned foreign investment has benefited the country and its local economy (Mortimore & Vergara, 2006).

In terms of FDI regulation, Latin America has experienced certain variance between its countries. For example, "Chile, Colombia and Peru are among the world's most open economies, with almost no restrictions on foreign ownership in the 32 sectors covered by the FDI Regulations indicators" (The World Bank Group and CAF - Development Bank of Latin America, 2013, p. 10). By contrast, from the countries listed in the same report of The World Bank Group and CAF (which are Brazil, Chile, Colombia, Mexico and Peru), Mexico is the most restricted economy. Brazil seems to be in an intermediary scenario: of the 32 sectors measured, foreign equity ownership restrictions exist in three sectors, namely television broadcasting, newspaper publishing and aviation. An overview of the other sectors is included below:

> Brazil recently revoked the restriction on foreign participation in cable television companies and is currently discussing opening up other sectors, including civil aviation, where an increase of the limit for foreign investment from 20 percent to 49 percent is under consideration, which is perceived by the market as a requirement for developing the sector. Another area which is currently under discussion is the review of existing restrictions on the acquisition or leasing of rural property by foreign individuals or entities, a restriction that is having an impact on the development of agribusiness in Brazil (The World Bank Group and CAF - Development Bank of Latin America, 2013, p. 10).

An indirect relationship between foreign direct investment flows and regulation has been observed by some authors. The less a country has established internal regulations (especially ownership restrictions), the higher is the volume of foreign direct investments (Pandya, 2014). The author even demonstrates that ownership restrictions remain more common the more FDI into the industry is market-oriented as a way to protect the local economy.

These ownership restrictions usually stipulate the "permissible maximum of foreign equity participation, ranging from sectors being either completely closed or completely open to foreign ownership" (The World Bank Group and CAF - Development Bank of Latin America, 2013, p. 7). Examples of such restrictions are the mandatory joint ownership (joint-venture) of companies between multinational corporations and local firms, including state-owned enterprises, in addition to the case in which equity stakes in foreign-operated projects are managed through a ministry or a separate agency (Ghebrihiweta & Motchenkovab, 2017, p. 320). Ownership regulations do not have the same standard and principles in all market-oriented FDI – this will vary considerably depending on the sector and type of economy. This variation seems directly connected to the state's interest in the economy sector. As an example, we can use the case of Brazil.

Article 172 of the Brazilian Constitution determines that the law will regulate the foreign direct investments based on the national interest. Based on this constitutional dictate, foreign equity ownership restrictions exist in only three sectors: television broadcasting, newspaper publishing and aviation (The World Bank Group and CAF - Development Bank of Latin America, 2013, p. 10). The insurance and reinsurance markets have less restricted implications: the foreign company can invest in the sector, but it must establish a subsidiary, or enter through a joint venture, or through the acquisition of, or partnership with, a local company. A stand-alone investment is not permitted. And the banking licenses applications are reviewed by BACEN on a case-by-case basis (U.S. State Department's Office of Investment Affairs' Investment Climate Statement, 2017).

Recently, Brazil seems to be moving toward a less restricted environment. In 2011, the Brazilian Law 12485/2011 revoked the restriction on foreign participation in cable television companies. Brazil's Congress is also discussing opening up other sectors, including civil aviation (where an increase of the limit for foreign investment from 20 percent to 49 percent is under consideration) and the acquisition or leasing of rural property by foreign individuals or entities (The World Bank Group and CAF - Development Bank of Latin America, 2013, p. 10). Regulation would be less common in industries with product differentiation since there is a weaker threat of product market competition (Pandya, 2014, pp. 126-127). On the opposite side, monopoly sectors are expected to produce more regulations from the government, since the product differentiation is less relevant.

2.3 Brazil's relevance in the foreign direct investment arena

In the most recent decades, Latin America has become a relevant player in the global political economy. Most Latin American governments have implemented neoliberal reforms to "meet conditions imposed by the Bretton Woods institutions for securing loans needed to tackle economic crises, reforms that encompassed the privatization, deregulation and liberalization of domestic economies, including the adoption of incentives to attract foreign capital" (Calvert & Pickup, 2016, pp. 201-202). With the adoption of neoliberal policies, Latin America has become an important destination for foreign investment.

Brazil is a large developing economy, and the biggest economy in Latin America, with a population of over 207 million and a Gross Domestic Product (GDP) of US$ 1.8 trillion – the ninth in the world. Brazil has attracted significant foreign direct investment in the past decades. In 2016, Brazil has attracted a total of US$ 78.8 billion in inflows of FDI, and has US$ 12.8 billion in outflows of FDI, representing 4.4% and 0.7%, respectively, of the country's GDP (The World Bank, 2018).

The evolution of Brazil's flows of FDI in the last decades is presented in Figure 1.

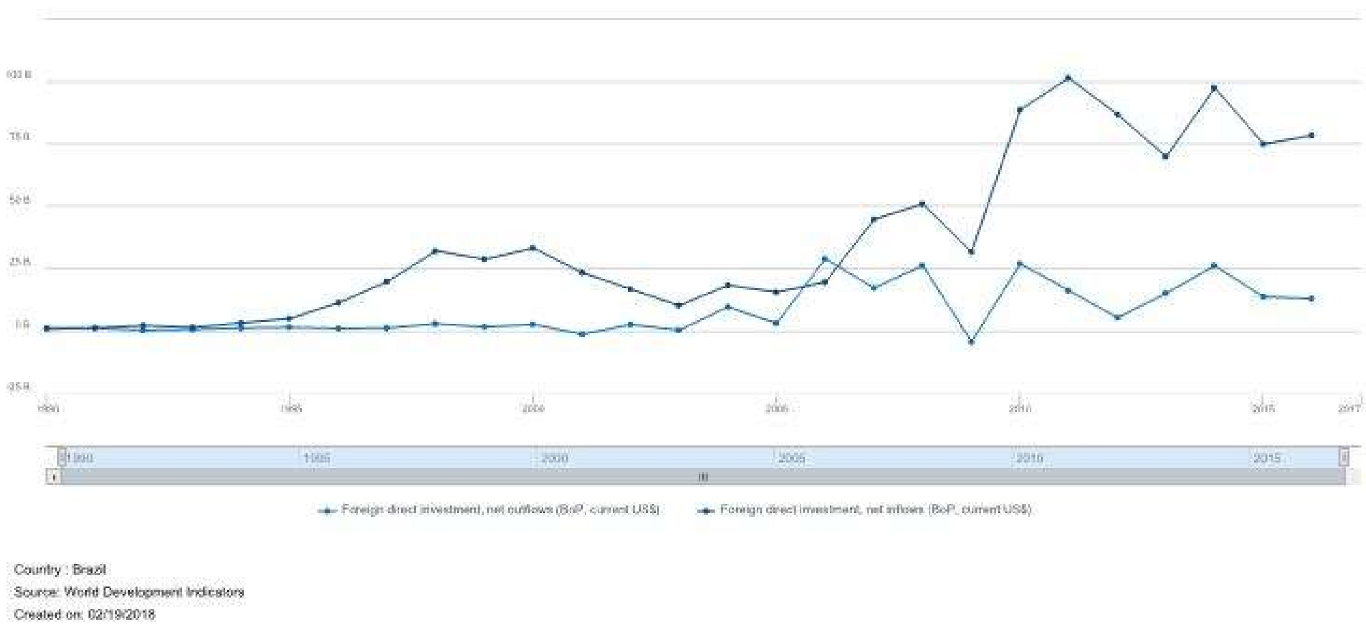

Figure 1: Brazil's flows of FDI between 1990 and 2017

Even though Brazil has experienced some political instability in the past decade, including many political scandals and a president impeachment process[2], and more than four years of an economic recession, according to Figure 1, the inflows and outflows of FDI in the country have continued to

[2] Dilma Roussef was impeached on April 17th 2016. On May, her powers were suspended for the duration of the trial, when Vice President Michel Temer became acting president.

be substantial. In 2016, Brazil was the 7th country in the world in terms of its FDI inflows (Castro J. R., 2017) and the 26th country in terms of FDI outflows, besides being the first country in Latin America and the Caribbean, both in terms of its inflows and outflows of FDI (The World Bank, 2018). This is a thorough demonstration that Brazil embraces foreign direct investment as a positive outcome to its internal economic development.

It is possible to identify a few explanations to why Brazil has attracted that a considerable volume of foreign direct investment in the past decades. Brazil has a huge domestic market, of more than 207 million habitants, as seen above, and it has easy access to raw materials, essential to most of the industries and sectors. Brazil is a very diversified economy, not so influenced by international crises, and has a strategic geographical position that facilitates access to the other South American countries (Export Entreprises SA, 2017). In addition to, although it has a very slow legal system, Brazil has demonstrated the greatest adherence to the rule of law, including publicized rules, fair regulatory enforcement and good access to civil justice (Collins, 2013, p. 44).

For those reasons, Brazil is certainly an important international player in the FDI arena, even during some economic recession periods experienced by the country, which makes its perspective on foreign direct investment and, consequently, the regulation of this matter by bilateral investment agreements, a relevant field of study.

Chapter 3: Concept, Controversies and Evolution of Bilateral Investment Treaties

This chapter will introduce an overview of the core object of study of the present thesis: the bilateral investment regime. The first part will present the BIT's regime and its historical evolution, followed by the main reasons that drive countries to sign bilateral investment agreements. The third section will introduce some critiques and current discussions involving bilateral investment treaties to illustrate the main challenges being faced by the regime. The fourth section of this chapter is focused on Brazil. It will introduce the reader to Brazil's evolution in terms of bilateral investment agreements, both from the perspective of the former wave of BITs signed by Brazil in the nineties and from the perspective of the new Cooperation and Facilitation Investment Agreements. In addition, the section will also provide some insights related to the bilateral investment agreements signing and ratification process under the Brazilian legislation, a requirement for BITs to produce effects. This approach will be essential to understand the political approvals that are necessary for the enforceability of this type of agreement. Finally, it will present the current status of each CFIA that has been signed by Brazil, indicating how the new model has been well accepted by the Brazilian legislative. This chapter will finalize with some recent trends regarding bilateral investment agreements for some specific chosen countries, besides Brazil.

3.1 The evolution of BITs

Many debates have been held in terms of a multilateral agreement to regulate foreign direct investment, but no agreement with such characteristic has been reached so far. A multilateral investment agreement (MIA) was discussed extensively from 1970 to 1998, even culminating with the Organization for Economic Cooperation and Development (OECD) working on a draft MIA for its members during the period between 1995 and 1998, but no agreement was ever concluded (Åslund, 2013, p. 5). The Agreement on Trade-Related Investment Measures (TRIMS) in the Uruguay Round, signed by all the members in 1995, could be a close analog to a multilateral agreement, however it was only intended to address the trade effects of investment measures, not to be a regulation of FDI properly (Collins, 2013, p. 14).

The bilateral investment regime, on the other hand, has emerged as a successful instrument to facilitate FDI. The origin of the bilateral investment regime is in the post-World War II era and was initiated by the United States in the late 1940s, with the negotiation of the so-called new treaties of “Friendship, Commerce, and Navigation” – the FCNs (Lipson, 1985, p. 96). These treaties were already used before in the previous century to address military questions, port access and navigation, basically the trade relationships between merchants (Medrado & Daudt, 2015). However, in the late 1940s, after the Second World War, new bilateral FCN treaties would concentrate on the rights and privileges of foreign investments, to “stimulate international capital flows by creating a general regulatory framework for foreign commerce and investment” (Lipson, 1985, p. 96). Such treaties included specific provisions regarding foreign investment, including those related to national treatment in the case of a foreign company establishment (Medrado & Daudt, 2015).

In 1962, the United Nations Resolution n. 1803 was signed. The Resolution codified the principle of permanent sovereignty over natural resources, providing newly independent countries with a "legal shield" against the property or contract rights claims of foreign companies or states (Kaushal, 2009). Even with Resolution n. 1803, many developing countries saw this balance as ambiguous and sought a new equilibrium. In the 1970s, developing countries called for a "New International Economic Order (NIEO) with complete national control over foreign corporations and the freedom to nationalize or expropriate foreign property according to national rules", which culminated in the United Nations Resolution n. 3281 (Kaushal, 2009, p. 500), a charter of economic rights and duties of states.

In the 1990s, the attraction of foreign investment became prominent and the 1974 Charter (the Resolution n. 3281) was replaced by a large web of BITs as the prevailing text in the sphere of international investment law (Kaushal, 2009, p. 501). The changes on the part of developing countries that culminated with this replacement can be explained as follows:

> The momentum of the BIT phenomenon is attributable to several changes in the historical context, beginning in the late 1970s. The new era ushered in the debt crisis, the abandonment of command economy models coupled with the rise of free market economies in Central and Eastern Europe, the decline in official development assistance, and the internal economic restructuring demanded by international financial institutions. (Kaushal, 2009, p. 502)

A bilateral investment treaty is an agreement between two countries to regulate the foreign direct investment from one country into the second country and vice-versa. This type of international treaty will introduce diverse clauses and provisions to create rules, standards and protection mechanisms. Some common provisions of BITs are: a preamble followed by relevant definitions, such as a definition of investment and investor; admission and establishment of foreign investors; fair and equitable treatment (sometimes combined with the principle of full protection and security and/or the international minimum standard); most-favourable nation principle; legal preconditions for expropriation or nationalization; protection in the event of war and civil disturbance; transfer of funds mechanisms; denial-of-benefits clauses; transparency provisions; reservations to one or more of the specific obligations in the agreement; and last, but indeed mostly discussed, the investor-state dispute settlement procedures (UNCTAD - United Nations Conference on Trade and Development, 2007, pp. xi-xiii).

According to UNCTAD, between 1995 and 2006 there were significant qualitative developments in BITs, as these agreements tended to become more complex and cover a broader set of issues. For instance, the preamble of BITs were not only introducing the objectives of investment promotion and protection, but also underlining "that this goal must not be pursued at the expense of other public interests, such as health, safety, environment and labour" (UNCTAD - United Nations Conference on Trade and Development, 2007, p. xi). The BIT is implemented specifically in the sphere of the two signatories' countries, which could introduce an arena of certain stability, since those clauses and provisions could be enforced to minimize the impact of economic, political or legal risks. According to Hanessian and Kloes:

> BITs may be seen as ''free insurance'' since BIT protection can often be achieved at minimal cost, for example, by interposing a holding company in a jurisdiction that has a favorable BIT with the country in which the investment is made. BITs generally include substantive guarantees regarding the treatment of investors, which should be fair, equitable, non-discriminatory, and not less favorable than the treatment of domestic investors or investors from other states. (Hanessian & Kloes, 2011)

Together with regional treaties, the BITs are understood by some as the most important method of regulating FDI (Collins, 2013; Allee & Peinhardt, 2014). The BIT regime became very popular in the past decades, with states worldwide signing multiple BITs (Allee & Peinhardt, 2014, p. 47). Although the first bilateral investment treaty was signed in 1959, between Germany and Pakistan, not many BITs were signed until the nineties. From 1959 until 1989, only a total of 386 BITs were signed, which represents 13% of the total treaties signed until today. However, this number exploded during the 1990s: according to UNCTAD, more than fifty developing countries enacted more open domestic laws on foreign investment, and during the same period, the number of signed

BITs increased threefold (Kosack & Tobin, 2006, p. 206). As of September 2018, a total of 2952 BITs have been signed, in which 2358 are in force (UNCTAD - United Nations Conference on Trade and Development, n.d.).

Most of the current bilateral investment treaties have been negotiated and signed between "traditional capital-exporting countries" and a developing country (Dolzer R. , 2005, p. 955). However, most recently there has been a change: many BITs were concluded between two developing countries (Azubuike, 2013 , pp. 162-163). This shows a rise of developing countries as major international actors, including in the field of FDI.

3.2 Why countries sign BITs

One can say that countries decide to enter into a BIT to minimize the risks for the private corporations and home countries' economy, especially when the investment will occur in poor developing countries. To increase the flows of FDI and to directly benefit from this type of investment, "host countries have to reassure foreign investors that their capital will not be expropriated (directly or indirectly) after they make an investment" (Milner, 2014 , p. 4).

In a way, developing countries are competing among themselves for foreign investments from private corporations, that are in a privileged position in terms of choosing the best destination for such investment. By providing a credible commitment mechanism to foreign investors through BITs, the host countries are increasing the chances of being the chosen country for this type of investment (or at least this is the main argument provided by those who encourage BITs).

BITs are an interesting protective instrument for developed economies, mainly when they are figuring as the exporter of capital (the home state). The BIT will create a safe environment for the home state's companies to expand their investment in another country. This is even more relevant when the destination of the investment is a developing or underdeveloped country. In this scenario, the BIT can be an additional protection against host state's investment expropriation measures, in addition to providing an additional venue to the domestic legal system of host states, as well as protection against more corrupt states (since BITs can bring the investors' claim to an international arbitration process).

It is more common to have BITs between developed and developing countries, but most recently, the South-South BITs have risen with some strength. This can be deduced when investigating the list of BITs in force in the UNCTAD's Investment Policy Hub website[3]. BITs between two developed countries are not as common, which emphasizes the reasons why BITs are signed in the first place: as a protection for home countries and their corporations and a way that developing countries stand out in the investment market. Even when North-North BITs might be signed, it is expected that there will be an equal distribution of rights and obligations between the countries when compared to North-South bilateral investment treaties (which indirectly might lead to disputes having a greater possibility of settlement through diplomatic interventions) (Kollamparambil, 2016, p. 6).

BITs are understood by some as an instrument to promote an increase in the investment flows by guaranteeing more beneficial terms to foreign investors, even in comparison to domestic firms:

> BITs in particular are said to be uniquely positioned to promote and protect foreign direct investment through their assurances for investors' property rights. They provide foreign investors with rights far in

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[3] The Investment Policy Hub (http://investmentpolicyhub.unctad.org/) is a very helpful tool to understand the BITs scenario across the world. It provides the reader with large information of treaties signed and in force, besides reports and evaluations prepared by UNCTAD.

> excess of what they would receive in a non-treaty, customary international law setting, and far superior to those provided to domestic investors (Kaushal, 2009, p. 497).

One of the most important clauses in BITs to provide this stable environment for foreign investment is the dispute-settlement procedure. This procedure leads to the possibility of having a third “impartial” party responsible for the arbitration of disputes. Some international agreements generally bring a common contracting issue – the enforceability aspect. In other words, this refers to how the provisions of the agreement will be complied by the parties. For regular legal procedures between a company and a state, the company will initiate the process following such state’s internal legal apparatus, which might be a slower and pro-state process. Treaties that allow third parties to settle disputes can minimize this concern.

Even though BITs are signed between two states – the home and the host countries – disputes under BITs usually occur between a private investor of the home state against the host state in relation to an investment in the host state (Kaushal, 2009, p. 498). When allowing foreign investors to utilize international legal institutions to directly challenge the legality of a host state action, BITs are providing a strong protection mechanism to the MNCs (Allee & Peinhardt, 2014, p. 52). This is a very relevant topic since a large number of BITs contain some sort of dispute settlement provision. According to a study, in 2/5 of the total of signed BITs, the two states have agreed in advance to settle disputes through international arbitration, in which most commonly the treaties will specify one or two options for an institutionalized international arbitration venue (Allee & Peinhardt, 2014, pp. 52-55).

