

Domestic Governance and Treaty Practice of Brazil's Investment Cooperation and Facilitation Agreements

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11.1 Introduction

Brazil is often discussed as an outlier case in international investment law. Most developing states, which ratified their bilateral investment treaties (BITs), incurred, at times unwittingly, constraints on their policy space being susceptible to investor–state disputes. Fortuitously, Brazil left unratified all fourteen of the BITs it signed in the 1990s¹ and, as a result, managed to remain outside of the dominant regime of international investment law, now synonymous with neoliberalism.² Importantly, as is often highlighted, despite abstaining from the dominant regime, Brazil maintained a relatively high rank among the top global foreign direct investment (FDI) recipient states since the 1990s, and since the 2000s, it also saw a rise in its outbound FDI figures.³

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¹ See generally D. Campello and L. Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' (2015) 22 *Review of International Political Economy* 1055–1086.

² M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015).

³ According to the *World Investment Report of 2020*, Brazil attained the sixth position for inward foreign direct investment in 2018–2019, behind the United States, China, Singapore, Netherlands, and Ireland. See UNCTAD, *World Investment Report 2020* (Geneva: United Nations, 2020), Figure I.7 (p. 12). See also Annex Table 1 for outbound

Within the context of the movement of revisions and reforms of traditional BITs, or what the United Nations Conference on Trade and Development (UNCTAD) referred to as the “re-orientation era,” Brazil launched negotiations for an Agreement on Cooperation and Facilitation of Investments (ACFI).⁴ The genesis of the ACFI is closely connected to *inter alia* the position of Brazil, at the time, as an emerging exporter of FDI. Since it has been first proposed in 2013, the agreement has, however, been adapted rather flexibly to various bilateral and plurilateral partnerships.

Besides being a prominent and evidently successful global outlier that worked toward an alternative regulatory framework for FDI, Brazil’s agreements have also innovated by emphasizing and solidifying the concept of “facilitation” as the driving force behind investment regulation. Nonetheless, there remains doubt about what “facilitation” measures specifically mean, as well as their precise role in international agreements.⁵ No less controversial is the distinctiveness of investment facilitation measures from those related to “investment cooperation” – the two invoked dimensions of the ACFI. While ACFIs are clearly not about investment protection, it remains to be clarified what investment “cooperation,” “facilitation,” and “promotion” entail and how they differ.⁶

and historical data. Although there has been a shrinkage in world FDI, Brazil is an exception to this trend, see UNCTAD, ‘UNCTADstat – General Profile: Brazil’ (November 2019), see online at: <https://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/076/index.html>, and the analysis by the Brazilian Institute for Applied Economic Research which suggests a combination of domestic policies and investment diversion due to difficulties and restrictions in other more developed markets as reasons for Brazil’s performance, at R. Baumann, ‘Considerações sobre a política para atração de investimentos externos’ (2022) *Texto para Discussão IPEA* 1–32.

⁴ Translation note: certain translations have re-ordered the words, resulting in the acronym ACFI (Cooperation and Facilitation Investment Agreement). UNCTAD, e.g., is using ACFI as the acronym in the *World Investment Report*. We have opted to apply the same acronym as in the original, Portuguese version, i.e., ACFI.

⁵ See, e.g., J. Coleman, B. Güven, L. Johnson, and L. Sachs, ‘What Do We Mean by Investment Facilitation?’ (February 2018), online at: <https://ccsi.columbia.edu/news/what-do-we-mean-investment-facilitation>.

⁶ UNCTAD has also been an important promoter of the efforts to clarify the distinctiveness of such concepts, and in promoting examples of policy practices in investment facilitation measures. See, e.g., UNCTAD, ‘UNCTAD Global Action Menu for Investment Facilitation’ (Geneva: United Nations, September 2016). In the same sense, the comparative perspective about the concept and the contributions of the Brazilian experience to the idea of “facilitation” of investments by F. Hees, H. Moraes, P. Cavalcante, P. Barreto Da, and R. Paranhos, ‘Investment Facilitation: Leaving the Past Behind’ (2018) 240 *Columbia FDI Perspectives*.

In this chapter, we describe the experience of Brazil and its treaty practice, along with how it developed governance mechanisms and institutions to implement the facilitation and cooperation commitments undertaken in its ACFIs. Using the Brazilian example, we aim at illustrating how those abstract concepts may work in practice.

In addition to Introduction and Conclusion, the chapter is divided into three other sections. In Section 11.2, we briefly describe the Brazilian experience with the ACFI since 2013, progressing from bilateral to plurilateral negotiations. In Section 11.3, we invoke the three-pillar framework of the ACFIs to illustrate how it is expected to coordinate with Brazil's domestic governance structure on investment cooperation and facilitation. Section 11.4 then details the domestic implementation of the agreement and its supporting institutions. To do so, we describe the recent institutional reforms in Brazil designed to effectively accommodate such principles and measures. We then conclude the chapter discussing possible challenges for domestic governance structures for states participating in the plurilateral negotiation at the WTO on an Investment Facilitation for Development (IFD) Agreement and some final observations on the Brazilian experience.

11.2 Brazil: From Bilateral to Plurilateral Negotiations

As of November 2022, Brazil has signed more than 15 ACFIs with countries across multiple regions and keeps pursuing new partners.⁷ Being a proponent of a regulatory approach that favors investment facilitation over investment protection, Brazil also led, along with China and other G20 countries, the launch of multilateral negotiations at the WTO. In this section, we briefly describe the most noteworthy shifts in ACFIs concluded by Brazil since 2013, the purpose being to

⁷ The bilateral ACFI are signed by Brazil with: Angola (2015), Colombia (2015), Ecuador (2019), Ethiopia (2018), Guyana (2018), India (2020), Malawi (2015), Morocco (2019), Mexico (2015), Mozambique (2015), Surinam (2018), and United Arab Emirates (2019). Brazil also included investment chapters emulating ACFI in the Economic and Trade Expansion Agreement signed with Peru in 2016, and in the Free Trade Agreement signed with Chile in 2018. Finally, it signed a Protocol with MERCOSUR Members on Cooperation and Facilitation of Investments in 2017. And, since November 2022, there is a mandate for the negotiation of an ACFI with Saudi Arabia, see CEC Resolution N. 8/2022, available at: www.in.gov.br/web/dou/-/resolucao-cec-n-8-de-7-de-novembro-de-2022-442085179 (last accessed 13 June 2023).

highlight the comprehensiveness of the facilitation and cooperation measures and their increasing clarification.

With a model agreement finalized in 2013, Brazil signed its first set of ACFIs in 2015 with six developing states from Africa and Latin America.⁸ It subsequently went on to sign a further seven agreements, the latest one being in 2020 with India. The number of successful negotiations and the diversity in the partner states suggests “interoperability” and an “intrinsic appeal” of the ACFI framework.⁹ Brazil’s ACFIs have been viewed as a pragmatic and necessary response to its changing dynamics during the mid-2000s, wherein Brazil’s proportion of outward FDI was expanding and Brazilian firms were increasingly internationalizing. In fact, around the time the initial ACFIs were signed with Southeast African states such as Malawi and Mozambique, Brazilian firms, including both private and state-owned enterprises, had ongoing investment projects present within the same region.¹⁰

Discussions of the historical context of the ACFI framework’s conception tend to broadly focus on two main periods: first, the mid- to late 1990s, and second, the early 2010s.¹¹

⁸ M. Sanchez Badin and F. Morosini, ‘Navigating between Resistance and Conformity with the Global Investment Regime: The New Brazilian Agreements on Cooperation and Facilitation of Investment’, in M. Sanchez Badin and F. Morosini (eds.), *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017), pp. 188–217.

⁹ Such expressions qualifying ACFI features were well-crafted by the Brazilian diplomats H. Choer Moraes and F. Hees, ‘Breaking the BIT Mold: Brazil’s Pioneering Approach to Investment Agreements’ (2018) 112 *AJIL Unbound* 19–201.

¹⁰ See P. G. Fagundes Visentini and A. Danilevicz Pereira, ‘The African Policy of Lula’s Government’ (2007) *AUSTRAL: Brazilian Journal of Strategy & International Relations* 4–9. Also see M. R. Sanchez Badin and F. Morosini, ‘The Brazilian Approach to South-South Trade and Investment: The Case of Angola’ (2015) 43 *Denver Journal of International Law & Policy* 489–514.

