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Investment arbitration in Brazil: revisiting Brazil's traditional reluctance towards ICSID, BITs, and investor-state arbitration

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RESUMO: Embora a arbitragem em matéria de investimento tenha crescido rapidamente na América Latina, como um veículo favorável para resolver as disputas entre os investidores estrangeiros e os Estados receptores, em um fórum neutro e com o mínimo de perturbações diplomáticas, o Brasil permaneceu distante desta realidade. Apesar da importância de investimento estrangeiro direto no Brasil e do crescente número de companhias brasileiras investindo no exterior, o Brasil continuou como o único país da América do Sul que não ratificou a Convenção sobre Resolução de Disputas envolvendo Investimentos entre Estados e Nacionais de Outros Estados ("Convenção ICSID") nem concordou com um contexto favorável à arbitragem direta em caso de conflitos com investidores. Este artigo explora as raízes da tradicional resistência do Brasil em consentir com

ABSTRACT: As investment arbitration has grown rapidly throughout Latin America as a favored vehicle to resolve disputes between foreign investors and host States, in a neutral forum and with a minimum of diplomatic disruption, Brazil has remained aloof. Despite the importance of foreign direct investment ("FDI") to Brazil and the increasing number of Brazilian companies themselves investing abroad, Brazil remains the *only* country in South America not to have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), or otherwise agreed to a framework for direct arbitration of investor disputes. This article explores the roots of Brazil's traditional reluctance to consent to investor-State arbitration in light of global developments in the field and the increasing importance of FDI

as arbitragens envolvendo Estado e investidor à luz dos desenvolvimentos globais na área e a crescente importância do investimento direto estrangeiro para o desenvolvimento econômico, e sugere que já está em tempo de o Brasil revisar sua postura por meio de salvaguardas apropriadas para proteger seu direito soberano de proteger o interesse público.

PALAVRAS-CHAVE: Arbitragem em matéria de investimento – Investimento direto Estrangeiro – Brasil.

to economic growth, and suggests it is time for Brazil to revisit its approach, with appropriate safeguards to protect its sovereign right to regulate in the public interest.

KEYWORDS: Investment Arbitration – Foreign direct investment – Brazil.

INTRODUCTION

In the last decades, the relevance of FDI as a tool for economic growth and development has received increasing attention, and FDI has been recognized as the main source of finance to developing countries.[1] One of the chief obstacles to attracting FDI to the developing world – the perceived "political risk" associated with unstable governance, corruption and/or concerns about the availability, neutrality and efficiency of local courts – has been substantially lifted. Through the proliferation of bilateral and regional investment treaties, investors have received assurances that their investments in developing countries will be afforded internationally recognized standards of treatment, and that they will have meaningful access to impartial fora for presenting claims of alleged violations, without the need to persuade their own governments to espouse their causes through resort to traditional "diplomatic protection." These dual developments – the availability of neutral standards and a mechanism for adjudicating compliance with these standards – has significantly reduced the political risk of investing in developing economies, and has helped justify and encourage dramatically increased FDI throughout the world, and in Latin America in particular.[2]

1. In 2005, total worldwide FDI was US$ 896.7 billion, and FDI in Latin America and the Caribbean (excluding financial centers) amounted to US$ 72 billion. See UN-ECLAC, *2005 Foreign Investment in Latin America and the Caribbean*, at 20, available at http://www.eclac.cl/publicaciones/xml/2/24302/lcg2309i.pdf; see also Marcílio Marques Moreira, The International Capital Flows' New Directions, 2006 Global Meeting, at 3, available at http://www.cpii.columbia.edu/documents/Moreira-capitalflowsdirections-sept2006.doc (noting that FDI has become more important than trade for delivering goods and services to foreign markets).

The global trend towards resolving investment disputes through investor-State arbitration can be illustrated by the impressive number of Contracting States to the ICSID Convention (currently 143 ratifications), of bilateral investment treaties ("BITs") in existence providing for investor-State arbitration (now more than 2,392), and of bilateral and multilateral free trade agreements ("FTAs") containing investment chapters that contemplate such dispute resolution mechanism. The overall number of investment disputes thus far brought by investors against States before ICSID or other institutions, or in *ad hoc* proceedings under the UNCITRAL Rules, is also instructive. While a number of these claims have resulted in declarations of State liability to private investors, a significant number of other cases have been resolved in the host State's favor, confirming the ultimate neutrality of the process.