Some empirical tests conducted by Allee & Peinhardt have demonstrated that home countries in general, and particularly countries with many large multinationals and right-wing governments, should prefer BITs to include investor settlement provisions that facilitate enforcement (Allee &

Peinhardt, 2014, p. 72). The same study[4] also indicates that powerful home states are more likely to get all of the features they and their investors desire included in the treaty: "preconsent to international arbitration, a greater number of venues through which investors can pursue grievances, and at least one institutionalized arbitration option — all of which enhance overall treaty enforceability" (Allee & Peinhardt, 2014, pp. 72-73). Power and preference of the home states are indeed defining the major characteristics of the executed BITs, especially in the dispute provisions. The result is that, after a BIT is in force, if the host state creates an adverse legislation that would negatively impact the investor, such as measures that would allow investment expropriation, changes in the tax laws or restrictions to the transfer of profits out of the country, then the foreign investor may bring a claim for compensation.

3.3 Controversies about the BIT regime

Some authors point out positive effects of BITs, such as how a BIT can protect "against entry barriers, performance requirements, foreign-exchange blockage, and unfair competition from state-owned enterprises", in addition to providing for dispute resolutions (Lipson, 1985, p. 97). These positive effects can be experienced by the MNCs and the home countries. However, the insurgence of a direct criticism to the bilateral investment regime has become more and more common.

One criticism of the BITs is the loss of sovereignty associated with the dispute-settlement mechanisms. Countries are increasingly critical of both (i) the ability of firms protected by a BIT to sue directly the host state, a mechanism that usually does not exist to any other domestic or

[4] This study introduces two other potential reasons for variations in BITs: tying hands and rational design approaches. However, the study did not find any direct correlation between such approaches and the variation in the dispute-settlement clauses among BITs.

foreign firm in the host country, and (ii) the delegation of the arbitration process to third parties (Milner, 2014 , p. 5). It is becoming a certain common sense that with BITs, developing countries bargained away sovereignty to enhance foreign property and contract rights (Kaushal, 2009, p. 496). The BITs can restrict the states' sovereignty in two ways. First, the primary obligations in BITs will narrow the permissible types of regulation that such state will have, without triggering a flood of legal procedures against the state. Secondly, BITs remove the ability of the host state to subject foreign investors to its domestic legal system (Kaushal, 2009, p. 511).

At the end of the day, depending on the numbers of signed BITs and the number and volume of foreign direct investors and investments, the state might prefer not to change the laws in response to domestic pressures or changed circumstances. It might be more financially costly to proceed with such alteration. This occurs because depending on the type of legal alteration and the number of foreign investors that are protected by a BIT provision, the implementation of new regulations might create an avalanche of legal suits against the host state. Just as an indication of the size and relevance of this risk, foreign firms publicly sued at least 113 host states with a large number of disputes originated in developing countries, most in Latin America[5] (UNCTAD - United Nations Conference on Trade and Development, n.d.).

Another strong criticism is that there is a significant lack of reciprocity in these types of agreements. BITs do not create responsibilities or duties for foreign investors or home states, apart from general preambular statements encouraging foreign investment flows, nor do BITs provide

[5] Out of a total of 855 known treaty-based investor-state arbitrations, 27% were against Latin America countries. Out of the 113 countries with at least one legal process based on a BIT, Argentina and Bolivia occupy the top positions, with 7% and 5% of the total arbitration procedures, respectively.

host states with the capacity to bring a claim against foreign investors (Kaushal, 2009, p. 499). The benefits are only granted to the private investor and indirectly to the home state. BITs rarely contain an obligation for the home country to promote investment flows; most BITs only focus on the protection of existing investments, rather than the promotion of new FDI (Kaushal, 2009, p. 508). Specifically relating to the investment dispute settlement, Kaushal presents another downside of BITs. The investment treaty arbitration regime distorts the distinction between international and domestic law and the separation between private and public law (Kaushal, 2009, p. 515). The major criticism is that public good and private interests are collapsed by privatizing part of the public interest.

Even though it was largely held by many authors, the assumption that BITs promote investment has recently been called into question by numerous studies. Kaushal notes the following:

> Two early U.N. studies found no "direct linkage" between BITs and FDI flows and concluded that BITs play a minor and secondary role in influencing FDI flows. A more recent World Bank report found that BITs do not seem to have increased flows of investment to signatory developing countries (Kaushal, 2009, p. 509).

Indeed, many countries still play a relevant role in terms of FDI flows, even though no BIT or a small number of agreements is in force. This is the case of Brazil, for example, which will be discussed in the next section. Another example is the United States, who does not have a BIT with China, the prime destination of its FDI outflows (Kaushal, 2009, p. 510). In addition, certain rights are guaranteed to foreigners even where they are denied to locals, which has caused tensions between developed and developing countries (Kaushal, 2009, p. 526). Domestic companies would probably have limited tools or instruments against their governments in case adverse measures are established by the legislative system after an investment is started by the domestic firm.

One additional interesting note is that the alteration in the regulation of host states is part of any business. Any domestic or international firm is subject to such risk. What some BITs may be doing is providing to foreign investors an additional compensation for risks that they should bear as part of the normal business process (Kaushal, 2009, p. 533).

3.4 Brazil and the BIT regime

In the next subsections, specific points about the Brazilian regime will be discussed, focusing first on a historical perspective, with the signature of the old BITs and new CFIAs by Brazil, and then on the process to internalize the international agreements and the current ratification process of the CFIAs.

3.4.1 The signature of the old BITs and the new CFIAs

Brazil has a unique situation in terms of signature and ratification of BITs, which makes the country a relevant and interesting study subject. Although it has signed many bilateral investment agreements in the past three decades, for a very long period Brazil did not ratify a single bilateral investment agreement. This scenario has only changed in 2017 when the first BIT finally came into force in Brazil.

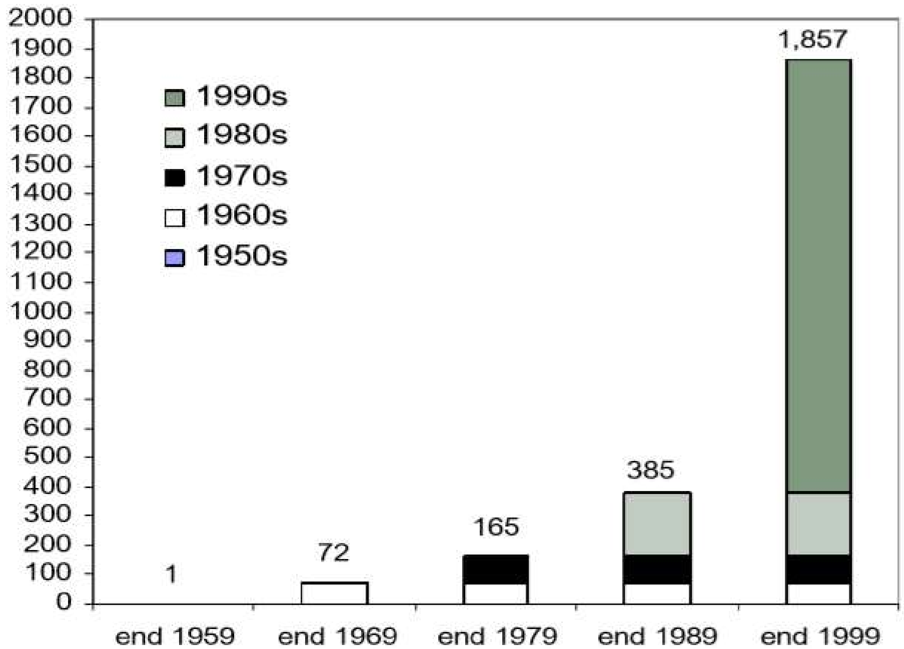
Since the 1990s, Brazil has signed 22 BITs. It is possible to divide these bilateral investment agreements signed by Brazil in two distinct groups or waves: the bilateral investment agreements signed in the 1990's and the new Cooperation and Facilitation Investment Agreements signed since 2015. The first bilateral investment agreement signed by Brazil was with Portugal, in 1994. During the same decade, 13 other BITs were signed by Brazil. These agreements will be referenced as the nineties' agreements, as all of them were signed between 1994 and 1999.

Table 1: The bilateral investment agreements signed by Brazil in the 1990's

Country	Year of signature
Portugal	1994
Chile	1994
United Kingdom	1994
Switzerland	1994
France	1995
Finland	1995
Italy	1995
Denmark	1995
Venezuela, Bolivarian Republic of	1995
Korea, Republic of	1995
Germany	1995
Cuba	1997
Netherlands	1998
BLEU (Belgium-Luxembourg Economic Union)	1999

Source: Author, based on the Investment Policy Hub website

During this period, Brazil followed an international trend in terms of bilateral investment agreements' execution, since in the nineties there was an explosion in the signing of BITs, as shown in the figure below.



Source: (UNCTAD - United Nations Conference on Trade and Development, 2000, p. 1)

Figure 2: Growth of the number of BITs, 1959-1999

From this first group of bilateral investment agreements signed by Brazil, there was not a single agreement ratified by the Brazilian National Congress. This means that although executed, these treaties have no legal effects for Brazil and the foreign investors from the other signatory party.

There has been much discussion of the reasons behind Brazil's decision in not ratifying the nineties' BITs. One of them was the level of internal political discussions held by the Brazilian executive during the process of BIT ratification. As it will be discussed in the next subsection of this chapter, BITs are signed by the executive, but the implementation of a BIT as an internal law must be approved by the Congress. This internal political discussion in relevant, therefore, especially in terms of the sovereignty: “(g)overnmental departments that sign BITs usually do so without any meaningful public debate or oversight (or even discussion with other governmental departments), which often results in conflicting approaches to the exercise of sovereignty within a national government” (Kaushal, 2009, p. 512). This might be one additional explanation for the unique position adopted by Brazil.

In this sense, some authors understand that Brazil’s refusal to adhere to the traditional BITs is because these treaties were seen as compromising Brazil’s sovereignty given, for example, that they do not provide home countries’ investors with obligations, only rights (Calvert & Pickup, 2016, p. 211). Other reasons behind this non-ratification have also been discussed in the literature; however, this will not be the main analysis of this research, which focuses on the second wave of bilateral investment agreements signed by Brazil.

Between 2000 and 2015, there was no new signing by Brazil of bilateral investment agreements, nor any movement from the Brazilian political forces to have the nineties agreements approved. In 2015, this situation changed. Under the first year of the second government of Dilma Rousseff, after some internal discussions in Brazil, the new wave of bilateral investment agreements began to be signed. The agreements under this new wave are named the “Cooperation and Facilitation Investment Agreement” (CFIA).

The first agreement under the new model was the CFIA between Brazil and Mozambique, signed in March 2015. After this first agreement, five more were signed in the same year: with Angola, Mexico, Malawi, Colombia and Chile. Following this first torrent of signatures, Brazil had a gap in terms of new agreements being signed. There was no new CFIA signed by Brazil in the years of 2016 and 2017, but there are some plausible reasons behind this scenario. Brazil was (and still is) going through a delicate political and economic moment, with the impeachment of Dilma Rousseff in May 2016 and her succession by Michel Temer, the former vice president, who is involved in many corruption scandals and currently holds the lowest approval rate in Brazil since the re-democratization process that occurred in 1985[6] (Boghossian, 2018).

Although no new CFIA was signed between the years of 2016 and 2017, the topic was not frozen internally in Brazil. All the treaties signed in 2015 continued to move within the internal ratification process in Brazil, first being approved by the Chamber of Deputies and then by the Federal Senate. In addition, in April 07th 2017, the Mercosur Cooperation and Facilitation Investment Protocol was signed by the Mercosur States (Argentina, Brazil, Paraguay and Uruguay) (Cozendey & Neto, 2017). Since the Protocol is a multi-party agreement, it is not included in the scope of the present research, which is limited to bilateral investment treaties. However, it is still an indication of Brazil's new intention in terms of investment agreements.

Then, in 2018, two more agreements were signed by Brazil, respectively with Ethiopia and Suriname, which reveals that Brazil has certainly entered into a new position in terms of investment treaties. The Brazilian government also announced that it is also in the final negotiation phase for new Cooperation and Facilitation Investment Agreements with Algeria, India, Jordan and Morocco (Cozendey & Neto, 2017).

[6] According to *Datafolha*, a well-known Brazilian research institute created in 1983, 82% of the people that were interviewed classified Temer's government as "bad" or "terrible". In April, this number was 70%.

A total of eight treaties have been signed so far by Brazil under this new framework, as illustrated in Table 2.

Table 2: The Cooperation and Facilitation Investment Agreements signed by Brazil

Country	Year of signature
Mozambique	2015
Angola	2015
Mexico	2015
Malawi	2015
Colombia	2015
Chile	2015
Ethiopia	2018
Suriname	2018

Source: Author, based on the Investment Policy Hub website

The new investment agreements have some key differences from the original BIT model signed in the 1990s, including that arbitration will be held between states, and not between the investor and the state, as it will be discussed. The analysis of this new model of BIT is very relevant to understand Brazil's position regarding FDI regulation by investment treaties (Calvert & Pickup, 2016, p. 211) and it will be further explored in the next chapter.

It seems that the new wave of bilateral investment agreements will have a different outcome from the unsuccessful nineties' agreements. From the eight agreements signed so far, two of them are already in force (the CFIA between Brazil and Angola and more recently the CFIA between Brazil and Mexico) and a few other agreements are in the last phase of approval, which starts in the Brazilian National Congress and ends with the promulgation by the President. This ratification process will be briefly presented in the next section, followed by the current status of the ratification process of the signed CFIAs.

3.4.2 Process of ratification

All international treaties will follow a number of acts until they are fully applicable and produce legal effects in Brazil. Those acts are respectively: negotiation and elaboration, signature, ratification approval, promulgation and registration in the United Nations (Mariano, 2016). The Brazilian National Constitution, in article 84, item VIII, determines that it is the competency of the Republic President to negotiate, draft and sign international acts, (treaties, agreements, memorandums of understanding, complementary adjustments, convections and protocols) that create rules and regulations (Ministry of Foreign Affairs - International Acts Unit). According to the Decree number 8.817/2016, schedule I, article 1, item III, one of the competencies of the Ministry of Foreign Affairs is the participation in commercial economic, technical and cultural negotiations with governments and foreign entities. The Ministry is, therefore, a supportive structure to the President in international acts. Usually, the International Acts Unit within the Brazilian Ministry of Foreign Affairs is the division responsible for the formal revision of international treaties (Ministry of Foreign Affairs - International Acts Unit). Once the treaty is ready for signature, it can be signed by any authority, provided that such authority has a Full Powers Letter with a powers' delegation from the President and countersigned by the Ministry of Foreign Affairs (Ministry of the Environment (Brazil), n.d.).

According to the same constitutional provision referenced above (article 84, item VIII), international acts must necessarily be submitted and approved by the Brazilian National Congress. The discussion and voting within the National Congress will occur separately in the two houses – first in the Chamber of Deputies and then in the Federal Senate. Each the Chamber of Deputies and the Federal Senate will have a specific process for international acts, with the involvement of different technical committees. The National Congress cannot change the content of the international treaty – it can only amend the original text to express agreement or disagreement, with a possibility of approving the treaty with reservations (Campello & Lemos, 2015, p. 12).

Once finally approved by the National Congress, the treaty will be promulgated by the President under a presidential decree published in the federal register. While the signature of a bilateral investment agreement requires a planning and formal decision from the Presidency, with a previous negotiation process, for bilateral investment agreements it is possible to say that the promulgation is more a ceremonial role. Considering that the agreement was signed in the first place by the same Presidency, it is expected that the promulgation will not encounter major difficulties, although the Presidency House can still veto the decree. The same understanding is not applicable to other types of legislative acts. Since they are usually initiated by the National Congress, the sanction or veto of the law is the first manifestation of the President in this type of act and, therefore, will be the most relevant instrument for the President's participation in the laws' approval system.

Appendix A: Flow Chart of the Brazilian Ratification Process summarizes the entire ratification process of international treaties, from the signature by the President or delegated authority, to the final promulgation by the Presidency House, passing through both houses of the National Congress (the Chamber of Deputies, and the Federal Senate). Only after successfully passing all the phases will the treaty be applicable by the Brazilian authorities and will it produce full effects.

According to a research conducted by the Brazilian National Confederation of Industry (CNI), the entire ratification process of an international treaty in Brazil takes an average of four and a half years. This estimate was yielded from a study that analyzed the processing of twenty-seven international agreements signed by Brazil between 2003 and 2017 (Agência Brazil, 2017). When this study was published, from the total of twenty-seven treaties, eighteen had already been ratified. Nine treaties were approved by the National Congress and were waiting for the presidential decree. The presidential decree usually takes an average of one year to be concluded, according to the same study (Agência Brazil, 2017). The executive director of CNI, Carlos Abijaodi, indicates that the main reason for the delay in the promulgation is the bureaucracy in the process. He cites specifically the delay by the executive in the promulgation process, in the sense that there is no logical reason for such a long promulgation process since there is no amendment to be done by the executive after the treaty's signature. Only the legislative can vote for the treaty approval or not (Consultor Jurídico, 2017).

3.4.3 Current ratification status of the CFIAs

Brazil and the international arena can expect a movement towards the approval of the CFIAs by the Brazilian legislative system. Although only two Cooperation and Facilitation Investment Agreements are in force in Brazil, which are the agreement between Brazil and Angola promulgated by the Brazilian President in October 11th 2017 (under the Decree number 9.167/2017), and the agreement between Brazil and Mexico promulgated by the Brazilian President in September 06th, 2018 (under the Decree number 9.495/2018), other three CFIAs are expected to follow the same path within the next months. The CFIAs with Mozambique, Malawi and Chile were all approved by the Brazilian Federal Senate in the first trimester of 2017, just as was the CFIA with Angola and Mexico. With the Senate's approval, the agreements were all directed to the last phase in the domestic ratification process, which is a more ceremonial phase: the promulgation by the President.

The CFIAs with Angola, Mexico, Mozambique, Malawi and Chile all have had a similar path so far, all of them signed in 2015 by the former president Dilma Rousseff. Besides these five CFIAs, a sixth bilateral investment agreement was also signed by Brazil in the same year – the CFIA between Brazil and Colombia. This CFIA is facing a slower ratification process. In 2018, two new CFIAs were signed by the current president of Brazil, Michel Temer. The CFIA with Ethiopia was signed April 11, 2018, and the most recent bilateral investment agreement with Suriname, signed May 02, 2018. The ratification process within the National Congress for these two new agreements has not yet started.

As seen in subsection 3.4.2 above, the average period for the ratification of an international treaty in Brazil is four and a half years. This means that the CFIAs' ratification process is still within the expected approval period. The same study indicated that the promulgation process, however, takes an average of one year. For this specific phase, it seems that there might have been a certain delay: the signed CFIAs that are with the Presidency House for ratification were received by the Presidency house in the first trimester of 2017.