¹¹ Discussions should also arguably include the 1960s during which Brazil, along with most other Latin American states, was a proponent of diplomatic protection of foreign investment and the ‘Calvo doctrine’, voted against and voiced skepticism towards the ICSID Convention and the problematic constitutional implications raised by its chief feature, investor-state arbitration. See C. Titi, ‘International Investment Law and the Protection of Foreign Investment in Brazil’ (2016) 2 *Transnational Dispute Management* 6–8; J. Kalicki and S. Medeiros, ‘Investment Arbitration in Brazil: Revisiting Brazil’s Traditional Reluctance towards ICSID, BITs and Investor-State Arbitration’ (2008) 24 *Arbitration International* 423–446, and H. Rabello de Carvalho, ‘The Brazilian Option in International Investment Law: Democratic Institutions, Human Rights and the Protection of Foreign Investment’, in D. de Andrade Levy, A. Gerda de Borja, and A. N. Pucci (eds), *Investment Protection in Brazil* (New York: Kluwer Law International,

In the former period, like many other developing states, Brazil's economy saw significant liberalization and its foreign service negotiated and signed several "traditionally drafted" BITs with largely capital-exporting member states of the Organisation for Economic Co-operation and Development (OECD).¹² Despite their negotiation and signing, as previously mentioned, none of these BITs achieved ratification and were eventually withdrawn from the Brazilian Congress by President Fernando Henrique Cardoso. While the set of conditions that led to this result were complex,¹³ a key factor that is often credited with preventing Brazil being subject to BIT obligations was a "resistance"¹⁴ from *inter alia* an influential minority within the Brazilian legislature that eventually "forced President Cardoso to withdraw" the BITs in December 2002.¹⁵ Instead, Brazil successfully employed alternative legal solutions (such as contractual arbitration clauses in state contracts, arbitration law reforms, double taxation treaties, constitutionally guaranteed national treatment, and provisions allowing repatriation of funds) to provide sufficient

2014), p. 217. See also C. Titi, 'Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas' (2014) 30 *Arbitration International* 357–386.

- ¹² A total of 14 bilateral treaties and 2 MERCOSUR-level protocols were concluded between 1994 and 1999, which were similarly drafted and provided for vast substantive guarantees typically found in early BITs (such as 'fair and equitable treatment') that were enforceable by investor-state arbitration (under ICSID or UNCITRAL rules) and remained legally enforceable beyond termination due to sunset clauses. Those non-ratified BITs and Protocols, online at: <https://investmentpolicy.unctad.org/international-investment-agreements> (last accessed 13 June 2023).
- ¹³ See Sanchez Badin and Morosini, 'Navigating between Resistance and Conformity with the Global Investment Regime', pp. 188–217 which describes in detail the multitude of normative and material factors that contributed to the nonratification of Brazilian BITs. See also Campello and Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil', pp. 1055–1086 which highlights the role of an "unresolved Executive" branch.
- ¹⁴ Projected as, for example, "a story of Brazilian legislators' exit from the product that had been negotiated by the state's diplomats." See N. A. Welsh, A. K. Schneider, and K. Rimpfel, 'Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties' (2014) 45 *Washington University Journal of Law & Policy* 105–144.
- ¹⁵ M. Maggetti and H. Choer Moraes, 'The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption', in C. A. Dunlop, C. M. Radaelli, and P. Trein (eds.), *Learning in Public Policy: Analysis, Modes and Outcomes* (Cham: Springer, 2018), pp. 295–316, also point to the existence of "a rather sophisticated debate in the Brazilian Congress on the implications of BITs which provided "a unique degree of awareness" that was scarce within developing states at the time. See also J. Muniz, K. Duggal, L. Peretti, 'The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change' (2017) 32 *ICSID Review – Foreign Investment Law Journal* 404–417.

protections to incentivize foreign investors while catering to its domestic concerns.¹⁶

In the latter period, the early 2010, it is important to consider three key conditions that had immense consequences for the nature of the ACFI frameworks eventual formulation:

First, Brazil's economy had seen greater internationalization and the emergence of a new constituency of Brazilian multinational corporations,¹⁷ the interests of whom added momentum to the domestic demand for rules that are also "investor-friendly."¹⁸

Second, by the early 2010s, enough investor–state arbitration cases had taken place for there to be a sufficient body of literature discussing and establishing the system's risks and flaws, validating Brazil's earlier decision from the 1990s. This also included the determination of an unclear, dubious statistical relation between the existence of bilateral investment treaties with investor–state arbitration clauses and incoming FDI.¹⁹

As a result, in 2012, the Council of Ministers of the Brazilian Chamber of Foreign Trade (CAMEX) granted a formal mandate to the Technical Group for Strategic Studies on Foreign Trade, a moment regarded as

¹⁶ Examples of those types of provisions are described in F. Morosini and M. Sanchez Badin, 'Mestizo International Law: Petrobras saga/ Petrobras in Bolivia: Is There a Rule of Law in the 'Primitive' World?', in H. Muir Watt, L. Bizikowa, A. B. de Oliveira, and D. P. Fernandez Arroyo (eds.), *Global Private International Law* (Cheltenham: Edward Elgar Publishing, 2019), pp. 381–391.

¹⁷ Brazilian firms had almost doubled their investments abroad between 2005 and 2010 to a record of US\$22 billion of outflows. Brazil's FDI outflow was multiplied by almost nine times in that period. See UNCTAD, *World Investment Report 2022* (Geneva: United Nations, 2022), Annex Table 02: FDI outflows, by region and economy, 1990–2021. More in D. M. Trubek, H. A. Garcia, D. R. Coutinho, and A. Santos, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013).

¹⁸ See Michelle Sanchez Badin and Fabio Morosini noting how Brazilian multinational enterprises pressured the government to create an investment agreement that responded to new demands of outbound investment, Sanchez Badin and Morosini, 'Navigating between Resistance and Conformity with the Global Investment Regime', pp. 248–250. See also G. Vidigal and B. Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19 *The Journal of World Investment & Trade* 475–512, noting how the rise of outward FDI "reignited the public debate concerning the importance of providing a framework to regulate the relationship between foreign investors and government."

¹⁹ A detailed analysis about this issue is available in J. Bonnitcha, L. Poulsen, and M. Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2018).

“the zenith of the process”,²⁰ to develop an entirely new type of investment agreement, crafted according to Brazil’s sovereign needs and in consultation of the Brazilian private sector.²¹ So far, Brazil had been an “attentive bystander”²² of the traditional BIT regime.

Third, Brazilian officials were also gaining their own experiences and building technical expertise in international state–state cooperation and dispute settlement at the WTO and MERCOSUR levels.²³ Such timely experiences of Brazilian diplomacy were drawn from and contributed to state preferences, thereby cross-fertilizing the nature of the ACFI model’s development.²⁴ In fact, it has been suggested that the adoption in an investment agreement of the very term “facilitation” was itself “a clear inspiration”²⁵ from the WTO’s 2013 adoption of the Trade Facilitation Agreement, which also contained facilitation measures, albeit in a different context.

The concrete result of these two highly consequential periods and the entailing “process of policy learning”²⁶ was the 2013 approval by CAMEX of the first draft ACFI to be negotiated with Malawi, Mozambique, and Angola. This result also marked the emergence of Brazil as a “laboratory for legal innovation” that chose “a revolutionary path”²⁷ and introduced the ACFI model being motivated by pragmatism

²⁰ Sanchez Badin and Morosini, ‘Navigating between Resistance and Conformity with the Global Investment Regime’, p. 245.

²¹ Ibid., p. 248.

²² Vidigal and Stevens, ‘Brazil’s New Model of Dispute Settlement for Investment’, p. 486.

²³ Maggetti and Choer Moraes, ‘The Policy-Making of Investment Treaties in Brazil’, p. 306, note how the “experience gained from addressing and/or solving disputes at the consultations stage is far from negligible. This experience exposed Brazilian officials to the permanent practice of alternative (i.e., non-judicial) methods of dispute settlement with their peers from other member States of MERCOSUR.” M. Sanchez Badin ‘Building Legal Capacity and Adapting State Institutions in Brazil’, in G. Shaffer (ed.), *Emerging Powers and the World Trading System: The Past and Future* (Cambridge: Cambridge University Press, 2021), pp. 81–127, detail the capacity building processes on international economic negotiations and litigation processes in the last three decades.

²⁴ Or as Sanchez Badin and Morosini, ‘Navigating between Resistance and Conformity with the Global Investment Regime’, p. 245, put it, “the right people at the right time.” See also Maggetti and Choer Moraes, ‘The Policy-Making of Investment Treaties in Brazil’, noting “the relatively deep foreign policy preference” for state–state interactions over investor–state. See also Vidigal and Stevens, ‘Brazil’s New Model of Dispute Settlement for Investment’, p. 489, pointing to Brazilian policymakers “bringing an element of diplomacy to the investment protection regime.”

²⁵ Maggetti and Choer Moraes, ‘The Policy-Making of Investment Treaties in Brazil’, p. 308.

²⁶ Ibid., pp. 295–316.

²⁷ A. Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 *American Journal of International Law* 410–432.

and the “ideal of more balanced relations between the parties and players benefitting from the agreement.”²⁸

With the ACFI model being in place, the subsequent treaty practice conducted by Brazil during the following five-year period led to the conclusion and signing of thirteen agreements, with the latest one being with India in 2020.²⁹ Across this period, Brazil’s treaty practice may be seen as having taken four discernible paths.

The first such path is concentrated in sub-Saharan African states and includes Mozambique, Angola, and Malawi, each of whom signed ACFIs with Brazil in 2015, the initial one being Mozambique on March 30, 2015. Classified as least developed countries, these three treaty partners are largely net importers of capital in relation to Brazil, and hence, any disputes are most likely to be concerning investments made by Brazilian parties. The cooperation dimension in the text of these treaties is noteworthy and evidenced in the detailed thematic agenda in the annexure of each agreement. It is also remarkable that the agreements involving these partners do only allow for a party to unilaterally initiate state–state arbitral proceedings if an investment dispute is not successfully resolved via a Joint Committee dispute prevention procedures.³⁰

This feature is contrary to what is observed in the agreements entailed in Brazil’s second (and most fruitful) treaty-making period, which focused on its fellow Latin American states, specifically Chile, Colombia, and Mexico in 2015, along with Surinam, Guyana, and Ecuador in 2018 and 2019.³¹ These ACFIs also saw considerable influences from other

²⁸ Sanchez Badin and Morosini, ‘Navigating between Resistance and Conformity with the Global Investment Regime’, p. 222.