Brazil, however, remains apart from this trend. It has never ratified the ICSID Convention, nor has it ever ratified any investment treaty that provides for investor-State arbitration. Brazil's isolation from other Latin American countries, and from all other South American countries in particular, is inconsistent with the priority it otherwise places on FDI as a means of furthering economic development. In order for Brazil not only to sustain but also to increase the amount of FDI attracted to the country each year, it should reconsider offering greater incentives and guarantees to foreign investors, in the form of international standards of treatment for investment and confirmed access to investment arbitration. The presence of strong competitors also maneuvering for increased FDI, such as China, India and Mexico, reinforces this need. So too do recent events elsewhere in South America – including the 2001 economic crisis in Argentina and the recent nationalization measures taken by Brazil's neighbors, Bolivia and Venezuela – which suggest that foreign investors in future will become more demanding, rather than less, in terms of assurances and protections for their investments in Latin America.

This article is organized into three parts. First, we highlight the global trend towards resolution of investment disputes through investor-State arbitration, and accordingly towards ratification of the ICSID Convention and conclusion of BITs and FTAs containing consent to investor-State arbitration. Second, we address Brazil's position in light of this global trend. Finally, we discuss some considerations that Brazil should take into account if and when its leaders decide

2. Francisco González de Cossío, *The International Centre for Settlement of Investment Disputes* – The Mexican Experience, 19(3) J. Int'l Arb. 227 (2002).

to review its position towards investor-State arbitration, the ICSID Convention and investment treaties.

1. THE GLOBAL TREND TOWARDS CONSENT TO INVESTOR-STATE ARBITRATION

1.1 The ICSID Convention

Before the ICSID Convention entered into force in 1966, complaints by investors against foreign sovereigns generally could be presented only in the home courts of those sovereign States, or in international proceedings initiated by the investors' own States, if they chose to extend diplomatic protection to their nationals' claims. Neither option proved particularly attractive. Investors were generally limited in local courts to claims based on contract or on specific provisions of local law, and even in these cases they had serious doubts about the neutrality of host State courts in actions against sovereigns or sovereign entities, and about their ability to enforce any monetary judgments they might obtain. Investors had other concerns about diplomatic protection, among them the uncertainty of obtaining home State espousal of their claims and loss of control of those claims even if espoused, as well as the general prerequisite that investors first exhaust local remedies before seeking diplomatic protection and the lack of any recognized enforcement remedies in State-to-State proceedings even in the event of favorable judgments.

The resulting lack of legal security was perceived as chilling foreign investment in countries that otherwise could benefit from inward capital flows in the quest for greater development. The ICSID Convention was designed to introduce a revolutionary new process in which States could attract greater investment by consenting to afford investors certain standards of treatment recognized by international law, and by agreeing in advance that investors could present claims for perceived violations directly before neutral international arbitrators, without the need for their own States' espousal and protection. Some 143 States have now ratified the Convention,[3] which obliges them to enforce ICSID awards as if they were final judgments of their own highest courts.[4] More States have ratified the ICSID Convention than have ratified the New York Convention on Recognition and Enforcement of Arbitral Awards (137 ratifications),[5] which governs enforcement of commercial arbitration awards and which is widely perceived as having broad acceptance throughout the world.

3. See ICSID website at http://www.worldbank.org/icsid/constate/c-states-en.htm.
4. See Article 54(1) of the ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."
5. See UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Adherence to the ICSID Convention did not, however, come easily or naturally to Latin America. Latin America traditionally was the home of the so-called Calvo Doctrine, which throughout the 19th and early 20th centuries was invoked widely to limit the interference of developed nations in the internal affairs of the region.[6] Generally speaking, the Calvo Doctrine was based on the idea that foreign investors should not be entitled to treatment more favorable than domestic investors, and therefore rights attributable to foreign investors should be governed purely by domestic law. This doctrine gave rise to the "Calvo clause," under which foreign investors could resort only to local courts (and not to international arbitration) for the defense of their rights. Such clauses were included in several Latin American States' constitutions and laws, and also in contracts concluded by those States or State entities with foreign investors.[7] As a result, a hostile environment towards international arbitration prevailed in the region.