Although the delay is not yet significant, it is possible to identify some reasons behind it. Besides the usual bureaucratic process, it is possible to indicate two other reasons for this delay. First of them, the current president of Brazil, Michel Temer, had other priorities in terms of laws to be promulgated. Some very important (and controversial) laws were recently approved in Brazil, after former president Rousseff's impeachment, including a major labour reform (which is being strongly criticized). In addition to this, the year of 2018 is an election year in Brazil, which naturally delays the political activities.

Table 3 summarizes the main dates of the signature and ratification process of the CFIAs signed until this date by Brazil.

Table 3: Status of CFIAs ratification in Brazil

	Mozambique[7]	**Angola**[8]	**Mexico**[9]	**Malawi**[10]	**Colombia**[11]	**Chile**[12]	**Ethiopia**	**Suriname**
Signature of the CFIA	30-Mar-2015	01-Apr-2015	26-May-2015	25-Jun-2015	09-Oct-2015	24-Nov-2015	11-Apr-2018	02-May-2018
Chamber of Deputies								
Agreement is converted into a Legislative Decree in the Chamber of Deputies	13-Jul-2016	13-Jul-2016	04-Oct-2016	13-Jul-2016	19-Oct-2017	13-Jul-2016	Pending	Pending
Endorsement by the Commission of Economic Development, Industry, Trade and Services	19-Oct-2016	13-Sep-2016	14-Dec-2016	25-Oct-2016	06-Dec-2017	23-Nov-2016	Pending	Pending

7 For the entire process of approval within the Chamber of Deputies refer to: www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2091789. For the entire process of approval within the Federal Senate refer to: https://www25.senado.leg.br/web/atividade/materias/-/materia/127901.

8 For the entire process of approval within the Chamber of Deputies refer to: www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2091721. For the entire process of approval within the Federal Senate refer to: https://www25.senado.leg.br/web/atividade/materias/-/materia/127900.

9 For the entire process of approval within the Chamber of Deputies refer to: www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2112888. For the entire process of approval within the Federal Senate refer to: https://www25.senado.leg.br/web/atividade/materias/-/materia/128180.

10 For the entire process of approval within the Chamber of Deputies refer to: www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2091791. For the entire process of approval within the Federal Senate refer to: https://www25.senado.leg.br/web/atividade/materias/-/materia/127902?o=t.

11 For the entire process of approval within the Chamber of Deputies refer to: www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2157976. For the entire process of approval within the Federal Senate refer to: https://www25.senado.leg.br/web/atividade/materias/-/materia/132498?o=t.

12 For the entire process of approval within the Chamber of Deputies refer to: www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2091793. For the entire process of approval within the Federal Senate refer to: https://www25.senado.leg.br/web/atividade/materias/-/materia/128395.

Endorsement by the Commission of Constitution and Justice and Citizenship	11-Oct-2016	04-Oct-2016	30-Nov-2016	13-Sep-2016	05-Dec-2017	04-Oct-2016	Pending	Pending
Endorsement by the Commission of Finances and Taxation	09-Nov-2016	11-Oct-2016	23-Nov-2016	11-Oct-2016	06-Dec-2017	19-Dec-2016	Pending	Pending
Approval by the plenary of the Chamber of Deputies	15-Dec 2016	15-Dec 2016	16-Feb-2017	15-Dec 2016	08-Mar-2018	16-Mar-2017	Pending	Pending
Sent to the Federal Senate	20-Dec- 2016	20-Dec-2016	21-Feb-2017	20-Dec-2016	13-Mar-2018	21-Mar-2017	Pending	Pending
Federal Senate								
Endorsement by the Commission of Foreign Relations and National Defense	11-May-2017	11-May-2017	06-Apr-2017	27-Apr-2017	12-Apr-2018	27-Apr-2017	Pending	Pending
Approval by the plenary of the Federal Senate	24-May-2017	24-May-2017	18-Apr-2017	10-May-2017	18-Apr-2018	09-May-2017	Pending	Pending
Sent to the President House	31-May-2017	31-May-2017	20-Apr-2017	17-May-2017	25-Apr-2018	17-May-2017	Pending	Pending
Presidency House								
Promulgated by the President	Pending	11-Oct-2017	06-Sep-2018	Pending	Pending	Pending	Pending	Pending

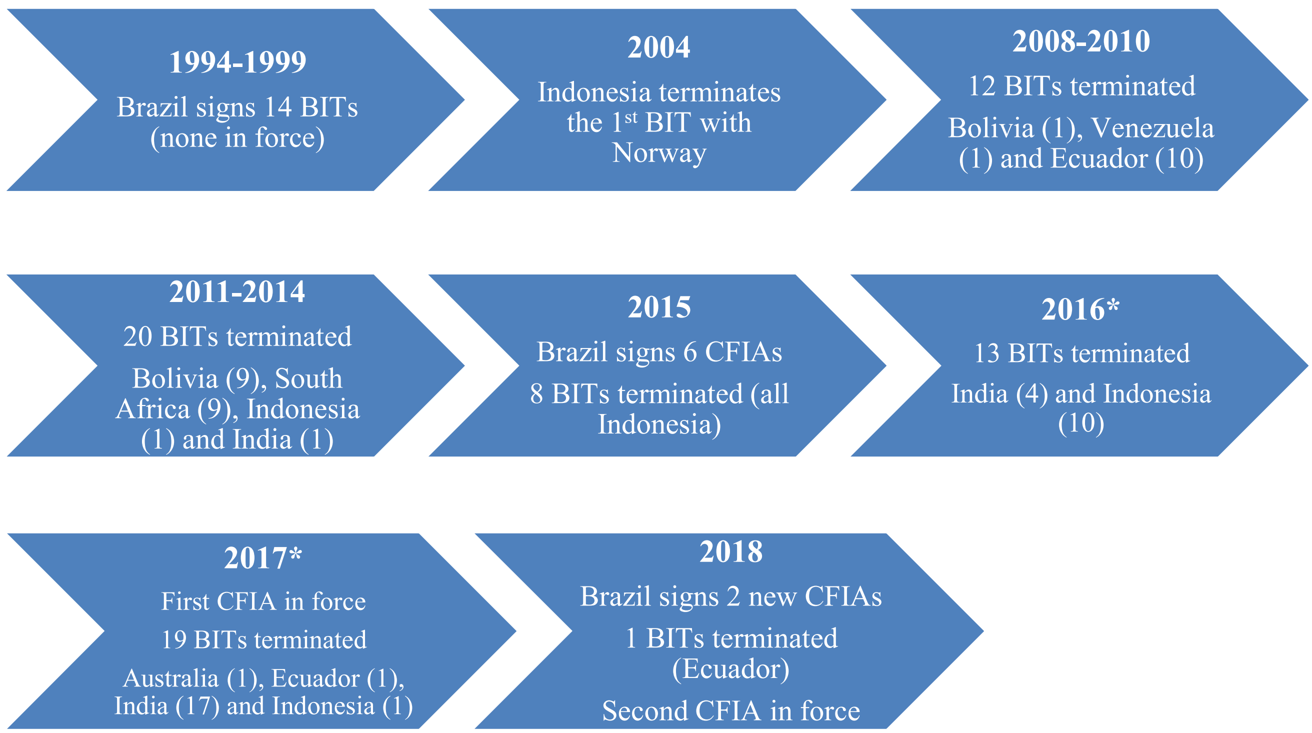
Source: Author, based on the Brazilian Chamber of Deputies, the Federal Senate and the Presidency house websites.

3.5 Recent trends regarding BITs

Many countries are questioning the benefits of BITs as a relevant instrument to increase FDI. While in the 1990s there was a boom in terms of the number of BITs signed in the world, recently it is possible to notice an opposite movement, at least in some countries. South Africa and India, for example, have begun to review all their BITs (Milner, 2014 , p. 5) and have refused or been reluctant to sign the ICSID Convention (Cutler & Lark, 2016, p. 181). India omitted key treaty protections from its Economic Cooperation Agreement with Singapore (Kaushal, 2009, p. 493) and Indonesia has terminated twenty of its BITs and is reviewing all of its remaining agreements, as a way of addressing concerns over the threat to sovereignty (Cutler & Lark, 2016, p. 181). Australia recently stopped signing BITs that contain external third-party arbitration (Milner, 2014 , p. 5). The last BIT signed by Australia was in 2005 (UNCTAD - United Nations Conference on Trade and Development, 2018). The European Commission has encouraged the termination of over 200 BITs between its member states (Cutler & Lark, 2016, pp. 181-182).

In Latin America, the movement is similar. Ecuador and Bolivia have both withdrawn from the ICSID Convention (Allee & Peinhardt, 2014, p. 83). Bolivia was the first country to denounce the ICSID Convention in 2007, followed by Ecuador, which filed a statement withdrawing its consent to ICSID arbitration for disputes in the oil and mining segment. Besides, Ecuador also terminated nine BITs and launched renegotiations for some others (Kaushal, 2009, p. 493). Venezuela has made similar movement by denouncing its BIT with Netherlands and has started a similar intention for the remaining BITs (Cutler & Lark, 2016, p. 181), besides refusing to sign new International Investment Agreements ("IIAs") or Free Trade Agreements ("FTAs") with investment clauses that provide investors the ability to sue states via third-party arbitration (Calvert & Pickup, 2016, p. 203). Finally, Bolivia has terminated its BIT with the United States (Cutler & Lark, 2016, p. 181).

The examples above from Brazil, Australia, Bolivia, Ecuador, India, Indonesia, South Africa and Venezuela can be compilated under a chronological diagram for a better understanding, as included below. It is important to clarify that such diagram contains only the data from Brazil (and the signed BITs) in comparison to Australia, Bolivia, Ecuador, India, Indonesia, South Africa and Venezuela, specifically the BITs terminated unilaterally from 2004 to 2018 by these countries. The BITs terminated by expected or mutual causes (expired, replaced by new treaty or terminated by consent) were not included in the list below since their termination does not necessarily mean an active role of the countries in distancing themselves from the bilateral investment regime.



Source: Author, based on the Investment Policy Hub website

Figure 3: Recent progress of bilateral investment agreement – chosen countries

*Specifically, for the BITs terminated from 2016 to 2017, there were two cases in which the BIT involved two of the countries listed (Australia-India and Indonesia-India). In these cases, the BIT was counted twice on the countries' specific information, however not on the total number of terminated BITs.

In complement to this position, Ecuador, Venezuela, Nicaragua, Bolivia and several Caribbean states have established an alliance called the Conference of Latin American States Affected by Transnational Interests, which is aimed to fighting lawsuits brought against them under BITs (Calvert & Pickup, 2016, p. 203). Some states have also refused to pay for compensations to investors following high-profile cases (Argentina, Bolivia, Congo, Ecuador, and Venezuela) (Cutler & Lark, 2016, p. 181). This might be a strong characteristic of post-neoliberal governments in Latin America, which are increasingly negotiating neoliberal prescriptions with a focus on domestic concerns, positioning the state as referee between international capital and domestic interests (Calvert & Pickup, 2016, p. 211).

Another movement being noted is the revision of states' constitutions to reject the jurisdiction to transnational arbitrational tribunals, a trend that "has been labeled by some as the 'revival of the Calvo Doctrine'. This has been forwarded by some regional organizations as an important movement towards protecting vulnerable populations from transnational corporate interests" (Cutler & Lark, 2016, p. 181).

In sum, this all represents the resurgence of a nationalistic movement, similar to that which generated the isolationist Calvo Doctrine, in which foreign investors are simply granted the same protections as nationals. While this guarantees an equal treatment between foreign and domestic investors, it could make foreign investors apprehensive about committing capital in counties with a more deficient legal structure (Collins, 2013, p. 44). These are only examples of other issues that have been influencing the world economy. The host countries' main concern seems to be that the costs of BITs in terms of loss of sovereignty may not be worth versus the benefits of increased investment that these treaties may bring. The reflect is that, as Kaushal puts it, "countries and civil societies are calling for restraint of foreign property and contract rights in favour of national sovereignty" (Kaushal, 2009, p. 495).

Chapter 4: The New Cooperation and Facilitation Investment Agreements

Twenty-three years after the first bilateral investment agreement was signed by Brazil[13], the first approval of a BIT finally occurred. The agreement was ratified by the National Congress and promulgated by the President of the Republic to become a domestic regulation. As seen in Chapter 3, it is not enough that Brazil signs an international treaty – the treaty must successfully pass all the necessary internal approvals within the National Congress and Presidency to then be published as an internal domestic legislation. This is when the treaty will produce binding effects in Brazil. It took Brazil more than two decades to finally have its first bilateral regulation for foreign direct investment in force. And one of the main reasons for this success was the change in the investment treaties' scope, with the creation of the Brazilian's Cooperation and Facilitation Investment Agreements, which will be the subject of this chapter.

The first section of this chapter will present a brief overview of the background to the signing of CFIAs, followed by a section outlining the main provisions of the new CFIAs. This chapter will be concluded with an analysis of the main differences between the new CFIAs and the BITs signed during the nineties, which is one of the explanations for the success of the new wave of bilateral investment treaties signed by Brazil.

4.1 Background of the CFIAs

The CFIA model was built based on the revision of previous agreements (mainly the BITs signed in the 1990s) by Brazilian policymakers, and from the inputs from the Brazilian private sector,

[13] The first BIT signed by Brazil was with Portugal in February 09, 1994.

based on their recent experience as capital exporters. Although the new wave of BITs was only signed in 2015, this process started internally in Brazil in 2012, with the creation of the Foreign Trade Strategic Studies Technical Group (GTEX)[14] within the Brazil's Council of Secretaries of the Foreign Trade Chamber (CAMEX), which is an unit within the Government Council of the Presidency of the Republic. This technical group was responsible for organizing studies and research and elaborating proposals in the field of foreign trade with specific countries and regions. The main purpose was to build a more dynamic flow of trade and investment for Brazil (CAMEX - Council of Secretaries of the Foreign Trade Chamber, n.d.). In the context of the Brazil-Africa relations, the GTEX recommended the creation of a new investment agreement framework, under the leadership of the Secretariat of Foreign Trade (SECEX).

In 2013, CAMEX issued a mandate for the negotiation of investment agreements with some chosen African countries, based on the guidelines of the newly developed CFIA model. Such mandate "was expanded in 2015, right after the conclusion of the first agreements with Angola, Malawi and Mozambique, to include all countries interested in negotiating agreements under the CFIA model with Brazil" (Martins, 2017). All these movements culminated with the development of an investment model with better chances of ratification. The model was created by the CAMEX governmental team and led by the Ministries of Finance (MF), Foreign Relations (MRE) and Industry and Foreign Trade (MDIC), in consultations with other institutions and private sector coalitions[15] (Martins, 2017). The private sector was mainly represented by the National

[14] The group was created by the Resolution CAMEX nº 30/2012.

[15] According to D. Godinho, Head of SECEX, Ministry of Development, Industry and Commerce, the Brazilian private sector voiced their position by answering a survey on investment facilitation. Based on a survey and on further studies conducted by GTEX, three additional elements were added to the initial scope of the new

Confederation of Industry in Brazil and by the Federation of Industries of the State of São Paulo (FIESP) (Costa & Gabriel, 2017).

Besides having a multi-disciplinary team and the support of domestic organizations, the creation of such model considered debates and studies of international organizations and economic forums as well (for instance OECD, UNCTAD, IISD and the G20 group), in addition to valuable benchmarks on the theme and country examples (Martins, 2017). This approach might explain the higher legitimacy and acceptance of this model, in comparison with the nineties' treaties.

According to the Brazilian government, the CFIA model is based on three main pillars: (i) risk mitigation, (ii) institutional governance and (iii) thematic agenda for the investment cooperation and facilitation (Ministry of Development, Industry and Foreign Trade, n.d.). It is interesting that this statement from the Brazilian government was issued during the 2014 World Economic Forum by Daniel Godinho, who was the Foreign Trade Secretary of the MDIC, one year before the first treaty was signed. This reflects that the bases of this new model of investment treaties were already established by the Brazilian government (Costa & Gabriel, 2017).

According to the Brazilian government, the new model focuses on a positive agenda and regulatory aspects that aim to minimize the risks for Brazilian companies that invest abroad and foreign companies investing in Brazil (CAMEX - Council of Secretaries of the Foreign Trade Chamber, n.d.). Such positive agenda includes the creation of a Joint Committee, the focus on a thematic agenda for the agreements and the creation of what CAMEX called the Focal Point or the

framework agreement proposed by the Brazilian government: 1) a focal point where firms could go for advice and help throughout the investment relation; 2) provisions for risk mitigation and dispute prevention; and 3) a thematic work program for investment facilitation devoted mainly to visa and licensing proceedings – according to a personal communication issued on April 28, 2015 to Morosini and Badin (Morosini & Badin, 2015).

Ombudsman. On the regulatory aspect, the focus is on general principles (national treatment and more favourable nation), the terms in which the cash flow will work, the direct expropriation regulations, and other aspects, such as loss compensations, corporate social responsibility and mechanisms for dispute resolution among states (CAMEX - Council of Secretaries of the Foreign Trade Chamber, n.d.). These characteristics of the new model of investment agreements will be explored more deeply in the next two sections of this chapter.

4.2 Analysis of the CFIAs

Although the structure in which they were developed varies to some extent, the main features of the new CFIAs are all based on the same model. These minor changes between one agreement and the other are, in fact, only necessary adjustments to the specific needs of each partner and the possibility to continually improve the model without losing its essence (Martins, 2017).

As the terminology suggests, the new Cooperation and Facilitation Investment Agreements approach is more related to a mutual cooperation between the signatory states, rather than an adversarial strategy. The main focus is to provide mutual benefits to both investors and states and not limitations to one of these actors. These agreements are more concentrated on investment promotion than its protection, and on the prevention of differences in terms of investments, rather than the resolution of such differences (Hamilton & Grando, 2016, p. 14). With the Cooperation and Facilitation Investment Agreement, Brazil saw an opportunity to "develop an innovative model that did not focus only on protection of investors and investments, but which aimed at promoting and facilitating productive investment of high quality" (Martins, 2017).

In a certain way, the new model of investment agreements indicates a larger concern with the host state's national sovereignty and in sharing the international investment benefits between the two signatory states (Medrado & Daudt, 2015). This is perhaps one of the most reasonable explanations for the success of the CFIAs, as will be more deeply explored in Chapter 5.

As indicated before, the main objectives of the new model of investment treaties highlighted by the Brazilian government, specifically the unit that was responsible for developing this new model, are the following: (i) improvement in the institutional governance; (ii) creation of mechanisms to mitigate risks and prevent disputes; (iii) elaboration of thematic agendas to the cooperation and investment facilitation (CAMEX - Council of Secretaries of the Foreign Trade Chamber, n.d.). These objectives are solidified by the clauses and conditions of the signed agreements. A closer analysis of some of the main provisions of the Cooperation and Facilitation Investment Agreements will be presented in the following subsections.