²⁹ Access to the full version of the agreements and their status of implementation is available at See Brazilian Foreign Ministry database, online at: <https://concordia.itamaraty.gov.br> (last accessed 13 June 2023). UNCTAD database also keeps this information, online at: <https://investmentpolicy.unctad.org/international-investment-agreements/> (last accessed 13 June 2023).

³⁰ See, e.g., the Brazil–Malawi ACFI (2015) which under article 13.6 states that “if the dispute cannot be resolved, the Parties to the exclusion of the investors may resort to arbitration mechanisms between States, which are to be agreed upon by the Joint Committee, whenever the Parties find it appropriate.”

³¹ A difference previously noted in Vidigal and Stevens, ‘Brazil’s New Model of Dispute Settlement for Investment’, p. 486, is that in ACFIs signed with Latin American countries “contain arbitral clauses, empowering either party to unilaterally initiate arbitration proceedings against the other party.” See, e.g., the 2018 Brazil–Surinam ACFI which under article 24.2.d states that “[i]n the event that the dispute is not resolved upon the completion of the time frames set forth in this Article, or there is non-participation of a Party in the meetings of the Joint Committee convened according to this Article, the

investment agreement negotiations in Latin America that, at the time, ran in parallel, such as the 2016 Brazil–Peru Economic and Trade Expansion Agreement, which contained an investment chapter, and the 2017 Intra-MERCOSUR Cooperation and Facilitation Investment Protocol, which contained, for example, clauses preserving the state’s right to regulate toward combating corruption and issues related to the environment, labor affairs, and public health. Together with the broader movements of BIT reforms and old BIT provisions (mainly the nondiscrimination clauses), such agreements influenced Brazil’s approach toward ACFIs.

The third and relatively recent path toward that Brazil’s treaty practice has seen success in the MENA region (including Ethiopia in 2018 and Morocco and the United Arab Emirates (the UAE) in 2019) and most recently, in India.³² Within this group, the Brazil–India treaty has attracted the most attention, given the comparably large size of both economies and the individual prior attempts of both treaty partners at reformulating the traditional BIT models to better suit their needs as developing states.³³ The treaty itself, while containing some features in line with the Indian model (such as exclusion of an MFN clause and inclusion of specific wordings for security exceptions and investor obligations), is “certainly more tilted towards the Brazilian approach.”³⁴

dispute may be submitted to arbitration by a Party in accordance with Article 25 of this Agreement.”

³² While the agreement with India was formally signed in January 2020 during an official visit of the Brazilian President to New Delhi, negotiations for the Brazil–India agreement were reported to have already been concluded as early as November 2016. See J. Dahlquist, ‘Brazil and India Conclude Bilateral Investment Treaty’ *Investment Arbitration Reporter* (28 November 2016). See also ‘Brazil and India Sign Investment Cooperation and Facilitation Agreement’ (January 2020), available online at: www.gov.br/mre/en/contact-us/press-area/press-releases/brazil-and-india-sign-investment-cooperation-and-facilitation-agreement (last accessed 13 June 2023).

³³ J. Nedumpara, ‘India’s Trade and Investment Agreements: Striking a Balance between Investor Protection Rights and Development Concerns’, in F. Morosini, and M. Sanchez-Badin (eds.), *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017), pp. 188–217.

³⁴ P. Ranjan, ‘India-Brazil Bilateral Investment Treaty – A New Template for India?’ (19 March 2020), available online at: <https://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/> (last accessed 15 August 2024). See also M. D. Brauch, ‘The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty – Investment Treaty News’ (10 March 2020), available online at: <https://www.iisd.org/itn/en/2020/03/10/the-best-of-two-worlds-the-brazil-india-investment-cooperation-and-facilitation-treaty-martin-dietrich-brauch/> (last accessed 15 August 2024).

This tilt is evident in the agreement giving center stage to investment facilitation and dispute prevention, unlike the Indian model agreement, which narrowly focused on specific strands of investment protection standards, permitting investor–state dispute settlement via international arbitration only once the investor has exhausted domestic legal remedies, that too for at least five years.³⁵ Nonetheless, it has been argued that the Brazil–India ACFI “represents a strong, original contribution to the safeguard of the right to regulate”³⁶ and that overall, Brazilian ACFIs have “improved with time through the progressive narrowing and strengthening of their jurisdictional, substantial, public policy and dispute resolution clauses.”³⁷

Of course, for a dualistic state such as Brazil, until international treaties that are intended to be binding are fully ratified and attain legal force, their value remains largely academic. Under Brazil’s national constitution, the president’s power to conclude international treaties, while exclusive, is nonetheless subject to mandatory approval by the Brazilian federal legislature, that is, the National Congress.³⁸ According

³⁵ One crucial point on which the Brazil–India treaty differs with previous practices of both states is that it “does not stipulate the possibility of any specific agreement by way of which an arbitration tribunal may award any sort of compensation to either of the parties” and that instead, “unlike most investment agreements, it expressly provides that a tribunal cannot award compensation.” Instead, the treaty “only permits a tribunal to interpret the BIT or order conformity of any noncomplying measure.” See A. Ray and K. A. N. Duggal, ‘Dispute Resolution in the India–Brazil BIT: Symbolism or Systemic Reform?’ (09 April 2020), available online at: <https://arbitrationblog.kluwerarbitration.com/2020/04/09/dispute-resolution-in-the-india-brazil-bit-symbolism-or-systemic-reform/> (last accessed 15 August 2024). See also Art. 19(2) of Brazil – India Investment Cooperation and Facilitation Treaty (2020), available online at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil-india-bit-2020-> (last accessed 13 June 2023).

³⁶ H. Choer Moraes and P. M. Cavalcante, ‘The Brazil–India Investment Co-operation and Facilitation Treaty: Giving Concrete Meaning to the “Right to Regulate” in Investment Treaty Making’ (2021) 36 *ICSID Review – Foreign Investment Law Journal* 304–318.

³⁷ S. Rais and K. Duggal, ‘The Evolution of Brazilian ACFIs from 2015 to 2020: Like Wine, Does It Get Better with Time?’ (2021) 38 *Journal of International Arbitration* 215–252. See also Choer Moraes and Hees, ‘Breaking the BIT Mold’, where the authors argue that the diversity of Brazil’s treaty partners suggests an intrinsic appeal in the ACFI model and demonstrates that the model possesses an inherent “interoperability” with more traditional formats of international investment agreements.

³⁸ See article 84, item VIII of the Brazilian National Constitution. Available in English at: www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf (last accessed 13 June 2023). Following approval by the national congress, a treaty must also receive ‘promulgation’ from the Brazilian presidency, a largely ceremonial act which nonetheless adds to the time consumed by the process. More on the dualistic approach in

to Brazil's National Confederation of Industry (CNI), this process, on average, takes four and a half years.³⁹ To date, four agreements with ACFIs provisions (those signed with Angola, Chile, Mexico, and MERCOSUR countries) have completed the process and are in force, with 6 of the 15 agreements signed from 2018 to 2020 (Ecuador, Guyana, India, Morocco, Peru, and the UAE) currently under process with Brazil's legislature and five (Colombia, Ethiopia, Malawi, Mozambique, and Surinam) awaiting ratification by treaty partners.⁴⁰

Concurrent with its later bilateral treaty practice, Brazil's economic diplomacy also moved onto engaging in several plurilateral fora to promote the adoption of investment facilitation as a regulatory approach. For example, under the BRICS forum, although investment facilitation had occurred previously in conjunction with trade facilitation in 2014,⁴¹ it was in 2017 that its member states, including Brazil, established an "Outline for Investment Facilitation," an initiative aimed at facilitating intra-BRICS investments and featuring voluntary good practices that have much in common with Brazil's ACFI model. These include the establishment or designation of a Direct Investment Ombudsperson (DIO) or a National Focal Point, a single-window system, and of guidelines on investor responsibilities and ethical business practices.⁴²

Brazilian legal system at A. Pereira and E. Silva Junior, 'Domestic Law and International Law in Brazil' (2018) 4 *Panorama of Brazilian Law* 197–222.

³⁹ Based on a sample of twenty-seven international agreements signed between 2003 and 2017. See A. Brasil, 'Pesquisa da CNI aponta prazo longo para promulgação de acordos internacionais' (24 October 2017), available online at: <https://agenciabrasil.ebc.com.br/economia/noticia/2017-10/pesquisa-da-cni-aponta-prazo-longo-para-promulgacao-de-acordos> (last accessed 15 August 2024).

⁴⁰ Notably, the 2015 ACFI with Chile has since then been substituted by a similarly drafted investment chapter within the 2018 Brazil-Chile Free Trade Agreement. See Brazilian Foreign Ministry database: <https://concordia.itamaraty.gov.br/detalhamento-acordo/11766>; <https://concordia.itamaraty.gov.br/detalhamento-acordo/12226> (last accessed 13 June 2023).