When the World Bank in 1964 proposed the creation of ICSID, for the express purpose of allowing investment disputes to be heard outside of local courts without escalating such disputes into diplomatic conflicts between States, Latin American States collectively rejected the idea.[8] Only in the late 1980s did States in the region begin to abandon the Calvo Doctrine, as part of a slow and gradual process of increasing their acceptance of the notion of international arbitration. The process started with an increasing number of States adhering to the New York Convention and the Panama Convention on international commercial arbitration, then expanded to the ICSID Convention and to bilateral investment treaties and free trade agreements.[9] Presently, the great majo-

6. For more information about the Calvo Doctrine, see Gonzalo Biggs, *The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-US Free Trade Agreement*, 19 ICSID Rev.-FILJ 61, 66 (2004) ("The Latin America reaction to foreign interventions was the Calvo Doctrine, which invoked the exclusive jurisdiction of states to try and judge the conduct of foreigners within their borders. It was, basically, an early expression of the principles of territorial sovereignty, juridical equality of States, equal treatment of nationals and foreigners, and of non-intervention. Its founder, Carlos Calvo, based his views on the XIX century practice that European countries applied to the relationship among European countries and Latin American countries."); and Bernardo M. Cremades, *State Contracts in Brazil*: An International Arbitration Perspective, 9 *Revista de Arbitragem e Mediação* 44, 57 (2006).
7. See Gonzalo Biggs, *id.*
8. This collective resistance to the ICSID Convention was formalized in 1964 at the World Bank's annual meeting in Tokyo, and became known as the "No of Tokyo." *Id.* at 68.
9. See Adriana Noemi Pucci, Arbitragem e Investimentos Estrangeiros [Arbitration and Foreign Investments], 2 *Revista Brasileira de Arbitragem* 7, 9 (2004); and Celso de Tarso Pereira, O Centro Internacional para a Resolução de Conflitos sobre Investimentos (CIRCI-ICSID) [The International Centre for the Settlement of Investment Disputes (CIRDI-ICSID)]," 140 *Revista de Informação Legislativa* 87, 91-92 (1998).

rity of Latin American countries have ratified the ICSID Convention.[10] In South America, in particular, all countries ratified the Convention, with the exception only of Brazil.

1.2 Investment treaties

Developed and developing countries have been entering into BITs since the 1960s, but the pace and number of such treaties has dramatically increased since the 1990s. There are now more than 2,392 BITs in existence,[11] involving more than 176 countries.[12] Most of these treaties have been concluded between traditional "capital exporting" countries, on the one hand, an traditional "capital importing" countries, on the other. An increasing number of BITs, however, are being concluded between countries within the developing world.[13]

Bilateral investment treaties normally articulate baseline standards for treatment of foreign investment and guarantee direct access for investors to neutral forums for resolution of their claims, independent of even purportedly "exclusive" forum selection clauses in applicable contracts. The substantive standards of these treaties vary, but most contain guarantees for investors of "fair and equitable treatment," nondiscriminatory and "most favored nation" treatment, "full protection and security," free transfer of currency, and prohibitions on expropriation without compensation. Access to investor-State arbitration is considered one of the most important guarantees provided by BITs, without which an investor could not effectively enforce the substantive protections contained in such treaties.

As a general rule, investment treaties provide investors with the option to choose among: (i) international arbitration under the ICSID Convention (avai-

10. The following Latin American States have ratified the ICSID Convention, in chronological order: Guiana (1969), Paraguay (1983), Peru (1983), El Salvador (1984), Ecuador (1986), Honduras (1989), Chile (1991), Costa Rica (1993), Argentina (1994), Nicaragua (1995), Venezuela (1995), Bolivia (1995), Panama (1996), Colombia (1997), Uruguay (2000), and Guatemala (2003). See http://www.worldbank.org/icsid/constate/c-states-en.htm. Mexico has not ratified the ICSID Convention, but it has consented to investor-State arbitration by select groups of investors through NAFTA Chapter 11 and several BITs.
11. UNCTAD, *Recent Developments in International Investment Agreements*, Research Note (2005), at 1, available at http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf Not all of these treaties have been ratified yet. At the end of 2004, for example, there were 1,674 BITs in force. See Jennifer Tobin & Susan Rose-Ackerman, When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties, at n. 3, available at http://www.law.yale.edu/documents/pdf/When_BITs_Have_Some_Bite.doc.
12. See UNCTAD website at http://www.unctadxi.org/templates/Page____1007.aspx.
13. It should be noted that either as cause or effect of BITs concluded between developing countries, FDI flows from developing to other developing countries have increased from US$ 14 billion in 1995 to US$ 45 billion in 2003. See Marcílio Marques Moreira, supra note 1, at 4.