4.2.1 Concept of investment[16]

The new model of investment agreements signed by Brazil presents a clear definition of investment. The concept is directly related to the production of goods or provision of services by the investor of one of the parties in the territory of the second party of the agreement. The signed agreements provide a non-exhaustive list of examples of such types of investment, which include investments in a company, corporation or association, investments in assets (both real state and

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[16] Article 3, Clause 1 of the Brazil-Mozambique CFIA; Article 3 of the Brazil-Angola CFIA; Article 3, Clause 1.2 of the Brazil-Mexico CFIA; Article 1, Clause 2 of the Brazil-Malawi CFIA; Article 3, Clause 1.2 of the Brazil-Colombia CFIA; Article 1, Clause 1.4 of the Brazil-Chile CFIA; Article 1, Clause 1.3 of the Brazil-Ethiopia CFIA; and Article 3, Clause 1.3 of the Brazil-Suriname CFIA.

goods) or any other property rights, investments in public concessions or licenses, and investments related to intellectual property rights.

The CFIAs expressly exclude from the concept of investment the so-called portfolio investments (in which the investor does not hold a significant level of management in the company), and the public debt operations and credit rights that may arise from commercial contracts. The operations with a more speculative profile, therefore, are not included in the definition of investment.

Most of the signed CFIAs present a similar concept of investment in the definitions section of the agreements. Generally, the definition of investment in the new investment agreements represents any type of asset or right, controlled directly or indirectly by the investor of one of the parties of the investment agreement in the territory of the other party of the investment agreement, with the main purpose of being inserted in lasting economic relations and designated to the services and goods production in the host state. In other words, the concepts of investment have something in common: they are restricted to both productive and long-term investments, two complementary elements (Costa & Gabriel, 2017).

This is true for all signed CFIAs, except for one agreement: the bilateral investment agreement between Brazil and Angola. Interestingly enough, this is one of the two CFIAs in force in Brazil. Article 3 of the Cooperation and Facilitation Investment Agreement with Angola has a very broad definitions section, in which the definitions of investment, investor and other definitions related to the matter will be regulated by the legal structure of the parties of the agreement.

According to Costa and Gabriel, this circumstance can be problematic. First, this legal provision does not specify which legal system will, in fact, regulate this concept – the Brazilian or the Angolan system, which have distinct concepts of investment. In addition to, each legal system may apply different concepts from different legislation. There is a risk of new legislation being introduced in the countries' legal systems, which is the case of the Private Investment Law of Angola, promulgated on August 2015 (Law n. 14/2015), after the signature of the CFIA between Brazil and Angola. This new law alters some of the concepts of the previous investment legislation of Angola (Law n. 20/2011) (Costa & Gabriel, 2017). According to the new Angolan legislation, the Law n. 14/2015, private investment is defined as:

> (…) the use in Angolan territory of capital, technology and know-how, capital goods and other goods, in specific economic projects, or the use of funds for the setting-up of new companies, groups of companies or another form of corporate representation of private companies, either national or foreign, as well as the acquisition of all or part of existing companies organized under Angolan law, with a view to implementing or continuing a given economic activity in accordance with the relevant corporate purpose. (UNCTAD - United Nations Conference on Trade and Development)

In Brazil, the foreign investment is regulated by the Law n. 4.131/62, which defines foreign capital as:

> (...) the assets, machine and equipment, entered in Brazil without the initial expenditure of foreign exchange, to be used for the production of goods or services, and the financial or monetary resources entered in Brazil to be used in economic activities, provided that in both cases they are owned by individuals or companies with a residency or headquartered abroad. (Presidency of the Republic of Brazil, n.d.)

Although the two concepts have similar ideas, it is possible to identify some minor deviations. For instance, the scope of investment under the Angolan legislation seems broader than the Brazilian one, since it includes not only assets and funds, but also technology and know-how, which are intangible concepts. Besides, the Angolan definition requires a purpose for the investment, by indicating that the investment must be made "with a view to implementing or continuing a given economic activity in accordance with the relevant corporate purpose". The Brazilian legislation does not provide a formal requirement of a continuation of the economic activity, even though it is expected that foreign direct investment will remain in the country for a longer period and might increase the productive capacity of a specific sector (Wolffenbüttel, 2006).

The main consequence of these divergences is that a specific type of economic activity could be considered as an investment regulated under the CFIA for Brazil, but not for Angola, and vice-versa, since for each country, its own legislation would apply. It seems that this was the purpose of the CFIA between Angola and Brazil: that each country could define the type of investment that would fall under the regulation of the agreement. This is proved, for example, by another provision of the CFIA: Article 11, Section 1, in which each party of the agreement may restrict certain investments according to its own legal order.

It is important to remember that in case a dispute arises in relation to divergences in the concept of investment, the investor can always bring such dispute to the Ombudsman and the Joint Committee, to have the bodies clarify this obscurity in the agreement. Since the signed investment agreement between Brazil and Angola is still new, a jurisprudence to this type of issue is still not available.

4.2.2 Free capital transfer[17]

The CFIAs kept the same provision of the BITs signed during the nineties in terms of capital transfer operations. According to the new model, the free transfer of funds is allowed between the host and home states. These funds will cover all funds from the initial investment capital from the

[17] Article 14 of the Brazil-Mozambique CFIA; Article 14 of the Brazil-Angola CFIA; Article 9 of the Brazil-Mexico CFIA; Article 12 of the Brazil-Malawi CFIA; Article 9 of the Brazil-Colombia CFIA; Article 11 of the Brazil-Chile CFIA; Article 10 of the Brazil-Ethiopia CFIA; and Article 10 of the Brazil-Suriname CFIA.

investor within the host country to the profits and dividends that arise directly from such initial investment. By keeping a free flow of capitals between the states, Brazil is in a certain way renouncing to certain controls over the flow of capital that Brazil has for other types of operations and for investments before the agreement is signed (Picard, 2015, p. 33).

4.2.3 Investors and investment treatment[18]

All the BITs signed by Brazil in the 1990s and submitted to the National Congress expressly stated the "national treatment" and "most favored nation" provisions, with the exception of privileges from the participation of regional economic organization and taxation provisions (Fernandes & Fiorati, 2015, p. 260). In the CFIAs, the provision that addresses this matter is called "investors and investment treatment", which is different from the nineties' agreements, that had the expressions "national treatment" and "most favored nation". However, the provisions of both groups of bilateral investment agreements are similar (Fernandes & Fiorati, 2015, p. 261).

The national treatment and the most favored nation provisions are two protective provisions. The expressions "national treatment" and "most favored nation" only appear in three CFIAs – the most recent agreements signed with Chile, Ethiopia and Suriname. In all the other agreements, the article title is slightly different: it refers to "investors and investment treatment" or "non-discrimination". These provisions, which are very close to the World Trade Organization (WTO) standard, will guarantee (i) an equal treatment to foreign and national companies in the domestic territory of the

[18] Article 11 of the Brazil-Mozambique CFIA; Article 11 of the Brazil-Angola CFIA; Article 5 of the Brazil-Mexico CFIA; Article 10 of the Brazil-Malawi CFIA; Article 5 of the Brazil-Colombia CFIA; Articles 5 and 6 of the Brazil-Chile CFIA; Articles 5 and 6 of the Brazil-Ethiopia CFIA; and Articles 5 and 6 of the Brazil-Suriname CFIA.

host state and (ii) a treatment to those investors that is not less favourable than the treatment that the host states apply to other partners and investors of the signatory states (Pereira, 2017, p. 64).

Although all the signed treaties have these non-discriminatory provisions, it is possible to make a distinction between the provisions of some CFIAs. The CFIAs signed with the African countries include a protection in an initial phase for the investment establishment, while the CFIAs with Latin American countries either do not address this additional protection (the case of Mexico, for example), or are explicit in not providing this protection to the investors for the establishment of an investment, but only the expansion or operation of foreign investments (the case of Colombia and Chile) (Costa & Gabriel, 2017).

This decision of Brazil to have two different standards will have an unequal impact on both the Brazilian investors investing abroad and the foreign investors that decide to invest in Brazil. First of all, if the same company decides to start a new investment in both an African and a Latin American country, this company would have non-discriminatory protection for the investment establishment only in the African country. The same effect would apply to foreign investors that decide to invest in Brazil. New foreign investors from African countries, for example, would have a protection that investors from Colombia would not have, at least in the establishment of new investment. The protection would still apply for the management of the business that was already implemented. Another difference is that the CFIAs with Chile, Colombia and Mexico exclude from the national treatment protection any advantage that was granted before the agreement enters into force, which is not observed in the agreements with the African countries (Hamilton & Grando, 2016).

As a summary, it is possible to say that the CFIAs with the African countries are more beneficial to Brazilian investors than the ones with the Latin Americans. An explanation will be developed in subsection 4.3.5 below.

4.2.4 Expropriation and compensation[19]

Considering that the CFIAs will be used primarily to protect the Brazilian investors abroad, especially in the African countries, the presence of expropriation and nationalization clauses is not a surprise in this new model of agreement. In this aspect, the CFIA model "condemns expropriation and nationalization, except in cases of public interest and as long as the procedure is not discriminatory and is respective of due process and provides for adequate compensation to the investors" (Monebhurrun, 2016, p. 92).

Generally, the phenomenon of expropriation can happen both in the direct form (when the asset ownership is transferred from the private investor to the state) and the indirect form (when the formal property transfer does not occur, but only the reduction of the investment's economic value or when the investor loses the investment control, based on measures taken by the state) (Fernandes & Fiorati, 2015, p. 265).

Regarding the indirect expropriation, it "may result from measures that a State takes to regulate economic activities within its territory, even where such regulation is not directly targeted at an investment. In this case, legal title to the investment is not affected" (Nikièma, 2012, p. 1). The

[19] Article 9 of the Brazil-Mozambique CFIA; Article 9 of the Brazil-Angola CFIA; Article 6 of the Brazil-Mexico CFIA; Article 8 of the Brazil-Malawi CFIA; Article 6 of the Brazil-Colombia CFIA; Article 7 of the Brazil-Chile CFIA; Article 7 of the Brazil-Ethiopia CFIA; and Article 7 of the Brazil-Suriname CFIA.

concept is not as clear defined as the direct expropriation is. For this reason, usually, the indirect expropriation is identified on a case-by-case perspective by the tribunals, and it may vary in terms of its application, as discussed below:

> The fact that regulatory functions of the States relating to the protection of human rights, to national security and/or to the protection of the environment, for example, may be subject to requirements of compensation that would have to be decided on an ad hoc basis is considered by Brazil as a major hindrance to policy space. (Hees, Cavalcante, & Paranhos, 2018, p. 2)

The new model of BITs specifically allows the direct expropriation by the state, but it does not include any provision on the indirect expropriation (Monebhurrun, 2016) (Fernandes & Fiorati, 2015) (Garcia, 2016). The indirect expropriation was one of the criticisms faced by the nineties' treaties and a difference between the CFIAs and the previous BITs signed by Brazil, which will be detailed in the next section of this chapter.

Regarding the indemnification to be paid to the investors in case of expropriation by the state, the CFIAs clarify that such indemnification must be paid according to the host state regulations. In addition to, such compensation must be paid without an unjustified delay, and it must be equivalent to the fair market value of the investment being expropriated, and it must be freely payable and transferable (Costa & Gabriel, 2017).

4.2.5 Dispute resolution mechanism[20]

The CFIAs have an innovative dispute resolution mechanism, which is more favourable to a dialogue between the investor and the state. The basis of this mechanism is the incentive to

[20] Articles 4, 5 and 15 of the Brazil-Mozambique CFIA; Articles 4, 5 and 15 of the Brazil-Angola CFIA; Articles 14, 15, 18 and 19 6 of the Brazil-Mexico CFIA; Articles 3, 4, 8 and 13 of the Brazil-Malawi CFIA; Articles 16, 17, 22 and 23 of the Brazil-Colombia CFIA; Articles 18, 19, 24 and 25 of the Brazil-Chile CFIA; Articles 17, 18, 23 and24 of the Brazil-Ethiopia CFIA; and Articles 18, 19, 24 and 25 of the Brazil-Suriname CFIA.

establish a closer communication line between the investor and the host country to increase the transparency of the process. This dispute resolution mechanism is part of the risk mitigation dimension of the agreements, which “comprises typical rules for investment and investor protection, and diplomatic and cooperative mechanisms for implementing, overseeing and enforcing the parties’ obligations” (Morosini & Badin, 2015). With this specific approach in mind, the new model created what is called the Ombudsman (or the Focal Point) and the Joint Committee.

The Ombudsman is an organized unit that must be created by the two signatory states and will become the main support structure to the foreign investor. The main purpose of Ombudsman is to clarify any questions that the investor might have. The Ombudsman will also interact directly with the involved authorities in both states to make feasible that a prompt response is provided to any complaint or initial dispute presented by any investor (Medrado & Daudt, 2015). The Ombudsman acts as a mediator to amicably settle disputes between investors and the host countries (Hawes, 2017).

The Ombudsman was inspired by the Korean model, considered to be a successful model by international organizations, such as the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development. Created in 1999, the Korean ombudsman is appointed by the president and, differently from the Brazilian model, is open to all the foreign investors, not only those covered by a bilateral investment agreement. The numbers of the Korean ombudsman are very impressive: in 2014 only, more than 400 complaints from investors were analyzed by the ombudsman office, with more than 90% of those investors satisfied with the results, a successful rate that is being kept by Korea since 2007 (Nasser, 2015).

Since the Brazilian Ombudsman will centralize in one single institution the receipt of all consultations and questions regarding any matter related to investment (CAMEX - Council of Secretaries of the Foreign Trade Chamber, n.d.), it is expected that these concerns and questions will be addressed in a timely manner, besides reducing the number of future disputes, since many of the initial discontents might be solved by the Ombudsman amicably. In Brazil, the Ombudsman was established in 2016 by CAMEX – the Brazilian Chamber of Foreign Trade, which remains responsible for its management.

The Joint Committee, the second institution created by the CFIAs, is a group formed by representatives of both the home and host countries as a second instance for the initial processes presented to the Ombudsman, in case the initial amicable settlement fails. A summary of the Joint Committee's role is included below:

> The parties to the dispute request a meeting in which their concerns will be presented and they may engage in negotiations. After 60 days of the request to establish the meeting, the Joint Committee will issue a report with its recommendation. If the parties are not satisfied with the report, they can move onto the dispute settlement phase – state to state arbitration. (Hawes, 2017)

The Joint Committee will act together with the Ombudsman to prevent, manage and solve any disputes between the investors and the host states, in the cases that the initial consultation to the Ombudsman was not able to solve. The Joint Committee's main objective is to prevent a dispute from being taken to arbitration, which will be the last resource available (Medrado & Daudt, 2015).

In summary, the Joint Committee and the Ombudsman have two main roles: (i) a preventive role, by promoting the exchange of information between investors and states to avoid a future dispute and (ii) an actual dispute settlement role, since they will implement the dispute settlement mechanism in case of a legal process, which will be based on consultancies, negotiation and mediation. These mechanisms aim to prevent judicial procedures against the host state (Badin, Luis, & Oliveira, 2017, p. 163).

The creation of the Ombudsman and the Joint Committee reveals a new intention from Brazil in terms of successfully implementing the new model of investment treaties. Not only is Brazil changing the model to a more cooperative agreement, to incentivize the investment and protect the national economy, but it is also concerned in providing the necessary support for investors while investing under the regulation of a CFIA. Only for the claims that were not resolved by the initial performance of the Ombudsman and the Joint Committee, will the international arbitration process be the last resolution mechanism available to as a judicial instance. It is clear that this last resource is only available after the preventive mechanisms are applied to the specific case, with an unsuccessful end.

The arbitration process in the CFIAs will be held between the host and home states only, not involving the specific investor. The main objective of the arbitration is to "identify whether the host state has violated any part of the CFIA and, where it has, recommend that the state adjust or remove the non-conforming measure" (Hawes, 2017). As mentioned, the arbitration process will not involve the investor – it must be held between the two states that are signatories of the investment agreement. In this aspect, there is a criticism about the process, related to legitimacy. The party that will submit a claim is the home state of the investor, and not the investor itself. Once the claim is presented by the investor to the state of origin of the investor, the state will decide whether it will follow up the complaint (which has already passed through two preventive stages) or end the procedure. This is a discretionary analysis of the home state by convenience, which may be influenced by the political judgment of the state, and there is no guarantee that the investor's rights will be demanded or protected (Gabriel, 2016, p. 148).

Some of the signed agreements (specifically the CFIAs with Angola, Mozambique and Malawi) do not provide an extensive description of the arbitration process. They only indicate that the arbitration mechanism will be held between the states, without presenting an actual resolution system. The most that some of these agreements do is to clarify that the mechanism will probably be developed by the Joint Committee – which is the case of the CFIAs with Mozambique and Malawi. For the CFIAs with Angola, Malawi and Mozambique, the use of the plural in "the Parties to the exclusion of the investors may resort to arbitration" and also the provision "whenever the Parties find it appropriate" indicate that the parties must agree to resort to arbitration. This means that the system is based on diplomacy. The party may not be able to submit the dispute to arbitration in case a procedure is not agreed between the signatories of the agreement. In other words, if the arbitration is not agreed before the dispute is in place, a considerable diplomatic effort might be required, with the risk of not being successful and the arbitration not being possible (Hamilton & Grando, 2016). The CFIAs with Colombia, Mexico and Chile, and the new agreement signed in 2018 with Suriname and Ethiopia, on the other hand, have a different approach. These agreements create a specific arbitration process to be observed by the signatory states, which includes rules for the nomination of the arbitration court. Regarding the arbitration process in these CFIAs:

> The objective of the arbitration is to bring any non-conforming measures into conformity with the treaty. Only upon specific agreement of the parties may the tribunal assess whether the non-conforming measures caused damages and grant compensation. If granted, the state must transfer compensation to the investor after deducting arbitration costs. Arbitration may not be invoked regarding disputes arisen or measures adopted before the CIFA entered into force. (Bernasconi-Osterwalder & Brauch, 2015, p. 14)

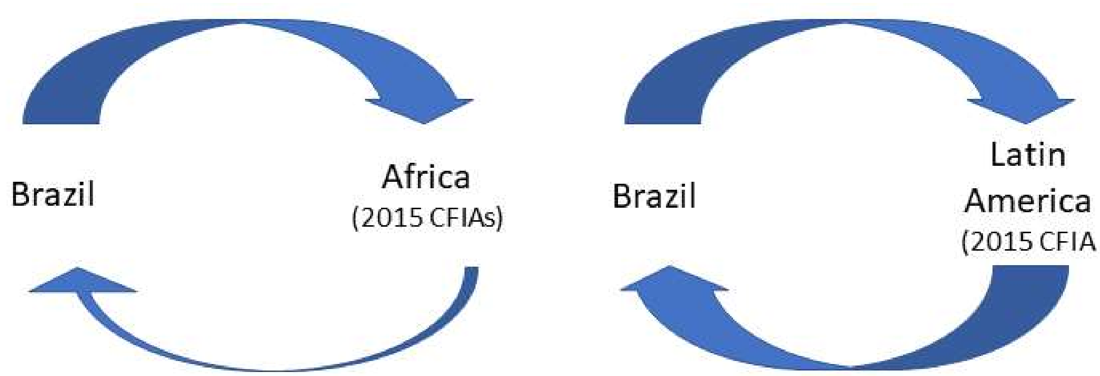
Although it was not possible to find in the current literature studies or academic articles exploring the possible explanations for this discrepancy in the arbitration clauses of the signed CFIAs (which is understandable since the Cooperation and Facilitation Investment Agreement is a relatively new theme), it is possible to indicate some interesting aspects that might clarify this discrepancy. Considering the first six CFIAs signed in 2015, only the agreements with the African countries had the generic arbitration provision. All the agreements signed with the Latin American countries provided a full arbitration process, to be followed in case the amicable dispute mechanism is not sufficient for the dispute resolution. This might be explained by the power imbalance between Brazil and the two groups of countries.