⁴¹ BRICS, *Trade and Investment Facilitation Plan* (Fortaleza, 22 July 2014), part 3, principles. Here, BRICS countries had already broadly announced key aspects of investment facilitation, including (1) increasing transparency and awareness; (2) promoting simplification and efficiency; (3) ensuring consistency and predictability; (4) enhancing communication and consultation, and (5) encouraging cooperation and harmonization. Tralac, 'BRICS Trade and Investment Facilitation Plan' (22 July 2014), available online at: <https://www.tralac.org/news/article/5916-brics-trade-and-investment-facilitation-plan.html> (last accessed 15 August 2024).

⁴² BRICS, 'Outlines for BRICS Investment Facilitation' (31 August 2017), available online at: <http://www.brics.utoronto.ca/docs/170831-investment.html> (last accessed 15 August 2024).

A second prominent example of this has been the signing of the MERCOSUR Protocol on Investment Cooperation and Facilitation in 2017.⁴³ Signed by Argentina, Brazil, Paraguay, and Uruguay, the protocol was significantly influenced by the ACFI model, including most of its key features such as transparency, state–state dispute prevention procedures, and national DIOs. Such influence has been regarded as “regionalization of the Brazilian model.”⁴⁴

Most prominent, however, has been Brazil’s participation and indeed leadership at the WTO with regard to building awareness and consensus on investment facilitation.⁴⁵ Together with China, Argentina, Colombia, Hong Kong SAR, Mexico, Nigeria, and Pakistan, on April 21, 2017, Brazil created the informal group “Friends of Investment Facilitation for Development” (FIFD) in the WTO. The aim was to launch a WTO Informal Dialogue on Investment Facilitation for Development.⁴⁶ On April 26, 2017, Brazil circulated in cosponsorship with Argentina the document “Possible Elements of a WTO Instrument on Investment Facilitation.” This Communication emphasized the need to incorporate regulations in both service and non-service sectors, avoid controversial issues, and include incremental implementation provisions along with special and differential treatment (SDT) clauses, and it summarized a list of thirteen “Possible Elements of a WTO Instrument on Investment Facilitation.”⁴⁷ The Brazilian–Argentine paper helped provide a stable

⁴³ There is also the MERCOSUR–EFTA Free Trade Agreement signed in 2019, which contains an investment chapter but is not yet publicly available.

⁴⁴ F. Pérez-Aznar and H. Choer Moraes, ‘The MERCOSUR Protocol on Investment Cooperation and Facilitation: Regionalizing an Innovative Approach to Investment Agreements’ (12 September 2017) EJIL Talk!, European Journal of International Law, available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045944 (last accessed 15 August 2024). It is worth noting that the 2017 Investment Facilitation Protocol is the first legal instrument on investment to enter into force – as of 30 July 2019 – for the region. Although MERCOSUR countries had previously signed other Investment Protocols, e.g., in 1994 with regards to the terms of BITs clauses and on investor protection, Brazil did not ratify any of them. And MERCOSUR regulation requires unanimity in the ratification for its entry into force.

⁴⁵ S. Baliño, M. Dietrich Brauch, and R. Jose, ‘Investment Facilitation: History and the Latest Developments in the Structured Discussions’ (31 January 2020), available online at: <https://www.iisd.org/publications/report/investment-facilitation-history-and-latest-developments-structured-discussions> (last accessed 15 August 2024).

⁴⁶ See Joint Communication, JOB/CG/122, online at: <https://docs.wto.org/> (last accessed 13 June 2023).

⁴⁷ See Joint Communication, JOB/CG/124, online at: <https://docs.wto.org/> (last accessed 13 June 2023).

basis for the talks, supporting delegations to systematize key elements and progressively deepen their understanding on investment facilitation.⁴⁸

On December 13, 2017, Brazil and sixty-nine other countries signed the Joint Ministerial Statement on Investment Facilitation for Development, right on the last day of the WTO's 11th Ministerial Conference (MC11). Furthermore, in January 2018, Brazil was the first country to submit a complete draft proposal to offer a "concrete illustration of a possible WTO multilateral framework."⁴⁹ The leadership role by Brazil clarifies that the draft proposal is not intended to serve as a negotiating text, but rather is meant to serve as a "concrete illustration" of what an agreement on investment facilitation could look like.

More recently, a third Joint Statement on Investment Facilitation for Development, endorsed by over 110 members,⁵⁰ was issued on December 10, 2021, in which the signatories stated their aim to conclude the text negotiations by the end of 2022 and their determination to further intensify outreach efforts. Such a document contributed to giving direction and consistency to the negotiations, consolidating the Brazilian vision of investment facilitation and building more confidence among reticent members. Brazil, notably, brought to the table the lessons learnt from its bilateral efforts and its national implementation process, and several of the provisions of the Brazilian draft are part of the informal consolidated text even today.

This means that the evolution of the Brazilian participation in the WTO alongside the country's innovative take on investment agreements may have a direct influence on the IFD Agreement. The intrinsic appeal of the ACFI archetype has been confirmed in the last years. However, the alleged ACFI archetype flexibility – under the interoperability concept linking a diversity of provision – is still to be confirmed.⁵¹ Yet its high dependency on the structure of domestic policies and institutions may pose further challenges to the international arena, as further exemplified in Section 11.4.

⁴⁸ J. Kreuz and A. de P. Ramos Souto, *Brazil and the WTO Informal Dialogue on Investment Facilitation for Development in 2017: History and Achievements* (Rio de Janeiro: FUNCEX, 2021).

⁴⁹ World Trade Organization, 'JOB/GC/169, Structured Discussions on Investment Facilitation, Communication from Brazil' (February 2018).

⁵⁰ See World Trade Organization, 'More than Two-Thirds of WTO Membership Now Part of Investment Facilitation Negotiations' (November 2021).

⁵¹ See Choer Moraes and Hees, 'Breaking the BIT Mold'.

11.3 ACFI Pillars – Cooperation and Facilitation Governance

As previously described, the resultant agreement template for ACFIs, centered around cooperation and facilitation that dismissed the traditional protection-based approach, has been both authentically Brazilian and objectively innovative in the international landscape of state approaches to international investment law.⁵² Such innovativeness expresses itself through the focus on more practically managing” foreign investment relations, preserving regulatory autonomy, and preventing investment disputes. ACFIs also adopt a relatively long-term perspective as compared to traditional BITs and do not aim to not only increase FDI flows but also foster a consistent and structured dialogue and cooperation between parties. In the following text, we provide a brief description of the main rationale behind the ACFI structure connecting the facilitation and cooperation action to the bodies designed for the governance of the agreement. In Section 11.4, we describe that dynamic between these notions and Brazil’s domestic-level institutional structures.

Essentially, the ACFI framework consists of three key pillars: (1) risk mitigation provisions, (2) a thematic agenda with special commitments between the parties, and (3) an institutional governance agenda.⁵³

11.3.1 Risk Mitigation

As a whole, the provisions in the Brazilian ACFI model create a framework that aims to mitigate potential risks involved for both state parties and foreign investors. It does so in four ways:

First, the main principle of the agreement concerns transparency. All Brazilian ACFIs contain a specific clause relating to transparency, but more importantly, almost all provisions of the agreement consider transparency as the guiding principle for accessibility, predictability, and consistency of investment regulation and policies. More recently,

⁵² In 2016, UNCTAD reported that the Brazilian ACFI was at the time the only agreement to incorporate concrete rules on investment facilitation, UNCTAD, ‘UNCTAD Global Action Menu for Investment Facilitation’.

⁵³ This is the scheme for the description of the agreement by Brazilian negotiators. See, e.g., one presentation by the former Ministry of Development, Industry and Commerce: www.mdic.gov.br/arquivos/ACFI-Presentation-EN.pdf. Further details about such structure and their provisions, at Sanchez Badin and Morosini, ‘Navigating between Resistance and Conformity with the Global Investment Regime’, p. 222.

ACFIs also include the availability of information and channels of communication electronically, in part linked to the transparency pledge.⁵⁴ Other principles were also part of the language of the first agreements but not yet explicitly drafted in such a way. These were the provisions on nondiscrimination and the right to regulate, which were later incorporated in special clauses as risk mitigation strategies.⁵⁵ Specific rules on the right to regulate were also added, such as on tax and macroprudential measures, along with security exceptions.

Second, drafting of the substantive content of the ACFIs excludes certain typical investment protection standards such as fair and equitable treatment, full protection and security, and indirect expropriation. The ACFI model is known for not being about protection of investors. Although it does explicitly provide for the prohibition of direct expropriations, it recognizes public interest exceptions as far as they are conducted in a nondiscriminatory way, in accordance with due process of law and, most importantly, with payment of effective compensation.⁵⁶ Compensation rules, on the other hand, also consider cases of potential balance of payments limitations of one of the parties.⁵⁷

Third, the ACFIs also aim at preventing the potential risk of socially detrimental effects of incoming FDI that may be contrary to a state's sustainable development goals. Risk mitigation therefore also serves the benefit of the state parties of the agreement and not only of the investor. On that note, since the first ACFI was signed in 2014, Brazil has consistently included corporate social responsibility (CSR) clauses encouraging foreign investors to respect human rights and

⁵⁴ See, e.g., Brazil-Ecuador ACFI (2019), article 9.1., online at: www.gov.br/siscomex/pt-br/acordos-comerciais/acfi-brasil-equador (last accessed 13 June 2023).

⁵⁵ Non-discrimination was first designed as a clause in the ACFI Brazil-Mexico (2015), and soon replicated in the other agreements signed with other Latin American countries. The right to regulate was included explicitly for the first time as a clause in the ACFI Brazil-Peru (2016), article 3.7 – although the wording was also included in the Preamble of ACFI Brazil-México (2015), and of ACFI Brazil-Chile (2015). The latter was replaced by the Brazil-Chile Free Trade Agreement (2018), with a chapter on cooperation and facilitation of investments (Chapter 8).

⁵⁶ See, e.g., ACFI Brazil-Angola (2015), article 9, regulating expropriation, nationalization and reparation; and, more recently, applying a similar rule, ACFI Brazil-India (2020), article 6, online at: www.gov.br/siscomex/pt-br/acordos-comerciais/acfi-brasil-india (last accessed 13 June 2023).

⁵⁷ See, e.g., ACFI Brazil-Angola (2015), article 14 about transfers, safeguarding regulatory measures during balance of payments crises, online at: www.gov.br/siscomex/pt-br/acordos-comerciais/acfi-brasil-angola (last accessed 13 June 2023).

environmental laws.⁵⁸ Also, since the second wave of agreements signed as from 2018 with other Latin American countries, the ACFIs have demarcated key areas of domestic regulatory space (such as relating to sustainable development goals and the protection of human, plant, and animal lives) for state parties and incorporated anti-corruption and anti-bribery clauses.⁵⁹

Last but not least, the backbone of risk mitigation is to prevent investment disputes. Such dispute prevention in the ACFIs operates at three levels of escalation, mobilizing both domestic and the agreement institutional structures. It initially consists of an investment ombudsperson to conduct consultations and negotiations, then with a Joint Committee that effectively functions in a mediatory role, and finally with state–state arbitration as a last resort. Although not all claims can be brought to the level of arbitration, it is expected that they all can receive institutional support, as in the previous levels.⁶⁰

Risk mitigation provisions are associated with both cooperation and facilitation measures, as they mobilize either unilateral actions by the state parties to facilitate investment flows or they may also allow for joint action by them through cooperation structures. In our view, facilitation and cooperation actions in the risk mitigation measures are closely linked, if one is the cause, the other may be the consequence, and vice versa. As a result, efforts to distinguish them are mostly theoretical at this point.

11.3.2 *Thematic Agenda*

A second pillar of the ACFI framework consists of thematic agendas for bilateral negotiations by state parties on special issues or commitments beyond the main agreement that cater to their specific and subjective domestic demands of the respective parties. Such negotiations under thematic agendas may lead to supplementary agreements or schedules that address subjects such as transfer of funds, visa proceedings, technical

⁵⁸ Similar clauses can be found in ACFI Brazil–Malawi (2015), article 9; and Brazil–India (2020), article 12. About the importance of CSR clauses and standards, see Baumann ‘Considerações sobre a política para atração de investimentos externos’, p. 24.

⁵⁹ See, e.g., ACFI Brasil–Colombia (2015), article 14, online at: www.gov.br/siscomex/pt-br/acordos-comerciais/acfi-brasil-colombia (last accessed 13 June 2023).

⁶⁰ ACFI Brazil–Malawi (original version available in English) establishes the Institutional Governance of the agreement as from Part I, articles 3–6, and in Part III addresses Risk Mitigation and Disputes Prevention, online at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download> (last accessed 13 June 2023).

and environmental licenses or certifications, technology transfer conditions, capacity building, and other development-oriented domestic matters. Thematic agendas emphasize constant coordination between state parties and allow them to tailor the ACFI according to their changing development needs. In case of developing economies, special rules on such topics may constitute major ground-level obstacles for foreign investors.

The thematic agendas are occasionally named working agendas, in the sense that they are expected to be revised and complemented periodically. This allows ACFIs to be as such, “living” or dynamic agreements that may evolve even after the signing and conclusion of the original main agreement. The institutional bodies are in charge of monitoring the thematic agenda and their periodical review, as described here. Accordingly, thematic agendas are strongly associated with the cooperation dimension of the ACFIs, as they depend on joint efforts by the parties to convene on their priorities to facilitate investment flows.

The thematic agendas may serve to improve the cooperation between the parties and strengthen the infrastructure that enables the facilitation of investments. If in the earlier agreements, the thematic agenda started with a detailed list of topics as an Annexure to the agreement, it later lost its precision to broadly refer to areas for cooperation.⁶¹ Furthermore, in the case of the last ACFI signed in 2020 by Brazil and India, one article of the agreement includes a best effort clause for the parties to further work on the thematic cooperation.⁶² This trend admittedly challenges the role of having the thematic agenda as a pillar of the ACFI, in particular the cooperation dimension of the agreement.

11.3.3 *Institutional Governance*

The third pillar of the ACFI is the institutional governance structure. A significant part of the agreements is devoted to defining this

⁶¹ See, e.g., ACFI Brazil–Angola and ACFI Brazil–Malawi with detailed commitments, such as the need to increase direct flights between the countries, in contrast to ACFI Brazil–Ecuador with a generic list as Annex I. The list of the ACFI Brazil–Ecuador, signed in 2019, generally appoints three axes for cooperation: visa proceedings, technical and environmental regulation and standards, and exchange of information, expertise and technology.

⁶² See article 25 of the ACFI Brazil–India, about an Agenda for Further Investment Cooperation and Facilitation. As an illustration of commitments under such agenda, see the Memorandum of Understanding on Bioenergy Cooperation, signed on the same date as of 25 January 2020.

governance framework. The ACFI creates two distinct institutions to run the agreement, promoting regular information exchange, preventing disputes, and, if a dispute may yet arise, mediating and facilitating negotiations toward an amicable settlement of the dispute, without recourse to state–state arbitration.

The first such institution consists of an ombudsperson (or focal point), a centralized mechanism appointed by each party to receive and analyze queries and demands from investors and subsequently to coordinate with various state entities or with other focal points to provide a concrete solution in return. Inspired by a similar South Korean policy,⁶³ the ACFI's DIO as an institutional structure has the mandate to foster a healthy business environment and provide an effective means for foreign investors to overcome regulatory challenges in their host state, while maintaining their investment. The DIO is also known as the single-window or one-stop shop for investors operating in the other state party territory to access information and settle its grievances.⁶⁴ This is the operational backbone of facilitation in the ACFI model. And, as exemplified with the Brazilian case in Section 11.4, although it is part of the agreement, it will always depend on each state party effort to have this institutional-level working properly.

The second distinct institution provided for by the ACFI framework is a single joint committee consisting of representatives of both state parties. Such a committee is tasked with, above all, allowing for state–state level cooperation, including supervising the implementation of the agreement, sharing information about investment opportunities, and coordinating agendas for cooperation. Part of its work is guided by reports and recommendation of the focal points, through the adequate

⁶³ The Korean Foreign Investment Ombudsman was created in 1999, under the structure of the Foreign Investment Promotion Act of Korea. According to the official information, the Ombudsman announces as its functions to “[...] collect and analyse information concerning the problems foreign firms experience, request cooperation from and recommend implementation thereof to relevant administrative agencies, propose new policies to improve the foreign investment promotion system, and carry out other necessary tasks to assist foreign-invested companies in resolving their grievances.” For additional information, online at: <http://ombudsman.kotra.or.kr/eng/index.do> (last accessed 13 June 2023). See a detailed analysis of the context for the creation of the Ombudsman in the Korean system by J. Cherry, *Foreign Direct Investment in Post-Crisis Korea: European Investors and 'Mismatched Globalization'* (Oxford: Routledge, 2007), pp. 81–121. We thank Ricardo Oliveira for sharing this reference with us.

⁶⁴ For more information, see the DIO official website <https://oid.economia.gov.br/en/menus/8> (last accessed 13 June 2023).

coordinating bodies at the national level (see illustrative examples in Section 11.4). The joint committee is also the locus for dispute prevention, aiming at resolving possible disagreements related to bilateral investments in an amicable manner. Its recommendations to settle investment-related disputes, however, are nonbinding, so if it were so that the parties to the dispute are not satisfied with the report, they may then move, as a last resort, onto state–state arbitration.

In addition to the bodies created to coordinate the actions between the parties and further development and supervision of the agreement, increasingly the ACFIs signed by Brazil have defined the main guidance for any arbitral tribunal established to resolve disputes between the parties. Such agreements decide upon the constitution of the tribunals, the profile of the arbitrators, the applicable rules of procedure, and also the costs incurred by the parties.⁶⁵ The ACFI Brazil–India was the first one to detail a Code of Conduct for Arbitrators, as Annex II to the agreement.

11.4 Governance at the Domestic Level: Implementation of Facilitation Institutions and Cooperation Support

One of the anchors of the ACFI is the domestic structure to implement measures related to investment facilitation and cooperation. In that sense, countries that have signed ACFIs need to designate an institution to both serve and implement the cooperation and facilitation measures.

In such an institutional structure, the main body is the direct investment ombudsperson. This is the body that is meant to respond to two of the main purposes of the agreement: (1) transparency and (2) exchange of information. The DIO also responds as a single window to queries of both national and foreign investors, and it coordinates with other national bodies and its counterparts in other states.