First, the relationship between Brazil and the African countries is more focused on Brazil's role as a capital exporter. Brazil's expectation is that the Brazilian companies will benefit from the agreements when doing business in these countries. However, the opposite flow of foreign direct investment in Brazil does not seem to be expected. In this aspect, it is reasonable to say that Brazil would prefer to have an arbitration clause that is more beneficial to the investors with the African countries than the Latin American ones. An open arbitration provision would be more beneficial since Brazil might be able to exercise more power and influence in the establishment of an arbitration process. In other words, Brazil's needs can be suited better without pre-established rules. When listing the procedure, on the other hand, this discretion is removed from Brazil. Since the African countries are more dependent on Brazilian companies' investment, they would be more pressured in the negotiation process to accept Brazil's preference regarding arbitration. This less reciprocal relationship could mean, therefore, a more arbitrary establishment of the arbitration rules.

With the Latin American countries, the situation seems to be slightly different. A more balanced relationship is expected, with foreign direct investments not only going from Brazil to these countries, but also coming from investors of these Latin American countries to Brazil. In this case, the negotiation process in the establishment of an arbitration process might be characterized by a more balanced negotiation.

The diagram below is an illustration of this imbalance of FDI flows from and to Brazil – considering both the African and Latin American countries. This diagram was prepared based on the volume of FDI flows in each of the countries with a signed CFIA with Brazil, as detailed in Appendix B: Foreign Direct Investment Flows for the 2015 CFIA Countries.

Figure 4: Representation of the FDI Flow from and to Brazil



Source: Author, based on the data from the United Nations Conference on Trade and Development – UNCTAD

The two new agreements signed in 2018, one with an African country and the second with a South American country, have the full description of the arbitration process. Both agreements have very similar content, not only for the arbitration clauses, but for most of their provisions. Considering that it took Brazil almost three years to re-start the signature of new CFIAs, after the first wave of agreements signed in 2015, it seems that Brazil has finally adopted a standard framework for CFIA, independent of the other party's location – if in Africa or Latin America. This argument can be confirmed in the future; once new agreements are signed by Brazil.

It is reasonable to say that when the bilateral investment agreements were being signed in 2015, the signatories did not have an approved template to refer. Most of the negotiations started simultaneously and the agreements were signed in a period of a few months. However, when the two new agreements were signed in 2018, the signatories were aware of the possibilities in terms of content, including the arbitration clause. It is a logical assumption that this might have impacted the decision of what arbitration clause to be chosen in these new agreements, which in both cases was the more complete one, and might continue to impact new agreements to be signed in the future by Brazil.

Considering that the ratification of the first two CFIAs occurred very recently, there is no available example of how the arbitration mechanisms will operate in concrete situations. A jurisprudence will probably take some time to be implemented, especially considering the preventive mechanism that will have to be exhausted before any arbitration is in place.

4.2.6 Thematic agenda for cooperation and facilitation[21]

The CFIAs utilize an additional tool for the cooperation and facilitation of bilateral investment: the thematic agendas. These agendas are present in all the CFIAs, although the content may vary between each agreement. The agendas will cover a vast array of specific topics of interest to the

[21] Article 8 of the Brazil-Mozambique CFIA; Article 8 of the Brazil-Angola CFIA; Article 20 of the Brazil-Mexico CFIA; Article 7 of the Brazil-Malawi CFIA; Article 24 of the Brazil-Colombia CFIA; Article 26 of the Brazil-Chile CFIA; Article 25 of the Brazil-Ethiopia CFIA; and Article 26 of the Brazil-Suriname CFIA.

signatory parties and their investors regarding cooperation and facilitation of investment and might include: “business visas, corporate social responsibility (CSR), technical and environmental regulations, cooperation on currency remittance, and any other areas deemed pertinent by the parties” (Bjorklund, 2016, p. 24).

The CFIAs introduce an initial list of themes to be developed by the parties of the agreement starting with the agreement’s signature. However, it is clear that this is only an initial objective to be addressed by the parties. The agenda should have an evolutionary content to be constantly revisited by the parties. The CFIAs delegate to the Joint Committee the responsibility of developing the agenda and coordinating the discussions related to such agenda between the competent governmental authorities.

This is a very dynamic mechanism since the agenda will be constantly updated based on the current demands of the parties. As Morosini and Badin put it, “(i)n the opinion of Mr. Daniel Godinho, Secretary of SECEX and a key person in designing and negotiating the agreements, the existence of such thematic agendas turn the ACFIs into dynamic agreements that may evolve along with the bilateral investment relations” (Morosini & Badin, 2015). Considering that the agreements will only be in force a few years after their signature, as the current process is indicating, this update will be a very resourceful tool to guarantee that the agreements are still addressing the most important themes for the facilitation of investment.

The thematic agenda of CFIAs provides solid evidence of the investment facilitation intention of this new model. The measures included (and yet to be included) in the agreements’ agendas, although very simple, such as visa policy, are considered as a basic need for the promotion of investment. This is an even more important concern with developing countries, which is the case of Brazil and the countries with which Brazil has a signed CFIA. In this sense:

> While those may be problems for an investor from any part of the world, such barriers are more costly for investors from developing countries, to the extent that they limit capital exports in the absence of alternatives. Brazil chose to address such problems through an investment agreement, including a thematic agenda for investment cooperation and facilitation as one of its core elements (Morosini & Badin, 2015).

In having a new and innovative approach, it is plausible that the outcome of the CFIAs will be different from the BITs signed by Brazil during the 1990s. To better clarify this proposition, the following section will provide a closer analysis of the CFIAs in comparison with the previous wave of investment treaties signed by Brazil between 1994 and 1999.

4.3 Contrasts with the old BITs

In a certain way, the CFIAs were created based on the traditional BITs signed by Brazil during the 1990s. However, to reach to the new model, the previous treaties were significantly reviewed. The Brazilian government evaluated the main criticism faced by the old treaties internally in Brazil, the limitations in terms of the domestic regulations of the signatories, and the contributions of the Brazilian private sector and its experience with investors of other countries – which were not always well received by the Brazilian domestic private sector (Costa & Gabriel, 2017).

The new investment treaty framework is a mix of provisions: some provisions also present in the previous 1990s BITs, although with minor differences (which is the case of provisions like the most favored nation, national treatment and expropriation); part of them representing a novelty in comparison with the previous bloc of agreements (like the creation of the Ombudsman and the Joint Committee); and some provisions that were omitted in comparison to the previous signed agreements (such as the equity and just treatment clause and the dispute settlements mechanism between state and investor) (Fernandes & Fiorati, 2015, p. 249).

This section will summarize some distinctions between the new framework of CFIAs and the investment treaties signed between 1994 and 1999. Only the main criticism of the 1990s treaties that were not repeated in the new CFIAs will be included and detailed in this section, since they may represent one of the reasonable explanations for the change in Brazil's position regarding ratification of investment treaties, as will be discussed in the next chapter.

The first distinction between the BITs and CFIAs is the concept of investment. As discussed in the previous section, the CFIAs present a more restrictive concept of investment in comparison to the 1990s BITs. The concept of investment in the nineties' agreements were very broad – it included, for example, "any type of possessions" (BITs with the United Kingdom and Switzerland); "all type of possessions, such as goods, rights and interests of any nature" (BIT with France); "all type of possessions, such as goods, rights and interests of any nature, acquired or exercised in line with the host state's legislation" (BIT with Chile); "all type of possessions invested or reinvested by an investor of one party in the territory of the other party, according to the legislation of this last party" (BIT with Germany); and "all type of goods and rights and acquired by the application or reapplication of resource, in accordance with the legislation of the recipient party of the agreement" (BIT with Portugal) (Fernandes & Fiorati, 2015, p. 253).

On the other hand, the concept of investment that is used in the CFIAs signed until now have a much narrower scope. The new model aims to protect only investments classified as "productive capital", which is the capital connected to the production of goods or provision of services in the host state (Medrado & Daudt, 2015). In other words, the long-term relationships are being promoted by these new agreements, rather than the punctual investment flows (in other words, a more speculative capital).

The second distinction is related to the expropriation provision and the payment of compensation in case of expropriation by the state. Regarding the expropriation process, the main difference is that the indirect expropriation, one of the issues that faced resistance before the Brazilian National Congress in the late 1990s and early 2000s, has been removed from the scope of the new model of bilateral investment treaties (Morosini & Badin, 2015). One of the biggest challenges with the indirect expropriation is to differentiate when the state is implementing an allowed regulatory measure (in which the state is freely allowed to do so, without any compensation to be paid to the investor) and when the state is actually implementing an indirect expropriation measure, implicating the state’s duty to indemnify.

In some cases, it is possible that the government, based on its regulatory power, is creating certain rules (related to taxation, commerce, environment, health) with the purpose of protecting the public interest, and those rules might indirectly impact the investor (Fernandes & Fiorati, 2015, p. 265). However, this does not necessarily mean an indirect expropriation. There is a fine line between when those rules could be considered an expropriation subject to compensation and when they were not considered as such. This lack of clarity is one of the issues faced by the definition of indirect expropriation present in the previous BITs. In addition, the indirect expropriation allowed by international treaties generates a certain fear from the governments, since it may be understood as potentially capable of reducing the regulatory scope of the states in the fulfillment of public policies (Costa & Gabriel, 2017).

Regarding the compensation to be paid in case of expropriation by the state, there was a change between the CFIAs and the old BITs as an attempt to eliminate inconsistencies between the previous agreements and the Brazilian Federal Constitution of 1988. The previous BITs created a specific circumstance in which the compensation would be paid immediately and in convertible currency. However, the Federal Constitution of Brazil determines that the compensation in cases of expropriation of assets will be paid in (i) cash, in case of regular expropriation of urban properties[22]; (ii) government bonds, in case of expropriation of urban properties as a sanction by the state (when the property does not fulfill its social function)[23]; or (iii) agrarian government bonds, in case of agrarian reform measures[24].

Therefore, in some cases, the compensation in Brazil can be paid in government bonds. However, this form of payment was not included in the nineties' bilateral investment agreements. This would mean that the previous BITs signed by Brazil were providing a more favourable treatment to the foreign investor, in comparison to the domestic investor. This was the Brazilian National Congress' understanding of its formal complaints about the BIT between Brazil and Switzerland:

> In issuing its opinion on the Brazil-Switzerland BIT, the Committee on Foreign Relations stated that the form of compensation provided for in the agreement would conflict with the constitutional provisions on the expropriation of urban and rural property, since, in the case of property, the Brazilian Constitution provides for the possibility of payment in cash or public debt securities, Art. 182, §3, while in the case of rural property, the constitutional text provides for payment with agrarian debt securities, Art. , 184, caput. (Fernandes & Fiorati, 2015)

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[22] Article 182, third paragraph, of the Brazilian Federal Constitution.
[23] Article 182, fourth paragraph, item III, of the Brazilian Federal Constitution.
[24] Article 184 of the Brazilian Federal Constitution.

According to the new language adopted by the CFIAs – as indicated in the previous section of this thesis – the compensation in case of expropriation by the state must be done according to the host state legislation. In this case, the payments in government bonds to foreign investors would be acceptable under the CFIA model. For the investor, this might not have a major impact. In those cases when the compensation is paid by government bonds, the investors can transfer abroad the amount that they receive from selling the bonds in the market, based on the transfer of capital provisions of the CFIAs (Costa & Gabriel, 2017). The discrepancies that the expropriation provision faced in the previous bilateral investment agreements, including direct disparities with the Brazilian Federal Constitution, are no longer a concern for the Brazilian government under the signed CFIAs.

The third distinction that will be presented in this section is related to corporate social responsibility, a new perspective included in the CFIAs in comparison to the previous BITs signed by Brazil. This approach includes the respect for human rights, the empowerment of local human resources, good practices in terms of corporate governance, and the respect for the environmental legislation. The CFIAs require the endeavour of foreign investors and investments to contribute to the sustainable development of the host state. In this sense, the CFIAs not only include a general provision for a responsible business conduct, but also provide a complete list with principles that are expected from investors and investments (Hawes, 2017). The new framework innovates the investment regulatory arena by introducing to the agreements an article on corporate social responsibility. By the new provisions, the states can establish recommendations to the investors in themes of CSR and, even though these recommendations are non-binding, “they can be used to construe the other provisions of the agreements by delimitating, for instance, the protection due to private companies as per their corporate social behaviour" (Monebhurrun, 2016, p. 79).

The fourth distinction is the existence of an organized thematic agenda to facilitate the investment flow under the new model of investment agreements. This is an unprecedented benefit for the investors, not present in any of the BITs signed during the nineties.

The fifth distinction is the omission of the fair and equitable treatment clause in the new CFIAs. Although there is a certain divergence in the literature in the definition of the fair and equitable treatment clause, according to most of the international relations authors, such clause is an autonomous guarantee of justice equity and good faith (Fernandes and Fiorati 2015, 256-257). The fair and equitable treatment clause is a very common provision to bilateral investment agreements and was inserted in the nineties' agreements. The literature is controversial on this omission. Some authors understand that this is an important provision and should have been part of the CFIAs, since it provides a balance to the distinct interests of the parties involved: the foreign investors and the host states. Other authors understand and agree with this omission due to the difficulty in defining the fair and equitable treatment clause and its materiality (Costa & Gabriel, 2017).

The sixth and last distinction, and perhaps one of the most relevant and discussed, is the dispute settlement regime chosen by the CFIAs. First of all, the BITs signed in the 1990s allowed the investor to initiate a legal process against the host state based on a breach of any provision of the BIT. Brazil's National Congress recognized the investor-state arbitration regime as a limitation to the states' right to regulate; besides, it granted extraordinary benefits to foreign investors, hence discriminating domestic investors vis-à-vis foreign investors. For these same reasons, Brazil did not sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Martins, 2017). In this sense:

> According to Itamaraty's legal adviser, Augusto de Rezende Rocha, in an opinion dating from 1964, Brazil should not bow to investment arbitration and, therefore, reject peremptorily the ICSID, as this would bring nothing good to the country. According to the text, besides consecrating tension between dominant economies and dominated economies, investment arbitrage would be instrumental in perpetuating disguised economic and financial imperialism. Even today, such opinion is perceived as an overflowing source of wisdom and authority. (Costa & Gabriel, 2017)

Still within the dispute mechanism approach, the new model of investment treaties created the bodies of the Ombudsman and the Joint Committee, which have helped minimize any mistrust, both from the side of the investors and from the side of the state, by amplifying the dialogue and cooperation space. The key, however, is that a real partnership is established between the public and private sectors, so that these mechanisms do not dissuade, in the middle of bureaucracy, an attempt to reach satisfactory solutions (Medrado & Daudt, 2015).

If the preventive mechanism is not enough for settling the dispute, then an arbitration process can be initiated, yet between the states that are parties to the agreement. It is interesting that the home state will still count on the technical and legal support of the investor that allegedly had its rights affected by the host state; however, the procedure will be implemented between states only. This is a similar approach to the dispute mechanism in the WTO, in which the private sector works in cooperation with the Brazilian government, especially within the Brazilian diplomacy structure (Medrado & Daudt, 2015). This distinction in the dispute settlement mechanism is one of the main advantages highlighted by the Brazilian government when presenting the CFIAs in its official websites:

> In addition, while a traditional BIT has as its central aspect the investor-state dispute settlement, the Brazilian proposal endorses mechanisms for the prevention of disputes based on bilateral dialogues and consultations, prior to the installation of an arbitration procedure. These instruments cover the direct and

> permanent performance of the aforementioned Focal Points, as well as extensive discussions within the Joint Committee responsible for the preliminary examination of specific issues requested by the signatories (Ministry of Development, Industry and Foreign Trade, n.d.).

As briefly discussed, this new dispute system – the state-state dispute resolution system in contrast to the investor-state dynamic – faces some critical reviews. This approach "may breed politicisation of investment disputes (precisely what BITs are designed to prevent). It also places the power of deciding which disputes are worth taking forward firmly within the state's hands, and makes state interference with the conduct of the case more likely". (Hawes, 2017). Some other authors challenge the argument that the CFIA may allegedly be considered a politicisation of investment disputes with the explanation that the arbitration model adopted by the CFIAs is very similar to the one adopted by the WTO, "where disputes are subject to (diplomatic) consultations followed by state-to-state dispute settlement" (Hees, Cavalcante, & Paranhos, 2018, p. 4). And "one does not often hear that the WTO system is "politicized" because affected private parties are not granted locus standi" (Hees, Cavalcante, & Paranhos, 2018, p. 4).

Despite the criticism of the new system, the alteration in the dispute settlement mechanism in comparison to the arbitration process of the nineties' BITs has undoubtedly a central role in the new path that the new Cooperation and Facilitation Investment Agreements are taking within the Brazilian National Congress. Among other possible explanations, the ratification of the signed CFIAs by the Brazilian legislative system, culminating with the promulgation of the first two bilateral investment agreements, was driven by this alteration in the dispute settlement mechanism and the suppression of other questionable provisions that were contained in the previous BITs. This was, however, only one of the main reasons for a novel outcome in terms of ratification of bilateral investment treaties signed by Brazil. Other circumstances can also explain this change in the Brazilian scenario, as will be discussed in the next chapter.

Chapter 5: Explaining the new CFIAs

The ratification of the first bilateral investment treaty by Brazil in 2017 followed by the second one in 2018 represents a complete change in the country's position regarding foreign direct investment regulation. As seen in the previous chapters, Brazil was for many years reluctant in ratifying this type of treaty. However, this changed radically. Two BITs were finally ratified, and the same process is expected for other signed investment agreements. But what has changed to make this ratification possible? What circumstances or factors have altered so abruptly Brazil's position? What influences were relevant to this new position of the Brazilian government?

This chapter will explore the possible explanations that may have influenced the Brazilian political decision of ratifying the new wave of bilateral investment agreements. The analysis will be divided as follows: the content of the CFIAs in comparison with the nineties' agreements; the support of the new model by domestic opinion makers; the change in Brazil's economic role; the influence of Brazilian private corporations; and Brazil's political scenario.

5.1 Criticisms of the old BITs

The differences between the first and second wave of BITs is perhaps the most obvious explanation for the successful path that the CFIAs are taking within the Brazilian Congress, including the ratification of the first Cooperation and Facilitation Investment Agreement in 2017 and the second one in 2018. Once they were finally signed by the Brazilian executive group, the nineties BITs faced many critical analyses within Brazil, including in the Congress and among some policymakers. After a few rounds of analysis and reviews within the Brazilian National Congress, it was clear that the nineties' treaties would not be ratified.

In a general perspective, the two main problems encountered by the nineties' agreements were the direct divergence that some provisions had with the Brazilian Federal Constitution and the risk that the original BITs posed to Brazil's national sovereignty. As seen in the previous chapter, the CFIAs are less protective to the investor, in comparison to the nineties' agreements. While the nineties' agreements were embedded in a more investor protection perspective, the new model is based on a different approach: the cooperation between state and investor. The result is that the investors are not benefited by protective provisions established by the states when negotiating the bilateral investment agreement, but encouraged to adopt a more cooperative approach, in which dialogue is the key factor.