It is also understood that the role of the DIO may support the prevention of any doubts and complaints of investors and the state parties of the agreement. This is the sole domestic body that all ACFI agreements request the parties to implement domestically. The national DIOs in the bilateral agreements coordinate with the bilateral joint committees, composed of representatives of the parties to the agreement.

However, in the Brazilian context, there are also other bodies that support and amplify the role of the DIO, with which the DIO coordinates

⁶⁵ See, e.g., ACFI Brazil–Mexico (2015), ACFI Brazil–Peru (2016), ACFI Brazil–Ethiopia (2018), ACFI Brazil–UAE (2019).

its actions. In the next sections, we first provide a brief description about the creation and implementation of the DIO in the Brazilian context and then provide an overview of the bodies that support its activities, as well as those of the joint committee.

11.4.1 The Direct Investment Ombudsperson (DIO): Objectives and Flow of Work

As previously mentioned, the national DIOs are part of ACFI commitments, being incorporated in the institutional governance chapters. The ambition here is to have just one agency responsible for supporting investors from the other party in its territory – thereby, its co-denomination as the focal point.

After signing the initial few ACFIs since March 2015 but before the entry into force of the same,⁶⁶ the direct investment ombudsperson system was created within the Brazilian government structure in September 2016.⁶⁷ And as part of the text of the first agreement signed with Angola, Brazil had appointed the Brazilian Chamber of Foreign Trade (known by the acronym CAMEX) to perform the role of the DIO.⁶⁸ Since then, the rules of procedure of the Brazilian DIO have been revised, but it still maintains its position in the CAMEX system.⁶⁹

According to the recent reforms in the structure of Brazilian central public administration,⁷⁰ CAMEX is a collegiate body currently placed in

⁶⁶ The first agreement to enter into force was the ACFI signed with Angola. It was approved by the Brazilian Decree N. 9,167, as of October 11, 2017, online at: www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/decretos1/decretos-1 (last accessed 13 June 2023).

⁶⁷ See Decree N. 8863, as of 28 September 2016. The rules of procedure of the Ombudsman were later approved by CAMEX Resolution N. 12, as of 16 February 2017. Such regulations are now revised and consolidated for public access, online at: www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/decretos1/decretos-1; www.in.gov.br/web/dou/-/resolucao-n-43-de-4-de-maio-de-2020-255374994 (last accessed 13 June 2023).

⁶⁸ The aim is that the parties already appoint in the text of the agreement the national agency/body in charge of the DIO functions. In the case of the ACFI signed by Brazil, all agreements have this nomination for both parties in the agreement.

⁶⁹ As of November 2022, the main regulation applicable to the DIO are: (1) Decree N. 9,770, as of April 22, 2019; (2) Decree 10,044, as of October 4, 2019; and (3) CAMEX/GECEX Resolution N. 43, as of May 4, 2020.

⁷⁰ Under President Bolsonaro's administration (2019–2022) there was a major reform in the public administration, and the allocation of functions. Since January 2019, there was a merge of ministries, and most of the economic and financial activities are now under the mandate of the Ministry of Economy. See Provisional Measure N. 870, as of 1 January 2019, converted into Statute Law 13,844, as of 18 June 2019. Considering the results of the

the structure of the Ministry of Economy, composed of eight other collegiate members and an executive secretary. Among the collegiate is the National Committee of Investment (known as CONINV), that is, the central body for foreign investment facilitation policymaking in Brazil and for encouraging and facilitating Brazilian investments abroad.⁷¹ Such structure is further detailed in Section 4.b as supportive agencies to the national DIO.

According to the texts of the ACFIs signed by Brazil, the main responsibility of the national DIO is to provide relevant information to foreign investors from the other party of the agreement. Domestic regulations in Brazil have extended that responsibility to include two other groups of interest. First, in 2016, it had already allocated the responsibility of coordination with its counterparts in supporting Brazilian investors with consultations and questions. Second, in reforming the national DIO rules of procedure in 2019, the regulation extended the work of the institution to other consultations and questions from and about non-ACFI parties.⁷² That regulation benefited both nationals from Brazil and foreign investors from countries with which Brazil still does not have an ACFI.

The national DIO is often compared with the Korean Foreign Investment Ombudsman, as it was inspired from the experience of the

Presidential elections in October 2022, there is a real possibility of changes at the ministerial level towards a fragmentation of the Ministry of Economy into a ministry of finance, a ministry of industry and a ministry of planning. In the past, structures dealing with foreign investment, and even CAMEX as an inter-ministerial body, were linked to the ministry of industry. This is then a possibility for reorganization from 2023 on.

⁷¹ CONINV is currently regulated by Decree N. 10,044/2019 and Decree N. 9,885/2019. Its rules of proceeding were recently revised by Resolution CONINV N. 5/2022, available online at: www.in.gov.br/en/web/dou/-/resolucao-coninv-n-5-de-20-de-setembro-de-2022-430756516. CONINV is composed of representatives at the Secretariat level of different ministries (such as the Ministry of Foreign Relations, the Ministry of Economy, the Ministry of Agriculture, the Ministry of Defense and the Ministry of Infrastructure), and a representative of the President's Cabinet.

⁷² Such reforms were undertaken with the support of the UK-funded IBEP Programme, by which the World Bank Group advised the Brazilian government's CAMEX on improving the country's DIO and its grievance mechanism for foreign investors. As a result, a new regulation was issued: Decree N. 9,770, as of 22 April 2019, amending the previous DIO Decree N. 8,863/2016. About the UK-funded IBEP Programme, online at: <https://thedocs.worldbank.org/en/doc/631941593542083818-0130022020/original/IBEPBrochureBrazil.pdf> (last accessed 13 June 2023). The regulation is available at: www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2019/Decreto/D9770.htm (last accessed 13 June 2023).

latter.⁷³ However, the main functions and their institutional environment of the Brazilian and the Korean ombudsmen are somehow different. In the case of Brazil, the DIO was created as a single window to operate at two levels: in direct contact with investors and in coordination with other relevant domestic agencies. Its work concerning investors' interest is linked to the mandate of (1) providing information on relevant legislative and regulatory issues, favoring transparency in investment legislation and procedures, and (2) addressing complaints or grievances regarding measures affecting investors and their investments, whether in the form of law, regulation, rule, procedure, decision, administrative ruling, or any other form, with a view to preventing disputes.⁷⁴

The second dimension of activities of the DIO is about (1) its coordination with public agencies responsible for topics concerning investments at the federal, state, and municipal levels in Brazil that may cause doubts or uncertainties among investors or that bring difficulties to a particular investment situation; and (2) connected with those doubts and difficulties of investors that the ombudsman is also in charge of recommending to the competent authorities, as and when appropriate, measures to improve the investment environment.⁷⁵

As described, although most of the mandate of the Brazilian DIO concerns aftercare – such as the Korean one – it also includes some information support, along with a coordinating role. In this respect, it is interesting to note the diversity of institutional structures and mandates that can result from bilateral and/or plurilateral negotiations on investment facilitation. Again, the main commonality should be the one-stop agency, operating preferably as a single electronic window.⁷⁶

⁷³ The Korean Foreign Investment Ombudsman is part of the Korean Trade-Investment Promotion Agency (known as KOTRA), together with the Foreign Investor Support Office and its Investment Consulting Center. The Brazilian Ombudsman is not a combination of those two structures (Ombudsman and Consulting Center), but plays parts of the roles of both of them. See also a more detailed comparison by R. Figueiredo de Oliveira, 'The Useful Institution of an Investment Ombudsperson', *Columbia FDI Perspectives* (2020). See also note 63.

⁷⁴ This mandate is explicit in CAMEX/GECEX Resolution N. 43/2020, article 5, but it is also part of ACFI texts – such as article 14.4 (d) and (e) of Brazil–India ACFI (2020), article 15.4 (c) and (d) of Brazil–Mexico ACFI (2015).

⁷⁵ Provisions about that interaction is part of the national regulation CAMEX/GECEX Resolution N. 43/2020, articles 5–20, 25 and 26, as well as of ACFI texts, e.g., article 14.4 (b) and (c) of Brazil–India ACFI (2020), article 15.4 (b) of Brazil–Mexico ACFI (2015).

⁷⁶ In the case of the ACFI signed between Brazil and other countries, although all parties have named their national DIOs, we see an enormous diversity of agencies appointed. For

The ACFI already provides the type of information that may be requested from the DIO. They include regulatory conditions for investments, relevant public policies and their legal framework, customs procedures and tax regimes, government procurement, public concessions and public–private partnerships, social and labor legislation and requirements, immigration law, and land regulation. The Rules of Procedure of the DIO in Brazil, updated in 2020, also list the topics and main areas of regulation about which the DIO is expected to be consulted.⁷⁷

Considering the importance of building trust between the DIO and the investor, both the international agreements and domestic regulations on investment facilitation have devoted clear provisions to the treatment of protected information and the responsibilities of public officials in accessing them.⁷⁸ A second concern for investors is about the efficiency of the proceedings. It is understood that a singular structure allows for supporting the investor in charge of responding to demands within a short time. The domestic regulation has detailed the maximum of time for responses from the DIO to request and inquiries from investors. The time period for requests of information is twenty days, extendable by no more than ten days; and, in case of inquiries, the time limit is of ninety

example, Mozambique appointed its Council of Investments; Angola the Secretariat for Cooperation in the Ministry of Foreign Affairs; Chile its Agency for the Promotion of Foreign Investments; India the Economic Department in the Ministry of Finance; Argentina (in the MERCOSUR Protocol) the Under Secretariat of Foreign Trade in the Ministry of Industry; Morocco the Moroccan Agency for the Development of Investments and Exports. In the case of Brazil, the DIO website describes the mechanism as “a ‘single window’ for foreign investors, provided by the Executive Secretariat of CAMEX”, cf. <http://oid.economia.gov.br/en>. But, in addition to the DIO, in September 2022, the Brazilian government, in tune with the OECD process of accession, launched a new website for investors. Such webpage consolidates information about the applicable domestic regulation (including sectoral ones), international agreements, links to investment facilitation mechanisms and information about opportunities for investment in the country. See online at: www.gov.br/produtividade-e-comercio-exterior/pt-br/comercio-exterior-e-assuntos-internacionais/investimentos (last accessed 13 June 2023).