This is exemplified by the exclusion of some traditional international treaties' provisions from the new CFIAs – all of them present in the nineties' agreements. For instance, the CFIAs do not embrace the fair and equitable provision nor the indirect expropriation; in addition, they do not allow the state-investor arbitration as a possible dispute resolution mechanism. According to Nitish Monebhurrun "(…) this exclusion is voluntary and is, once again, strategical to some degree. It is also an element of the ACFIs' originality. The Brazilian negotiators are aware of the content of other States' investment agreements, and they are acquainted with the evolution and trends of international investment law" (Monebhurrun, 2016, p. 93).

For the indirect expropriation, the National Congress encountered difficulties in approving the 1990s bilateral investment agreements since this provision did not follow the constitutional rules in place in Brazil. This circumstance was exposed in the some of the opposition from the members of the Congress, specifically during the agreements' processing in the Chamber of Deputies'

Commission of Foreign Relations and National Defense. According to one of the members of the parliament:

> (…) the indemnification format defined in the text [of the bilateral investment agreement] must be confronted with some constitutionals precepts in force regarding the expropriation of urban and rural properties. (…) Since the particularities from the [Federal Constitution] were not excepted in the text of the agreement, we can imagine that the foreign investor could, in case of a future dispute, intend the applicability of the agreed treaty[25]. (Morosini & Badin, 2015)

Besides a direct discrepancy with the Brazilian Federal Constitution, the expropriation provision from the nineties' agreement could also mean an impairment to the sovereign regulatory power of the Brazilian state. As a rule, any state – by exercising its regulatory power – can freely adopt rules and regulations to protect the public interest, which may affect or restrict the rights of investors. In some circumstances, these rules and regulations can constitute the indirect expropriation. The difficulty is in the fact that a very tenuous line exists between a permissive regulatory provision, in which the state has all the power to adopt policies due to its sovereignty (and which do not result in the payment of any compensation), and a regulatory measure, that is characterized by an indirect expropriation, and therefore would necessarily means the payment of a compensation by the state to the investor (Fernandes, 2014, p. 17).

The same concern in terms of sovereignty loss is also discussed in the investor-state dispute settlement provision seen in the nineties' agreements. This concern is complemented by other issues. The international jurisdiction right granted to the foreign investors was understood as a

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[25] BRASIL. Câmara dos Deputados. Parecer da Comissão de Relações Exteriores e Defesa Nacional [ao Projeto de Decreto Legislativo nº 367 de 1996]. Exposição do Deputado Luiz Gushiken. Diário da Câmara dos Deputados, Brasília, v. 60, n. 78, 4 maio 2000. p. 21692, as cited in Morosini, Fabio, and Michelle Ratton Sanchez Badin. 2015. "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" International Institute for Sustainable Development. August 04. Accessed June 19, 2018. 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/.

direct conflict to the constitutional rules and as a provision that would discriminate against Brazilian investors. These concerns were evident from the memorandum issued by the Commission of Foreign Relations and National Defense in the analysis of the bilateral investment agreement between Brazil and Switzerland. According to this memorandum:

> (…) the access to an international jurisdiction by the foreign investor was a direct conflict with the principle of full exhaustion of domestic remedies and with the principle of non-obviation of Judiciary jurisdiction, besides implicating in the state sovereignty reduction. The memorandum also mentioned the material cost of the public funds in the maintenance of legal representatives abroad. Also, the Commission's position was that the choice of the jurisdiction by the investor favored foreign investors and established discriminatory treatment to the national investors, whose only option was the access of the local justice system. (Fernandes & Fiorati, 2015, p. 269)

In addition, the investor-state dispute settlement mechanism provoked an additional criticism – this time a financial one, not political. This type of dispute resolution system increased the perception of potential new judicial procedures in Brazil. During the same period that the nineties' BITs were refused by the National Congress, Brazil's close neighbour, Argentina, suffered several arbitration procedures from investors based on BITs signed by Argentina during the nineties[26]. These arbitration disputes were a direct result of the Argentinian government measures that were taken by the country to face the economic and financial crises at the beginning of 2000 (Medrado & Daudt, 2015). These disputes created a strong argument to reinforce the critical review of the excessive protection granted to investors by the BITs, without guaranteeing rights to the host states (Dan, 2010, p. 173; Bringsken, 2012).

[26] To this date, Argentina has figured as a respondent state in a total of 60 cases – this represents 7% of the total cases worldwide. Out of the 60 cases, 54 were initiated between 1997 and 2009. Argentina is the country with more cases as a respondent state – followed by Venezuela with 44 and Spain with 43 cases. This is based on the number of public cases, available at the UNCTACD Investment Policy Hub website (UNCTAD - United Nations Conference on Trade and Development, n.d.).

As Monebhurrun explains, this voluntary decision of leaving the provisions cited above out of the Cooperation and Facilitation Investment Agreements was made since such provisions were seen by the Brazilian Congress as damaging to the sovereign regulatory powers of Brazil. In other words, Brazil would consequently lose its control and grip over foreign investors. The decision to remove these provisions was evidently intentional and could mean a voluntary effort of the Brazilian executive to guarantee that the new agreements would finally be accepted by the Brazilian Congress. The CFIAs were "negotiated and drafted to ensure ratification" (Monebhurrun, 2016, p. 93). The purpose, therefore, was not to repeat the experience of the nineties' treaties, but to guarantee that the new framework of investment treaties would finally be ratified and become a formal law in Brazil.

5.2 Support for the new model – a legitimacy explanation

As discussed in the previous chapter, the elaboration of the new model of bilateral investment agreement in Brazil had the participation of many different actors. The framework and main elements of the CFIAs were approved by the Council of Secretaries of the Foreign Trade Chamber – CAMEX, which is a unit within the Government Council of the Presidency of the Republic. As seen, CAMEX is composed by the Industry and Foreign Trade Secretary, who is the president of CAMEX, and by the Chief of Staff of the Presidency of the Republic and the Secretaries of Foreign Relations, Finance, Agriculture, Planning, Budget, and Management, and Agrarian Development.

Besides this wide support from the executive, the CFIAs' development also counted on the support of other public institutions (such as the Central Bank), and the private sector, mainly represented by CNI[27] and FIESP[28]. The active support of a wide range of organizations was an innovation to the CFIAs. FIESP, for example, not only participated in discussions, but also had an active role in the promotion of the Cooperation and Facilitation Investment Agreements. In the document entitled "Position Document: Industry Foreign Integration Proposal – 2014", FIESP recognized the importance of the new CFIAs to protect the Brazilian industry and listed various activities that should be developed by FIESP to promote these types of agreements (Federação das Indústrias do Estado de São Paulo, 2014, p. 24):

a) Identify, together with the private sector, priority countries for the signature of new CFIAs;
b) Negotiate and sign CFIAs with these countries, with an emphasis on Africa and Latin America; and
c) Initiate studies to the elaboration of mechanisms that may increase the protection of Brazilian investments in the African and Latin American countries.

The National Confederation of Industry in Brazil has also publicly endorsed the signing and ratification of the new bilateral investment treaties. During the signature process of the CFIA between Brazil and Mexico, the president of CNI, Robson Braga de Andrade, announced that these

[27] CNI (National Confederation of Industry in Brazil) is the Brazilian industry representative. Founded in 1938, CNI is the highest unit in the industry employers' system, and it advocates for the interests of the Brazilian national industry and articulates with the executive, legislative and judiciary powers, several entities and institutions in Brazil and abroad. CNI represents 27 industry federations (including FIESP) and 1.250 employer's unions, in which 700.000 industries are affiliated. (Confederação Nacional da Indústria, n.d.)

[28] FIESP is the industry federation of the State of São Paulo, the richest state in Brazil. FIESP is the largest class entity of the Brazilian industry. The institution represents 130.000 industries of many different sectors, of all sizes and from different productive chains, spread across 131 employers' unions. (Federação das Indústrias do Estado de São Paulo, n.d.)

agreements are the best path for Brazil to reach the foreign market. According to CNI's position, the agreement between Mexico and Brazil would increase the legal safety and the institutional environment of investments (Agências de Notícias CNI, 2015). A similar statement was issued for the Cooperation and Facilitation Investment Agreement between Brazil and Mozambique. In addition to indicating the benefits to legal safety and institutional environment of investments, the Confederation recommended that new similar agreements were signed with other countries, primarily in Africa and Latin America (Agências de Notícias CNI, 2015). In the same article, CNI's industrial development director, Carlos Abijaodi, also indicates the importance of the CFIAs to Brazil as an exporter of capital, which will be more deeply investigated in the next section of this chapter: "(i)t is fundamental the implementation of these agreements and that the government expands them to other countries. Investing abroad allows the access to new markets, the increase of exportation and the companies' productivity".

The CFIAs were also endorsed by other private groups, such as the Brazilian Section of the BRICS Business Council. The BRICS Business Council was created in 2013 in the fifth annual BRICS summit, in South Africa, with the participation of members of all the BRICS countries – Brazil, Russia, India, China and South Africa (Confederação Nacional da Indústria, n.d.). The Brazilian Section of the BRICS Business Council, established under the CNI, advocates that the BRICS should initiate an institutional dialogue with the main purpose of signing multilateral or bilateral investment agreements, following the new Brazilian model. This was marked as one of the priorities for the Brazilian Section. The Brazilian Section of the BRICS Business Council understands that intra-BRICS investment might be increased with the support of tools for the promotion, cooperation and facilitation of investment, which is the case of the CFIAs (Secretaria da Seção Brasileira do CEBRICS, 2017/2018, p. 19).

After the creation of the BRICS Business Council, some advancement for potential CFIAs between Brazil and the other BRICS members has occurred. For example, in October 2016, a Cooperation and Facilitation Investment Agreement between Brazil and India was drafted – the first agreement of this type with one of the BRICS states. In July 2017, during the visit of Brazil's president to Russia, the countries have signed a Memorandum of Understanding about investment and economic cooperation, which created a workgroup for the economic, trade, scientific and technological cooperation. The expectation is that this initial forum is used as a starting point for the negotiation of a CFIA between Brazil and Russia (Secretaria da Seção Brasileira do CEBRICS, 2017/2018, pp. 19-20).

Besides gaining the support of many institutions for the development of Cooperation and Facilitation Investment Agreements, the negotiation process of the new agreements was also a multidisciplinary task. In case of Brazil, a technical team, composed by representatives of the Ministries of Foreign Relations, Industry and Foreign Trade, Finance, besides CAMEX and the Central Bank, was established for this purpose (Ministry of Development, Industry and Foreign Trade, n.d.).

During this research it was not possible to identify significant participation of the civil society in the elaboration and negotiation of the new Cooperation and Facilitation Investment Agreements. As civil society actors, we can include social and environmental activists, indigenous groups, human rights defenders, religious and public policies groups. During the nineties, the social movements in Brazil were impacted by the neoliberal measures of the governments of this period

(Fernando Collor de Melo and Fernando Henrique Cardoso). Concomitantly with a crisis of the social movements, other forms of popular organizations – institutionalized, hierarchical and with systemic encounters – emerged (Duarte, 2015). In the 2000s, with the criticism of the neoliberal measures implemented in Brazil, many new social groups arose and existing ones were strengthened. The result was that militant actions for social pressure resumed in Brazil, in the form of popular mobilizations and protests (Duarte, 2015). These groups have a strong tie with the Workers Party – their participation in the political scenario is closely connected to the party's presence in the government (Avritzer, 2012).

Considering that the new bilateral investment agreements were negotiated and signed during the government of the Workers' Party, a lack of resistance from the organized social groups, capable of preventing the signature of these agreements, can be understood. Even if it was possible to find some critics from small groups (Grupo de Trabalho sobre Investimentos nas Américas, 2015) (Instituto Pacs – Políticas Alternativas para o Cone Sul, 2015), this was probably not robust and organized enough to have a negative impact in the implementation of the new CFIAs, since the signature happened as proposed by the executive. Based on this understanding, and considering that (i) the Workers' Party had exercised a strong opposition in the Congress against the BITs signed under the government of Fernando Henrique Cardoso and (ii) many social groups are strongly connected to such party, it is a logical conclusion to say that a more relevant opposition was probably exercised by social groups and organizations against the North-South BITs of the 1990s, in comparison to the CFIAs. This is certainly an aspect that could be explored more deeply in a future research.

The participation of so many relevant actors in the elaboration and negotiation process of the CFIAs demonstrated a greater commitment in the implementation of the new agreements, which might be one of the explanations for their success. This is a relevant change of scenario in comparison with the nineties' agreements, which were a priority for the Ministry of Foreign Affairs (in a certain way, all treaties and agreements are a priority for the Ministry of Foreign Affairs, since they embody the costs of time and resources allocated to the negotiation and singing) (Campello & Lemos, 2015, p. 19). However, "there is no signal that they were relevant for the 'hard' areas of the government – the Finance Ministry, the Central Bank and the Chief of Staff of the Office of the President (Casa Civil)", showing the absence of a clear domestic constituency (Campello & Lemos, 2015, p. 23).

Based on the open support presented by the Brazilian industry sector, such as CNI and FIESP, the Brazilian business sector seems to be very interested in this new model of international investment protection. Such a wider support to the new framework of bilateral investment agreements could be explained by the fact that the CFIAs provide to the investor some relevant measures to protect their business in the host state, including the definition of a thematic agenda, the exclusion of the indirect expropriation clause from the new agreements, and the creation of an amicable dispute resolution system, which seems closer to the investor than the formal legal process since it creates the possibility of participation by investors and also the civil society:

> That is precisely why individual investors affected by a measure might be invited to participate in the prevention of dispute procedure, so as they are granted an opportunity to present their point of view on the matter. Civil society can also participate in such proceedings, as the joint committee may invite other interested stakeholders to appear before the joint committee and present their views on such measure whenever relevant to the consideration of the measure in question (Hees, Cavalcante, & Paranhos, 2018, p. 4).

The possibility of the presence of the civil society in this institutional governance can allow a greater democratization and transparency of the rules' construction process under the new bilateral investment agreement framework, besides promoting a permanent dialogue for the construction of an adequate protection to investors that does not aim for the investors' risk reduction at the expense of the public interest (Perrone & César, 2016, p. 40).

The old BITs seem to be more protective to the investors. Some provisions that were beneficial to investors were removed from the CFIAs, which is the case of the investor-state arbitration clause. Although a state-state arbitration clause is not the ideal mechanism from the investor's perspective, it is clear that the Brazilian legislature would not approve a bilateral investment agreement that contained such a clause. Therefore, if investors insisted on keeping the investor-state clause, the chance is that the new CFIAs would have suffered the same outcome of the nineties' agreements. For this reason, in my perspective, the business sector might have accepted the new framework without major discussions, due to the fact that it would have a better chance of being approved by the National Congress.

The new CFIA model diminishes the political controversy related to national sovereignty and the discussions relating to the investor-state arbitration clause that were raised by the legislature when reviewing the nineties' BITs, besides offering bureaucratic support for Brazilian investors' activities overseas (Hees, Cavalcante, & Paranhos, 2018, pp. 2-3). This double perspective was probably recognized by the private sector in their decision to support the new framework of bilateral investment agreements.

5.3 Support for the new model – an economic perspective

One of the major differences between the nineties' agreements and the CFIAs is the other signatory parties of the agreement. The bilateral investment treaties signed by Brazil between 1990 and 1999 were mainly between Brazil and a high-income economy, while the new model of investment agreements signed after 2015 was mainly with lower income economies. Using the World Bank's income classification (World Bank, n.d.), out of the fourteen BITs signed almost three decades ago, twelve were with high-income economies, respectively the following countries: Portugal, Chile, United Kingdom, Switzerland, France, Finland, Italy, Denmark, Republic of Korea, Germany, Netherlands and BLEU (Belgium-Luxembourg Economic Union). This represents 86% of the total investment agreements signed by Brazil during this period (UNCTAD - United Nations Conference on Trade and Development, n.d.).

That scenario was quite different from the new Brazilian Cooperation and Facilitation Investment Agreements, in which only one out of the eight agreements was signed with a high-income economy. In other words, almost 88% of the CFIAs were signed with upper-middle income, lower middle income and low-income economies (UNCTAD - United Nations Conference on Trade and Development, n.d.). The comparison is presented in Table 4.

Table 4: Number of countries that signed BITs with Brazil and their income classification

Income classification	1990s BITs	CFIAs
High income	12	1
Upper middle income	2	3
Lower middle income	0	1
Low income	0	3

Source: Author, based on World Bank and UNCTAD websites

Another deviation is related to the high-income economies that were parties in the two groups of bilateral investment agreements. In the 1990s, most of the high-income economies were located in the Northern hemisphere – the BITs from this period were mainly North-South agreements. The CFIA signed with a high-income economy, on the other hand, was with a South American economy; in other words, it was a South-South relationship. This says a lot about the purpose of the investment agreements from the Brazilian perspective. The second wave of bilateral investment treaties signed by Brazil was designed to meet a different concern: Brazil's role as an exporter of capital and not only an importer of foreign capital. In the past few years, Brazil has been adopting a new role in the field of foreign direct investment. Brazil is more and more not only figuring as "a recipient of FDI (…); in addition, Brazilian companies are increasingly investing abroad (…)" (Kalicki & Medeiros, 2008).

> Brazilian firms have become particularly important regional players and are increasingly looking outward for international investment opportunities. For example, seven of the 20 largest foreign acquisitions by trans-Latin firms in 2012 were by Brazilian companies. Moreover, Brazil continues to have the highest level of outward FDI stock in Latin America, with more than US$200 billion – 50 per cent higher than Mexico, the second largest source (Calvert & Pickup, 2016, p. 210).

This movement is noted in the early 2000s, in which "a transition from the Brazilian position as solely a large investment recipient to also being an investor has led to the adoption of a new standard of investment protection for Brazil, the CFIA (…)" (Gabriel, 2016, p. 156). The fortification of the Brazilian economy was a favourable aspect to the increase of the internationalization process of Brazilian corporations – especially in Latin America and Africa – which demanded the creation of a legal structure to protect these corporations when doing business outside of Brazil (Morosini & Badin, 2015, p. 441). The Brazilian companies *Petrobras*, *Companhia Vale do Rio Doce*, *Odebrecht*, *Embraco*, *Gerdau*, *Camargo Correa*, *Usiminas* and

Companhia Siderúrgica Nacional are examples of this internationalization process (Kalicki & Medeiros, 2008, p. 441).

As a historical overview, the first signs of an opening in the negotiations of the new model of bilateral investment agreement was with South American countries, where the largest number of Brazilian companies operating internationally are located. Negotiations under the Work Subgroup number 12 – Investments, of the Mercosur (Southern Common Market) were initiated in the government of the former president Luiz Inácio da Silva (Lula) in 2010, based on a Brazilian proposal focused in the promotion of investment and cooperation. However, these negotiations were put on hold after some resistance from Argentina (Perrone & César, 2016, p. 38). From 2013, Brazil has opted to move its agenda to Africa, where the investments and the Brazilian commercial presence were encountering an important expansion in the previous years (Perrone & César, 2016, p. 38). After 2013, Brazil also redirected its attention to Latin America, focusing its efforts in building bridges with the countries of the Pacific Alliance formed by Chile, Colombia, Mexico and Peru, which were the main destinations for the Brazilian investments in Latin America. The signed CFIAs confirm this strategy. As well, the negotiations with the Dominican Republic were advanced, and with a new government in Argentina, a new proposition has been presented to Mercosur (Perrone & César, 2016, p. 39).