⁷⁷ Article 4 of CAMEX/GECEX Resolution N. 43/2020, online at: www.camex.gov.br/resolucoes-camex-e-outros-normativos/58-resolucoes-da-camex/2699-resolucao-n-43-de-4-de-maio-de-2020 (last accessed 13 June 2023).

⁷⁸ All ACFI signed by Brazil safeguards information provided by the investors. For example, Angola–Brazil ACFI (2015), article 6.4; MERCOSUR Protocol (2017), article 20; Brazil–India ACFI (2020), article 16. In the Rules of Procedure of the DIO there is one chapter devoted to the confidentiality of the information provided by the investors. This chapter includes rules for the responsibility of public officials with access to the information circulated in the DIOs structures. See Chapter VI of CAMEX/GECEX Resolution N. 43/2020.

(2) the Domestic Focal Points Network, and (3) the Advisory Group. The IGM is the ordinary support for the work of the DIO either in replying to requests for information or in addressing grievances from investors. The Domestic Network is composed of other focal points in different bodies of the state bureaucracy, at the federal, state, and municipal levels.⁸² This network is expected to be triggered frequently and be ready to answer information requests in no more than fifteen days. The relevant focal points of the networks can also be invoked to answer inquiries about corresponding legislation and conflict with rules and requested actions, as well as about specific cases, including in conjunction with the IGM. The Advisory Group, in its turn, is the supervising agency of the work of the DIO and is composed of representatives from different ministries and bodies of the Ministry of Economy that will consider the necessary adjustments and recommendations for legal and/or administrative changes in investment regulations and procedures.⁸³

Developing such institutional architecture is complex, especially in a large economy with a federal system of government. The DIO office since its establishment in 2016 has been fully operational, and it has also developed the designated institutional coordination at the domestic level. Going forward, its main priorities at that level involve (1) increasing partnerships and strengthening collaboration among public agencies at the subnational levels; (2) building the capacity of other relevant government agencies at the federal level; (3) guaranteeing the monitoring and evaluation framework to measure impact, based on the experience of IGM and the network of focal points; and furthermore (4) putting in action the IGM and the Advisory Group, based on concrete situations in the future.

⁸² It also includes APEX that is the Investment Promotion Agency, currently part of the Ministry of Foreign Affairs. The regulation concerning the Domestic Focal Points Network is provided by CAMEX/GECEX Resolution N. 43/2020, Chapter IV, online at: www.camex.gov.br/resolucoes-camex-e-outros-normativos/58-resolucoes-da-camex/2699-resolucao-n-43-de-4-de-maio-de-2020 (last accessed 13 June 2023). According to interviews with public officials in April 2022, the Focal Points Network comprises about forty bodies; they include regulatory agencies and subnational entities working on investment-related topics. Interview N. 3 on file with the authors.

⁸³ The design of the Advisory Group according to CAMEX/GECEX Resolution N. 43/2020 request that representatives of the bodies are part of the group and should be in a high position as from DAS 5 (article 7). In the Brazilian public administration, positions are ranked in 6 levels, from the lowest (1) to the higher ones (5), see Decree N. 9739/2019. On that sense, the Advisory Group to the DIO is staffed by representatives highly qualified, and with mandate to decide on important issues.

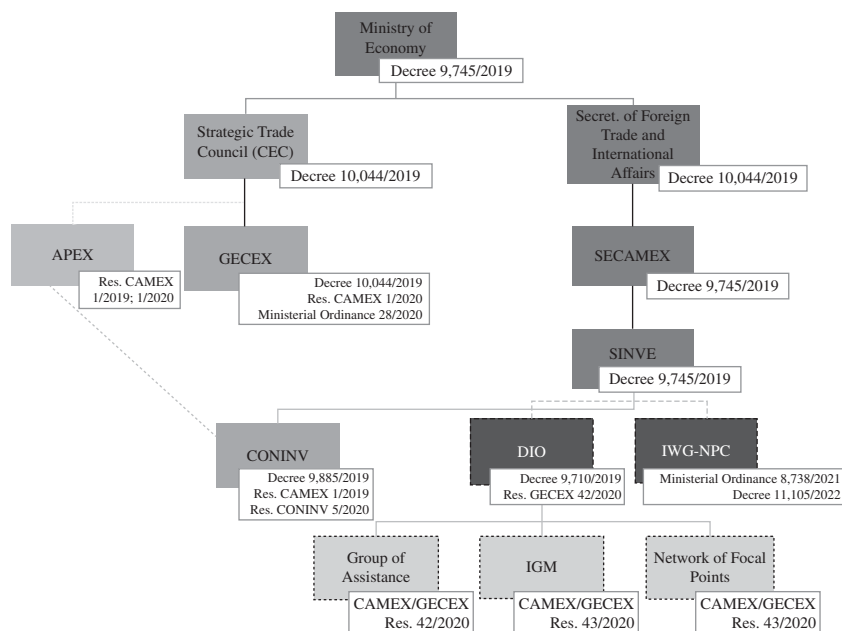


Figure 11.2 The supportive structure to the Brazilian DIO.

Note: About the colored boxes: The bodies of the Ministry of Economy are in gray. CAMEX collegiates are in orange; CAMEX committees are in blue; the DIO mechanisms are in rose; a separate institution of the Brazilian government working on investment promotion is in green.

Source: Authors, based on www.gov.br/produtividade-e-comercio-externo/pt-br/assuntos/camex/sobre-a-camex, and applicable regulation in November 2022.

11.4.2 CAMEX and the Supportive Structure to the DIO

In addition to the direct assistance bodies to the National DIO, there are other bodies of the Brazilian public administration that also deal with investment policies. They are, to varying degrees, connected to the work of the DIO. The most relevant ones are illustrated in Figure 11.2.

Right above the DIO is the Secretariat of Foreign Investments (acronym in Portuguese, SINVE), which is the direct administrative support to the DIO, performing the operational activities for all requests and inquiries to investors (see Figure 11.1). This Secretariat, based on its experience, is also in charge of proposing better regulatory practices to facilitate investments in the country and of recommending new measures by the

CONINV to facilitate inbound and outbound investments. In addition to that, SINVE coordinates the IWG-NPC.

The IWG-NPC is the national contact point to handle inquiries and to promote the resolutions of alleged nonobservance of the OECD Guidelines for Multinationals. Brazil adopted the Guidelines in 1997, but the IWG-NPC was finally institutionalized in 2010.⁸⁴ Since then, this body has been active in assisting enterprises through mediation and conciliation with their stakeholders and civil society groups to implement the OECD Guidelines in Brazil.⁸⁵ It is understood that IWG-NPC may help implement investor responsibilities as defined in the ACFI.⁸⁶ Such coordination is built through requests of information to the IWG-NPC in Brazil by CONINV and through biannual reports of the IWG-NPC to this committee. Just as the OECD Guidelines, corporate social responsibility clauses in the ACFIs and those related to the respect to labor, environment, and human rights regulation are voluntary in nature. The processes then tend to be more a naming-and-shaming system for foreign investors, and an alert to the authorities to potentially address the issues at the political and strategic levels.⁸⁷

The CONINV, in turn, is the first level of guidance and evaluation of public policies and actions related to both inbound and outbound investments in Brazil. Right after the creation of the DIO in 2016, the CONINV was established as an interministerial body to coordinate the actions toward investments and to coordinate the technical bodies working in the field.⁸⁸ The Committee has the role of intermediating the work of

⁸⁴ The IWG-NPC was first located in the Ministry of Finance. Since the reforms in 2019, it has been based on the structure of the Ministry of Economy. Currently, it is regulated by Ministerial Ordinance N. 8,738/2021 and Decree 11,105/2022. More detailed information is available online at: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/pcn> (last accessed 13 June 2023).

⁸⁵ For more information about its activities and cases, see <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/pcn>; [http://mneguidelines.oecd.org/database/searchresults/?q=\(NCP:\(Brazil\)\)](http://mneguidelines.oecd.org/database/searchresults/?q=(NCP:(Brazil))) (last accessed 13 June 2023).

⁸⁶ According to the OECD database, most of the inquiries concern investments in Brazil (28 out of 31 cases). Besides inquiries on general policies, the issues involved in the complaints are about, in order of importance, labor relations, human rights violations, environment, disclosure, and combatting of corruption. More details available online at: [http://mneguidelines.oecd.org/database/searchresults/?q=\(NCP:\(Brazil\)\)](http://mneguidelines.oecd.org/database/searchresults/?q=(NCP:(Brazil))) (last accessed 13 June 2023).

⁸⁷ See the rules of procedure for the IWG-NPC published by the Ministerial Ordinance N. 8,738/2021 (mainly articles 4–6).

⁸⁸ Decree N. 8,807, as of 12 July 2016. This Decree was replaced in 2019, due to the reorganization of the Ministry of Economy (Decree N. 9,759/2019), by Decree

technical bodies – the blue boxes of the organization chart in Figure 11.1 – with the strategic actions at the political level. This is also the forum for coordination with the private sector and with subnational entities for the promotion of investments.

CONINV is composed of Secretariat-level representatives who are assisted by a Technical Group of public servants from the ministries and agencies that are part of CONINV. This group has to meet at least bimonthly and to report to CONINV that will meet every six months. Public officials from the current Ministry of Economy report that both the Technical Group and the CONINV have followed that agenda.⁸⁹

CONINV reports then to both the CAMEX Executive Committee (GECEX) and the Council on Trade Strategy (CEC). These are two strategic bodies of the CAMEX structure which address the broader public policy of investments in Brazil, aiming at increasing the productivity and competitiveness of the Brazilian economy. The Council of Trade Strategy receives the recommendations from GECEX for a decision on strategic actions, including those connected to international negotiations.⁹⁰ This is a Ministers-level body that meets biannually or upon request of the President. As such, GECEX, which meets at least once a month, coordinates among the lower level of ministers' representatives the daily routine.

In addition to those agencies, it is worth mentioning the Brazilian Trade and Investment Promotion Agency (known by the acronym in Portuguese APEX). This is the oldest structure in the institutional design for investments promotion in Brazil. APEX is placed in the structure of the Ministry of Foreign Affairs, and it has been considered as part of the investment cooperation and facilitation system by the regulation of the main bodies operating in the system.⁹¹

N. 9,885, and, more recently, its rules of procedure have been updated by CONINV Resolution N. 5/2022.

⁸⁹ Interviews with officials by Michelle R. Sanchez-Badin during October 2020. On file with the author.

⁹⁰ Decree N. 10044/2019 (article 3) GECEX/CAMEX Resolution N. 1, as of 10 January 2020. The Rules of Procedure for the Council for Trade Strategy is yet to be approved – expected by December 2020.

⁹¹ Decree N. 10044/2019, article 10, para. 2, and GECEX/CAMEX Resolution N. 1/2020, article 13, para. 2 appoint APEX together with the Brazilian Antitrust Agency as part of GECEX and its policy-coordination meetings, although they do not have voting rights. Decree N. 9,885 (article 3, para. 2), and Resolution CONINV 5/2022 (article 2, para. 2) appoints APEX participation in the CONINV meetings on the same terms, including the meetings of its Technical Group (Resolution CONINV 5/2022 (article 9, para. 1)).

11.4.3 *Coupling the Domestic Governance and the ACFI Governance*

The institutional structure of Brazil's ACFI domestic governance was designed after the signing of the agreements by Brazil and so were created reflexively in accordance with the same. As previously mentioned, APEX and with the IWG-NPC were the sole domestic agencies exclusively focused on investments before 2016. We can then identify that the actions for facilitation and cooperation – in spite of their gray zones – are somehow distributed among the national agencies in tandem with the ACFI's two major bodies (the joint committee and the DIOs).

In Figure 11.3, we couple the domestic organization chart and the international institutional governance structures in order to illustrate the cooperation and facilitation actions, from the Brazilian institutional design.

As the concepts of cooperation and facilitation overlap in practice, we can see that the works from the more technical and administrative perspectives of the facilitation bodies (in blue) bring the inputs for cooperation at the strategic and political levels. The purpose being that the political level would be able to respond more efficiently to the needed reforms and revisions appointed by the ground-level experiences of

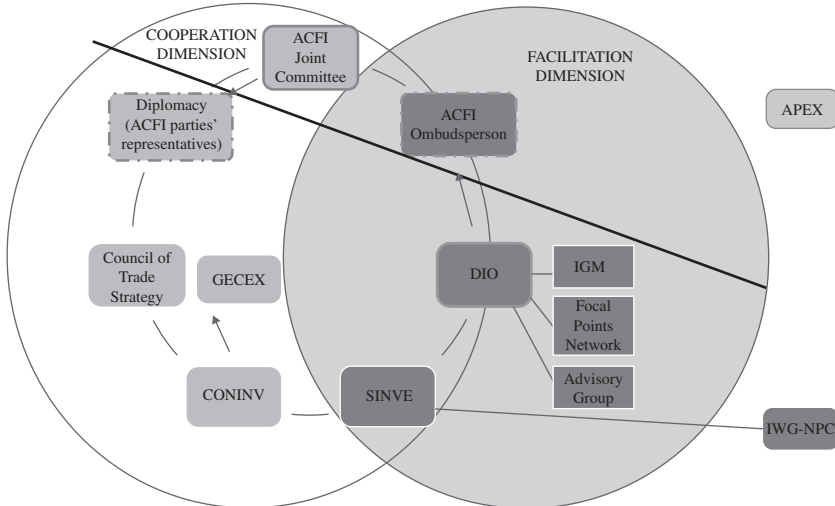


Figure 11.3 Cooperation and facilitation coordination among domestic and international institutional governance structures.

Source: Prepared by the authors.

investors and concerned groups together with the technical groups that expect to facilitate the investment process.

It is important to consider that most of the institutional reform and the pairing of the national and international levels still need to be tested in practice. This will require time, as well as investment flows from and to countries with which Brazil has signed the ACFI and others.

The same structure applied to bilateral relations is also expected to be in action to plurilateral agreements, such as the intra-Mercosur, the Mercosur and agreements, and the negotiations at the WTO level.

11.5 Conclusion

During the international investment's regimes "Era of Re-orientation,"⁹² Brazil launched a new framework agreement for regulating foreign investment focusing on cooperation and facilitation of investments. This framework not only shifted the focus from investment protection to investment promotion and cooperation as alternative perspectives, but it also contested one of the main pillars of BITs governance: the investor-state arbitration system. In doing so, the ACFIs decided upon new language, the exclusion of certain clauses, and in adding new legal safeguards to international investment agreements. In addition, a new governance structure was designed to promote continuous coordination among the parties, along with risk mitigation and dispute prevention. The fact that there is no single standard or model agreement for the ACFI, but rather an interoperable framework, has raised reservations about the potential of this new framework.

Sections 11.2 and 11.3 of this chapter aimed at highlighting the brief history of those negotiations and the flexibility of the content of the agreements. The purpose was to highlight the adaptability of the ACFI, according to the parties, but also the building up process for new rules. Since Brazil has increased the number of agreements it has signed, proposing the framework to nontraditional economic partners of the country, it is noticeable that the cooperation agenda became less operative and that the ACFI is increasingly focused on the functioning of the institutional governance of the agreements.

⁹² About the movements of international regulation for investments, see UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (Geneva: United Nations, 2018), p. 14. Available online at: https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf (last accessed 13 June 2023).

Section 11.4 has described in detail the reforms in the Brazilian state bureaucracy to accommodate the principles and structures of the ACFI. Most of the reforms have been taken in the last seven years, and they were adjusted to the reforms taken in 2019 when President Bolsonaro took office. Given the two central governance structures of the ACFIs – the DIO and the joint committees, the former should be part of institutions already in place, all referenced in the ACFI texts. Then, most of the innovation is expected to take place in the implementation of the single-window system. In the case of Brazil, Figure 11.1 details the processes of request and inquiry. Its functioning has been amplified to any investor, including non-ACFI origin, and is somewhat active. In the case of Brazil, then, the DIO became central to the facilitation processes to investors. Additionally, there has been an effort to integrate other support agencies and to connect them, as illustrated by Figure 11.2, mainly around SINVE and CONINV. Furthermore, the interplay of those two agencies in connecting the national and the international levels are essential for the good performance of the ACFI in Brazil.

A second feature in the governance structure of the ACFI is the joint committee. However, this may be a bottleneck within the governance structure. Such structure is composed of representatives of the ACFI parties and depends upon a certain level of political commitment.⁹³ The joint committees are the pivot system for cooperation and risk mitigation, and in case of any complaint of an investor of the parties, this is the first mandatory step to take. So, coordinating at the diplomatic level is crucial. Taking into account that a plurilateral agreement is under negotiation at the WTO, the implementation of a contact point at that level may favor the centralization of such coordination.

It is still too early to make a proper evaluation of the ACFI as a stimulus for cooperation and facilitation for investments but may be considered a promising model when compared to the wider scheme of proposals submitted so far. Even if not yet a model, at least the ACFI framework, its contestations and proposals, as well as the experience of implementing a facilitation system in a middle-power country as Brazil may serve as inspiration in the continuous reorientation of the investment regime.

⁹³ According to public officials interviewed on 11 April 2022, the Joint Committees of the agreements in force have been able to meet. They exemplify that the three meetings took place in the case of Mexico; in the case of Angola, the Joint Committee met twice. Officials confirmed that, although their agreements were not yet in force, the Joint Committees with India and the UAE had already convened. In the case of the MERCOSUR Protocol, the Special Working Group N. 12 is in charge of addressing the Protocol issues and it met quite often. Interviews on file with Michelle R. Sanchez-Badin.