The next sections will summarize the main differences and specificities of the two strategic regions identified by Brazil as an exporter of capital, specifically Latin America and Africa, and also provide some insights related to other regions not included in such strategy.

5.3.1 South America and Mexico

The first priority region for Brazil's bilateral investment treaty strategy is South America and Mexico. Four (out of eight) Cooperation and Facilitation Investment Agreements were signed with countries located in Latin America. According to a study of the Brazilian business organization Fundação Dom Cabral[29], one of the biggest concentrations of Brazilian corporations outside of Brazil is in South America and Mexico (Fundação Dom Cabral, 2014). This study lists three out of four of the countries in Latin America with signed Cooperation and Facilitation Investment Agreements with Brazil.

Table 5: Countries with the greater presence of Brazilian companies

Position	Country	Number of Companies	Signed CFIA
1	United States of America	39	
2	Argentina	33	
3	Chile	28	X
4	Uruguay	24	
5	Colombia	23	X
6	Peru	23	
7	Mexico	22	X
8	China	19	
9	Venezuela	16	
10	Paraguay	15	
11	Portugal	15	
12	Bolivia	14	
13	United Kingdom	14	

Source: Author, based on Ranking FDC das Multinacionais Brasileiras 2014

[29] Established in 1976, *Fundação Dom Cabral* is a nonprofit Brazilian business school. According to the institution's website, the school provides domestic and international educational solutions that focus on innovative business, and has developed executives, public managers, private managers and entrepreneurs from organizations across the globe.

The investment of Brazilian companies in South America is made in diverse sectors, such as oil and gas, steel, machinery and equipment, food and cosmetics (Ribeiro & Lima, 2008). The increase of the investment in South America at the beginning of the twenty-century was driven by the access to the South American countries' domestic markets, increasingly protected by government trade measures, and natural resources, since South America is a very rich region in the most diverse types of natural resources, mainly in the energy sector (oil and gas) (Ribeiro & Lima, 2008).

In the past years, a combination of the Brazilian economic crisis, the political changes in South America with the weakening of left parties, and the corruption investigations in Brazil have caused a drastic decrease in the investment from Brazilian companies in South America (Gombata, 2017). It will be interesting to see how this will impact the Brazilian FDI flows in South America and the signing process of new bilateral investment agreements with South American countries in the following years, since, until now, Brazil has only CFIAs signed with Colombia, Chile and Suriname.

Regarding Mexico, Brazil is one of the main destinations for Mexican foreign direct investments and the investments from Brazilian investors in Mexico has reached in 2014 around USD 120 million. Among the Brazilian companies that have invested in Mexico, it is possible to provide a few examples. One example is the joint-venture of Brasken and the Mexican group IDESA in the development of the Ethylene XXI Project, which focused on the construction of a petrochemical complex in the country, with estimated investments of USD 4,5 billion. The Brazilian company Gerdau has a project to build a steel plant, with estimated investments of USD 600 million. And finally, Oxiteno, a Brazilian company, has, after many mergers and acquisitions in Mexico, acquired a leadership position in the Mexican chemical industry (Ministry of Foreign Affairs, 2015).

5.3.2 Africa

The second priority region for Brazil's investment strategy and signature of CFIAs is Africa. Especially from 2003, with the government of the former president Lula, Brazilian foreign policy started to focus on diplomatic relations with Africa. The former president's inauguration speech, for instance, indicates this approximation strategy for Africa and South America (Silva, 2003).

The approximation with Africa can be explained by the direct cultural and historical affinities with the African people, besides the ethnics and cultural affinities with the African countries also colonized by Portugal (Banco Mundial and Instituto de Pesquisa Econômica Aplicada, 2011, p. 29). More recently, during Dilma Rousseff's government, the need to strengthen Brazil's economic presence in Africa, where the Chinese presence was spreading rapidly, has become a new rationale for Brazil's presence on the continent (Castro C. M., 2013/4). Africa has attracted foreign direct investments in the past years, mainly due to the abundance of mineral resources in the continent and the increase of the price of such products in the international market. The foreign direct investment in Africa was focused on the extractive industry of mineral resources and the implementation of the necessary infrastructure for the outflow of these resources (Veiga, 2013, p. 7).

Brazil's flow of investment in Africa is still not relevant in terms of volume in comparison with other countries; however, some specific African countries have acquired more importance regarding receiving Brazilian investment. Brazil occupies an important presence in some African countries, such as Angola and Mozambique. The connection with both countries was facilitated by the common language and the close relationship between the Brazilian companies and the Portuguese companies that worked in both regions. Angola, for example, is the main recipient of Brazilian investment in the African continent[30] (Veiga, 2013, p. 8).

One of the studies that analyzed the Brazilian relationship with Africa has listed a few difficulties recognized by the Brazilian government associated with the expansion of Brazilian investments in Africa: inexperience of Brazilian companies abroad, the lack of knowledge of the African reality, limitations in terms of credits, lack of a good infrastructure, corruption problems and a deficient legal system in many African countries (Banco Mundial and Instituto de Pesquisa Econômica Aplicada, 2011, p. 100). This last difficulty is directly related to the signing of bilateral investment agreements.

The expectation is that Brazil expands this initial strategy and signs CFIAs with other countries in South America and Africa, as well as countries of other regions, such as Asia. According to government and private sector representatives, it is expected that the CFIA model is expanded to Morocco and India. New discussions are also expected with China, South Africa, Argelia and Tunisia (Thorstensen, Mesquita, & Gabriel, 2018, p. 86).

[30]Vilas Bôas, J. 2011. Os Investimentos brasileiros na África no Governo Lula: um mapa, Meridiano 47, Vol. 12, no 128, nov.-dez, as cited in Veiga, Pedro da Motta. 2013. "A África na agenda econômica do Brasil: comércio, investimentos e cooperação." RBCE (Nº 116): 4-19. Available at: http://www.funcex.org.br/publicacoes/rbce/material/rbce/116_PMV.pdf., p. 8.

5.3.3 Other countries

For other countries that are not included in the above strategy, Brazil can still benefit from existing bilateral investment agreements, even though such agreements do not include Brazil as a signatory. The mechanism that may be adopted by Brazil is called “treaty shopping”, which represents the creation of international operations (usually subsidiaries) in states that have a large number of signed investment agreements (Morosini & Badin, 2015, p. 435).

This was the case of Petrobras’ subsidiary in the Netherlands. In 2006, Evo Morales, who is the current president of Bolivia, occupied two oil refineries owned by Petrobras in Bolivia. Since these two refineries were acquired by Petrobras Netherlands, the company could have used the signed BIT between Netherlands and Bolivia to bring Bolivia into international arbitration. Another example was a dispute involving the Ecuador government, in which Petrobras has used a bilateral investment agreement between Argentina and Ecuador since Petrobras has initiated this investment using its subsidiary in Argentina (a company called PESA). It is actually via Argentina that Petrobras has chosen to manage many investment opportunities in Latin America since Argentina has a large number of signed BITs with Latin American countries (Bringsken, 2012). This approach can still benefit Brazilian’s corporations. However, it is difficult to measure if this strategy is a business strategy adopted by the Brazilian corporations or a political decision influenced by the Brazilian government per se. Especially in the case of Petrobras, which is the largest crown corporation in Brazil.

5.3.4 Additional considerations

It is possible to say that Brazil's change of perspective, from a primary recipient of capital to an exporter and importer of capital, was recognized by the Brazilian Congress for the ratification process of bilateral investment agreements. The members of the National Congress understood this impact in the sense that the new BITs do not impose obligations and rules on the exporters of capital, but only emphasize the rights granted by the host states to the investors. This is supported by the fact that, even though there are a few agreements between two developed economies, the great majority of bilateral investment agreements around the world is between a developed and a developing nation (Dan, 2010, p. 168).

In a formal analysis, the bilateral investment agreements encounter reciprocal provisions, since both parties would have the same rights and obligations. However, this reciprocity is only formal, since, in practice, such investment agreements have a more beneficial impact on the countries that export capital[31] (Dan, 2010, p. 168). To exporters of capital, the bilateral investment agreements serve as an important tool to de-regulate the flow of investments and minimize the host state intervention, since they will create specific rules that will protect the foreign investor. This characteristic was duly noted by the Brazilian Congress in both historical periods: first, to influence the non-ratification of the bilateral investment agreements signed until 1999, and then to facilitate the ratification process of the new model of investment treaties signed from 2015.

[31] PERRONE-MOISÉS, Cláudia, (1998), "Direito ao Desenvolvimento e Investimentos Estrangeiros", Ed. Oliveira Mendes, p. 28, as cited in Dan, Wei. 2010. "Acordos Bilaterais de Promoção e Protecção de Investimentos. Práticas do Brasil e da China." Revista Nação e Defesa, p. 168.

In a way, it is possible to say that Brazil does not recognize bilateral investment agreements as a major factor for the increase of foreign direct investment. This is evidenced by the fact that, even though Brazil did not have an investment agreement in force until 2015, the country was still a relevant recipient of foreign direct investment from other countries. Perhaps the most relevant contribution of bilateral investment treaties, thus, is their benefits to the investors. This is a key reason why Brazil has started a new model of agreement with countries that Brazil has an interest in investing in and not so much in receiving an investment from. This is why the role of Brazil as an exporter of capital, and more particularly the other signatory parties of the CFIAs, is a plausible and relevant explanation for the successful ratification process of the new wave of bilateral investment agreements. One can say that Brazil has implemented a risk analysis and has understood that bilateral investment agreements are mostly pertinent and beneficial when they are protecting the state as an exporter, not as much a recipient of capital.

5.4 Influence of private companies in the Brazilian government and Congress

As already discussed in the second chapter of this thesis, one of the main actors in the foreign direct investment is the multinational corporations. The importance of FDI is increased when domestic companies are seeking an expansion in their markets and consequently their profits. When such companies are already well established in the internal markets, a very valuable strategy is to seek new markets – now in the international sphere. This is the internationalization movement that many countries have experienced, including Brazil.

The internationalization of a company is configured as the opening of a business operation in another country – which includes a commercial office, distribution centre, franchise, store, productive unit, partnership with other company, among others (Dib, 2017). And the reflection of this internationalization process is the flow of foreign direct investment to the host country. As indicated by APEX in a recent study related to the internationalization process of Brazilian companies, the reasons that motivate the internationalization of these companies are the increase in the company's sales (72,7%), the risk diversification (65,3%) and the protection against the domestic market volatilization (61,3%) (Dib, 2017).

Many Brazilian companies include in their strategic plans the internationalization process. As a result, many of those companies have experienced real and significant internationalization, by opening units and developing projects outside of Brazil. A study of the Brazilian association *Fundação Dom Cabral*[32] has listed the Brazilian companies that are more internationalized. The study used the level of transnationality as the ranking main criteria, which includes three basic numbers: the part of the total revenue of the company that comes from overseas, how many assets of the company are located outside of Brazil and how many employees the company employs abroad (Barbosa & Vaz, 2014). A list with the top internationalized Brazilian companies, with their segment, revenue and their position in the ranking of Brazil's largest companies, is included in Table 6 (Barbosa & Vaz, 2014) (Revista Exame, 2017):

[32] For more information on *Fundação Dom Cabral*, see footnote number 29.

Table 6: Top internationalized Brazilian companies

Ranking	Name of the company	Segment	Annual revenue (in US$ million)	Ranking in the list of the 500 biggest companies in Brazil
1	Construtora Norberto Odebrecht	Infrastructure	956.0	203
2	Gerdau	Metals	2,273.0	76
3	InterCement	Cement	633.1	317
4	Stefanini	IT	n/a	n/a
5	Metalfrio	Appliance	n/a	n/a
6	Magnesita	Metals	464.8	421
7	Marfrig	Food and beverage	1,868.5	92
8	JBS	Food and beverage	8,690.4	12
9	Artecola	Chemical	n/a	n/a
10	IBOPE	Consultancy	n/a	n/a
11	Sabó	Automotive	n/a	n/a
12	Tupy	Automotive	631.1	320
13	Tavex	Textile	n/a	n/a
14	Minerva Foods	Food and beverage	1,957.0	88
15	Votorantim	Cement	1,478.8	120
16	DMS Logistics	Logistics	n/a	n/a
17	OAS	Infrastructure	611.2	332
17	BRF	Food and beverage	9,022.6	10
19	Vale	Mining	2,119.7	81
20	Tigre	Construction	461.1	430
21	Andrade Gutierrez	Infrastructure	643.1	310
22	WEG	Industrial machinery	1,449.8	124
23	Marcopolo	Automotive	495.9	393
24	CZM	Industrial machinery	n/a	n/a
25	Embraer	Aviation	5,165.6	23
26	Camil	Food and beverage	1,145.8	159
27	Alpargatas	Shoes and apparel	849.5	238
28	IndusParquet	Construction	n/a	n/a
29	Construtora Camargo Corrêa	Infrastructure	585.3	342

Source: Author, based on *Revista Exame*

The list of the top Brazilian companies that have a presence in other countries is composed of large corporations, with economic importance in their sector and capable of exercising some influence in terms of decision making. The first company of the list above, for instance, is Odebrecht, a large corporation in the infrastructure sector, with a revenue of US$ 956 million, and which occupies the position 203 in the ranking of the 500 biggest Brazilian companies (Revista Exame, 2017). Other examples of large Brazilian corporations that are included in the list of the top internationalized Brazilian companies are JBS (the 8th most internationalized company and the 12th largest Brazilian company in Brazil) and Vale (the 19th most internationalized company and the 81st largest Brazilian company in Brazil), with a revenue of US$ 8,7 billion and US$ 2,1 billion respectively.

It is well known that large corporations have been exercising more and more influence in the political scenario over the past years: "companies now devote massive resources to politics, and their large-scale involvement increasingly re-directs and constricts the capacities of the political system" (New America's Weekly Wonk, 2015). When analyzing the list of the most international Brazilian companies, it is possible to notice that most of them operate in the sectors of the economy privileged by the foreign policies developed by Brazil's government. Many of the companies listed are from the infrastructure, mineral resources and food sectors (most of them operating in the meat segment). As seen in section 5.3, these sectors are listed as the main sectors developed in the two priority regions for Brazil: South America (oil and gas, steel, machinery and equipment, food, cosmetics) and Africa (extractive industry of mineral resources and infrastructure).

Based on this correlation, it is reasonable to conclude that the largest internationalized Brazilian corporations have benefited from the signature of the new wave of bilateral investment agreements by Brazil. It is possible to go even further and conclude that such benefit acquired by the companies could be a strong evidence that the companies have exercised some influence (even if indirect) in encouraging the elaboration, signature and ratification of Cooperation and Facilitation Investment Agreement by Brazil. The close relationship between these companies and the Brazilian executive and legislative powers is a reality.

For example, some of the cited infrastructure companies and a company in the food sector are significant donors to political parties and candidates. In the 2014 elections, the 10 companies with largest donations helped in the election of 70% of the Chamber of Deputies. Among these 10 companies, some of the top internationalized Brazilian companies listed in the table above are included: (i) JBS (and companies from the same economic group or with the same shareholders) donated R$ 61,2 million (US$ 16,5 million) to 162 elected federal deputies; (ii) OAS invested R$ 13 million (US$ 3,5 million) to help elect 79 federal deputies; (iii) Andrade Gutierrez spent almost the same amount of OAS and helped in the election of 68 federal deputies, (iv) Odebrecht has donated R$ 6,5 million (US$ 1,8 million) to 62 federal deputies; and (v) Vale has elected the third biggest business group of federal deputies – 85 elected federal deputies from 19 political parties, who received part of the R$ 17,7 million (US$ 4,4 million) donated by the company (Toledo, Maia, & Burgarelli, 2014). This financial support has undoubtedly had some influence on the federal deputies' role in the Congress since it is expected that the congressmen will return the favour received from the private corporations during their mandates.

In addition to political donations, an entire corruption scheme involving Brazilian companies, especially in the infrastructure sector, was uncovered by some recent corruption investigations held in Brazil, starting with the *Castelo de Areia* ("Sand Castle") investigation and then solidified by the *Lava Jato* (“Car Wash”) federal investigation. The *Castelo de Areia* investigation was initiated in March 2009 and involved the infrastructure company Camargo Corrêa. However, it was annulled by the Justice system in 2011 after allegations of illegality, without having any of the company’s investigated employees prosecuted or condemned.

The *Lava Jato* federal investigation, on the other hand, is still an ongoing investigation, with some very successful numbers. The operation is the biggest corruption investigation ever conducted in Brazil. It was initiated in March 2014, as a unification of four other operations that were investigating networks operated by *doleiros* (black market money dealers) who used small businesses, such as petrol stations and car washes, to launder the profits of crime. This initial investigation has led the Brazilian prosecutors to uncover a vast and extraordinarily intricate web of corruption (Watts, 2017). The scheme involved the payment from companies to politicians (members of both legislative and executive) and political parties, to impact legislation approval and public contracting. From the list of politicians, it is possible to cite federal deputies, ministers, mayors, governors and even the former president Lula. Some of the numbers of the operations disclosed by the Federal Prosecution Service in Brazil are included in Table 7 (Folha de S. Paulo, 2017):

Table 7: The number of the *Lava Jato* federal investigation

1.434 procedures initiated;
775 search warrants;
210 bench warrants;
95 provisional detentions;
104 temporary detentions;
6 flagrant arrests;
158 plea bargains;

10 leniency agreements; **274** accused persons; **141** convictions; **R$ 38,1 billion (US$ 10,3 billion)** is the total amount of the compensation claimed against the prosecutors (including penalties) **R$ 3,2 billion (US$ 0,9 billion)** is the total amount of assets of defendants already blocked by the Justice

Source: Author, based on *Folha de S. Paulo*

Besides investigating the public sector, the operation has also investigated private corporations and their relationship with the public sector (for example, illegal payments to the company's executives and political parties). The list of companies that were investigated (and some of them already convicted) includes: Petrobras, Odebrecht, JBS, Galvão Engenharia, OAS Construções, Mendes Júnior, Andrade Gutierrez, Camargo Corrêa, UTC, Engevix, Toyo Setal, Eletronuclear, Eletrobras, Promon, MPE Montagens Industriais, Iesa, GDK, Alusa, Carioca Engenharia, Schahin, Setal Engenharia, and Sano-Sider (Rodrigues, 2017) (Scheller, 2017) (Deutsche Welle, 2017) (Congresso em Foco, 2017). A big portion of these companies operates in the infrastructure sector. Most of them are already familiar to the reader since they were listed in Table 7 as the top internationalized Brazilian companies.

One can assume that the companies' "investment" in political parties and candidates and politicians aims at an economic benefit to such companies. Once these parties and candidates are elected to both the executive and the legislative, it is expected that they will pursue measures that will somehow involve a repayment to the companies. It is possible to identify some strong indications that this might have been one of the reasons for the success of the new wave of bilateral investment agreements in Brazil. Most of the new investment agreements signed by Brazil after

2015 will somehow benefit many of these Brazilian corporations, when they are expanding their business to other countries. Therefore, they could have used their influence to, in a certain way, push the ratification of the new CFIAs. However, this is only a possible indication. A direct relation between the influence of private corporations within the government and the signature of the new Cooperation and Facilitation Investment Agreements is extremely difficult to be proved, even though many of the companies mentioned before will benefit from most of the signed CFIAs.

It is important to note that the perspective above only focuses on the Brazilian companies' interests in the ratification process of the CFIAs. However, the opposite analysis can also be a pertinent one: in this case, an analysis of whether the CFIAs encountered any opposition from Brazilian companies concerned about the competition of foreign investors coming from the countries that are parties of the CFIAs. Perhaps for the African countries, this might not be a relevant perspective, since the flows of investment from the African signatories of CFIAs to Brazil are not significant, as previously mentioned in Chapter 4. For foreign investors from Latin America, however, this might be a more relevant issue.

Since the new CFIAs' ratification process has been successful so far, there is not much evidence that there was a strong opposition from other Brazilian companies. A plausible explanation for this lack of opposition could be that these companies are not large enough to have an impact in the decision-making process of the executive and legislative. This is certainly an aspect that could be explored in future research.

5.5 Relationship between the executive and the legislative branches

Although the first Cooperation and Facilitation Investment Agreement was only signed in 2015, the draft of the agreement and the negotiation process started a few years before, in 2012. The signature of new bilateral agreements by Brazil is a reflection of the consolidated foreign policy that Brazil was adopting in the previous years by the two Worker's Party presidents, specifically during the two governments of Lula, from 2003 to 2010, and during Dilma Rousseff's mandates from 2011 to 2014 and the partial mandate from 2015 until her impeachment in May 2016.

As cited before, one of the premises of Lula's government was to solidify the South-South relations (with an emphasis in Africa and South America), especially after the international financial crisis of 2008. The priority given to the South-South engagement has been maintained by Rousseff, even though changes have been noted in the diplomatic style and foreign policy objectives compared to her precedent, Lula (Castro C. M., 2013/4). This was a divergence from the foreign policy of Fernando Henrique Cardoso's government when the nineties' bilateral agreements were signed. Cardoso's foreign policy had a wider approach, with a political opening in both the regional and global levels, including a closer relationship with high-income countries (especially the United States and the European countries) (Barbosa R. , 2015).

Lula had a good relationship with the National Congress during his two mandates. Although some important legislative projects initiated by the Presidency House were not approved by the Congress, due to a strong movement from the opposition, during the eight years that Lula was president, the Congress approved more provisory measures initiated by the Presidency House than proposals presented by the congressmen (Mazenotti & Lourenço, 2010). From the total of approved legislation, 63% were created by the executive, 31% were created by the legislative and 4% by the

Judicial, Public Prosecutor's Office or the Federal Court of Auditors (Benites, 2015). The numbers of Dilma Rousseff, however, are not remarkable: 42% of the legislation was produced by her government and 47% by the elected federal deputies and senators. Since 1988, this is one of the lowest rates obtained by a president (Benites, 2015).

Differing from the logical expectation, although Dilma did not count with a strong allied group in the Congress, this hasn't negatively impacted the approval by the Congress of the CFIAs signed under her government. The probable reason is that other external factors were the real boosters in the ratification process of CFIAs by the Congress, as indicated in the previous sections. The political strength of the executive and its influence in the Congress was not an indispensable or decisive condition for the success of the new wave of bilateral investment agreements. This argument is supported by the fact that the ratification process of the signed agreements continued unaltered in the National Congress, even after Dilma's impeachment. This process continued during the government of Michel Temer. Actually, two new agreements were signed in 2018 under Temer's government. This all occurred, despite the fact that Michel Temer is an extremely unpopular ruler (as referenced in Chapter 3) and is losing more and more support in the Congress (Costa R. , 2018; Odilla, 2017).

Perhaps more than a strong group of allies in the Congress, what might facilitate the ratification process of a legislative matter is the lack of unified and strong opposition to this specific matter being discussed. According to Campello and Lemos, one of the reasons for the unsuccessful fate of the agreements signed under the government of Cardoso, from the Brazilian Social Democracy Party, is that they suffered a small – but cohesive – opposition by the Worker's Party within the Congress. At that time, many liberalizing measures encountered a significant opposition in the

Congress from the left parties based on an anti-liberalization and anti-globalization position, including the old bilateral investment agreements (Campello & Lemos, 2015, pp. 18-19).

Since the new Cooperation and Facilitation Investment Agreement model was signed by a Worker's Party president, the same party that figured as the former opponents of the nineties' agreements, the new model did not encounter the same organized opposition in the Congress, which might have facilitated its approval. It is reasonable that the opposition parties and political coalitions in the Congress were more involved in other political matters, such as Rousseff's impeachment. A resistance to an economic agenda related to foreign direct investment, already supported by many opinion makers in Brazil, was probably not a priority at this moment.

Chapter 6: Conclusions

This thesis presents the Brazilian experience regarding bilateral investment agreements, specifically some possible explanations for why Brazil failed to ratify all the BITs signed in the 1990s but has since 2015 begun to sign new bilateral investment agreements again and ratified some of them.

One of the most evident explanations is the significant change in the content of the new bilateral investment agreements signed by Brazil since 2015, in comparison to the first wave of treaties signed during the 1990s. Many controversial clauses that were challenged by the Brazilian Congress in the late 1990s and early 2000s were removed from the new Cooperation and Facilitation Investment Agreements. The most relevant one, perhaps, is the investor-state arbitration clause, which was substituted by a less pro-investor, but also less controversial, state-state arbitration clause.

Besides the change in the agreements' content, another explanation for the successful outcome of the new CFIAs is the new role of Brazil as an exporter of capital. As a sole importer of capital, Brazil did not visualize many advantages in the signature of the nineties' treaties, which were mainly between Brazil and a developed country. Since the flows of foreign investment were still significant in Brazil, the ratification of the treaties signed in the nineties were not seen as indispensable for Brazil's economy and the continuation or increase in the receipt of foreign direct investment. Brazil is now seeing itself in an opposite perspective: seeking additional protection for its firms since they are pursuing new investments abroad. The new CFIAs are an additional protection to these firms, as they provide a legal apparatus that they might not encounter in the other countries which are parties to the BITs. This new perspective was undoubtedly an additional incentive for the Brazilian's authorities to "make the new model work".

This leads to a third explanation for the reasons why the new CFIAs followed a more successful path. With a better incentive to implement the new wave of bilateral investment agreements signed since 2015, the Brazilian government delegated to an internal unit the elaboration process of the new framework agreement. This elaboration process was supported by powerful actors, especially the private sector and many ministries and other authorities from the executive. Although a substantial participation of organized groups of the civil society could not be clearly identified in this preliminary phase, the support of industry associations and private corporations was a key element to the successful outcome of the new BITs.

In addition, as briefly discussed, the new CFIAs do not seem to have encountered a strong political opposition in the National Congress. The first six new agreements were signed in 2015, under the government of the left party *Partido dos Trabalhadores* (Worker's Party). During this period, it was not possible to identify a strong organized political party or group that exercised a relevant opposition to the signed CFIAs, as it happened with the 1990s agreements. This is potentially a relevant additional explanation for the approval of the new bilateral investment agreements by the Chamber of Deputies and Federal Senate.

Perhaps the most interesting influence for the change in Brazil's perspective in terms of BITs approval was the private sector, specifically Brazilian corporations with an intention of exploring international markets under the protection of BITs. There are good indications that, either through lobbying or political donations, these corporations could have exercised an important influence in the ratification process of BITs.

This is a very interesting aspect that deserves special attention. For a very long time, Brazil did not feel the necessity of devoting significant efforts to the ratification of bilateral investment agreements. As mentioned above, Brazil did not expect that the flows of foreign direct investment would increase significantly with these treaties in force. In fact, even without any signed BIT, Brazil continued to receive a relevant flow of investments from abroad, including during crisis and recession periods. This might be explained by the fact that the international market recognizes Brazil as a solid and stable investment destination, with a legal system capable of protecting foreign investors that decide to invest in Brazil. In other words, the country is seen as a democratic society with strong legal institutions and small risks in terms of government intervention in private property.

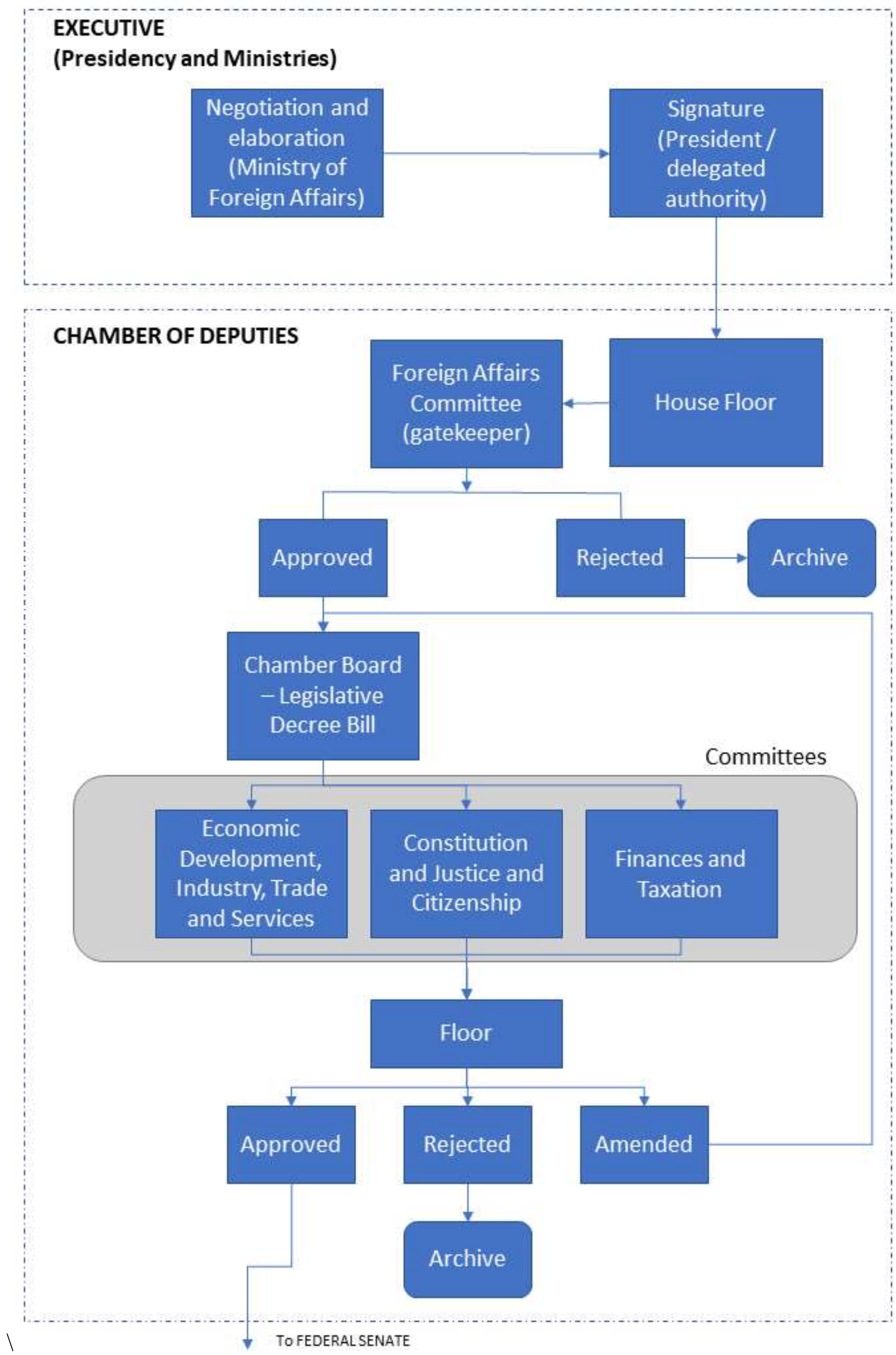
However, some findings of this research could push this understanding into a different direction. Brazil's political machine seems to be influenced by a small, but powerful, elite group, formed mainly by large private corporations. Although Brazil is an open economy, with many incentives for new investments, the decision-making process of its government is directly impacted by the interest of a few. Therefore, perhaps Brazil is not as democratic as it is seen by the international markets. Evidence of this weakness is reinforced by the recent corruption scandals that have been in the Brazilian news over the past years.

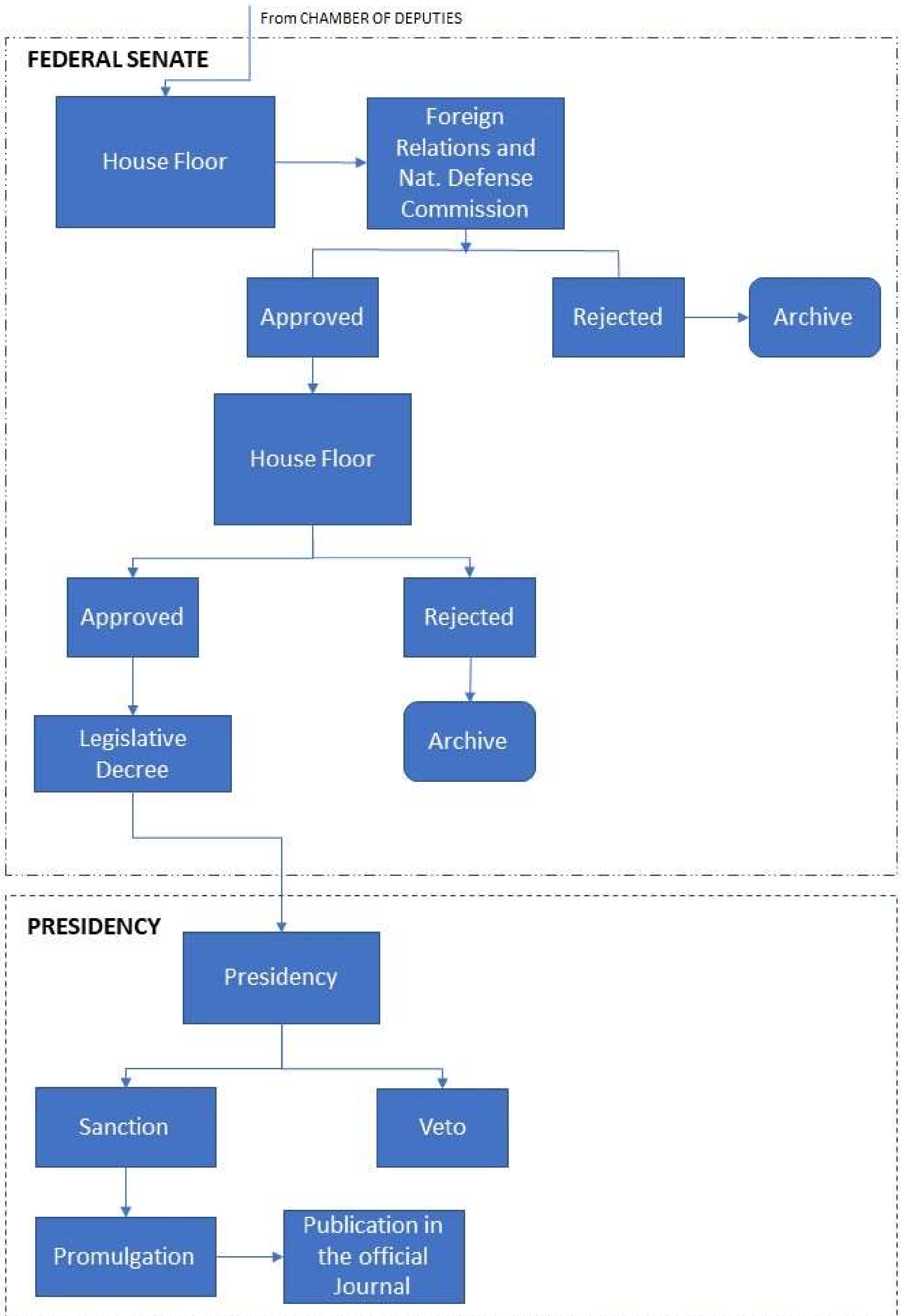
On the other hand, the corruption schemes that were revealed are being investigated by the Brazilian authorities, with the conviction of many political authorities and high-level employees of private corporations. This reveals that, although the political system in Brazil may suffer from an intrinsic corruption and influence of private actors, the legal system in Brazil is indicating its capacity to be impartial to some level and capable of applying the laws and guarantying certain juridical stability.

If the lack of a democratic perspective is revealed to be true, then Brazil might encounter some difficulties in increasing (and even keeping) the current levels of foreign investment. In this case, Brazil might consider a change in the current course of action, by considering the signature of bilateral investment agreements with developed countries, re-introducing the North-South model of BITs. However, it is important to highlight that although the international capital analyses the democratic aspect of a country before investing, it is also concerned about the rule of law (perhaps even more than the democracy aspect per se). If Brazil's creates a reputation of a country that does not allow corruption, with a legal system strong enough to combat it, this might be sufficient to guarantee the maintenance of FDI flows, including from Northern countries, even without a bilateral investment agreement to support the investor.

The results of this new scenario in Brazil might be an outcome for the longer term. For now, it is expected that the other CFIAs signed by Brazil will follow the same path of the bilateral investment agreements with Angola and Mexico: the ratification and production of internal legal effects in Brazil. In addition, the emergence of new CFIAs following the successful South-South model is also a logical expectation for the short-term scenario.

Appendix A: Flow Chart of the Brazilian Ratification Process





Source: Author, based on the Brazilian Chamber of Deputies, the Federal Senate and the Presidency websites and (Campello & Lemos, 2015)

Appendix B: Foreign Direct Investment Flows for the 2015 CFIA Countries

The table below was prepared based on the data retrieved from the United Nations Conference on Trade and Development – UNCTAD website, using the information reported by the countries to UNCTAD. Except where noted, the data refer to the most recent volume of FDI reported, specifically from 2012. The table encompasses both the FDI flows and stock in each of the researched countries. As a clarification, the FDI flows constitute in the amount of FDI received from a country over a specific period (in this case, the year of 2012). The FDI stock is the total accumulated value of foreign-owned assets of one country in the other at a given point in time (in the case below, the end of 2012).

Country	Location	FDI flow from Brazil (USD millions)	FDI flow to Brazil (USD millions)	FDI stock from Brazil (USD millions)	FDI stock to Brazil (USD millions)
Mozambique	Africa	1,300	Not available*	1,235**	Not available
Angola	Africa	Not available*	Not available*	1,175	1,146**
Mexico	Latin America	67	2,756	1,072	22,377
Malawi	Africa	Not available*	Not available*	Not available*	Not available*
Colombia	Latin America	355	194	816	1,386**
Chile	Latin America	448	1,640	5,957	12,773

*For the not available items, the numbers were not reported by the countries to UNCTAD

**Data retrieved from 2011, since the numbers of 2012 were not available or not relevant

Source: Author, based on United Nations Conference on Trade and Development – UNCTAD

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