lable when both the country of the investor's nationality and the host country have ratified the Convention); (ii) international arbitration under ICSID's Additional Facility (in case one of the parties has not ratified the ICSID Convention); or (iii) *ad hoc* arbitration under the UNCITRAL Rules. In addition, some treaties provide access to the Stockholm Arbitration Institute and/or the International Court of Arbitration of the International Chamber of Commerce ("ICC"). Other treaties establish that the investor may choose to bring a claim against the host State in its own local courts, although this option – which is generally open to investors even without express reference in a treaty – does not generally inspire equal confidence on the part of foreign investors.

Free trade agreements, both regional and bilateral, also frequently incorporate a chapter on investments that contain the guarantees normally found in BITs, including investor-State arbitration. This is the case, for instance, of Chapter 11 of the 1994 North-American Free Trade Agreement ("NAFTA"),[14] Chapter 10 of the 2004 Central America-Dominican Republic-United States Free Trade Agreement ("DR-CAFTA"),[15] Chapter 10 of the 2003 Chile-U.S. FTA,[16] and the Dispute Settlement Chapter of the 1994 Energy Charter Treaty ("ECT").[17]

Despite the significant number of BITs now in existence, the conclusion of these treaties by Latin American countries is a rather recent phenomenon. For the same reasons Latin American countries were reluctant to adhere to the ICSID Convention, they initially resisted entering into bilateral investment treaties. This resistance began to wane in the 1980s.[18] Today, the vast majority of Latin American countries have signed and ratified significant numbers of BITs.[19]

14. The text of NAFTA Chapter 11 is available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160. Chapter 11 permits an investor of one NAFTA Party to seek money damages for measures of one of the other NAFTA Parties that allegedly violate other provisions of Chapter 11. Investors may initiate an arbitration against the NAFTA Party under the UNCITRAL Rules or the ICSID Additional Facility Rules.
15. The text of CAFTA Chapter 10 is available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf.
16. The text of U.S.-Chile FTA is available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf.
17. About the Energy Charter Treaty, see http://www.encharter.org/index.php?id=7. In force since 1998, the ECT is presently adopted by fifty-one States plus the European Communities. Investor-State arbitration is provided for in Article 26 of the ECT.
18. Celso de Tarso Pereira, supra note 9, at 92.
19. See Nigel Blackaby, Arbitration Under Bilateral Investment Treaties in Latin America, in Nigel Blackaby, David Lindsey & Alessandro Spinillo (eds.), *International Arbitration in Latin America* 379 (2002) ("Latin American countries have concluded over 380 treaties for the reciprocal promotion and protection of investments in order to promote their 'investment friendly' climate. They recognize that foreign investors take into account the existence of these treaties when assessing the political and legal risk profile of their potential investments in the region").

Brazil is in an isolated position: although it entered into 14 BITs in the 1990s, it has never ratified any of them. Brazil is the only country in South America to adopt this conservative position towards investment protection treaties and the investor-State arbitration mechanism they traditionally provide.

1.3 The current stage of investor-state arbitrations

In the last two decades there has been a dramatic increase of investor-State arbitrations. Statistics show that from only 20 cases filed in ICSID's first 20 years (1966 to 1985), ICSID's caseload, including cases brought under the Convention and its Additional Facility, grew to almost 180 cases filed in the next 20 years (1986 to 2005). There have been 148 ICSID cases filed in the past six years alone and at least 9 lodged in the first trimester of 2007. Overall, ICSID now has resolved 116 investor-State cases, and another 110 are presently pending.[20] The number of non-ICSID cases has also grown considerably in the last years. It is estimated that there have been 65 *ad hoc* arbitrations decided under the UNCITRAL Rules, 18 cases administered by the Stockholm Chamber of Commerce, and 4 cases before the International Chamber of Commerce. At least 70 governments – 44 of them in the developing world, 14 in developed countries and 12 in Southeast Europe and the Commonwealth of Independent States – have faced investment treaty arbitration.[21]

Some of the disputes heard before ICSID's Additional Facility are NAFTA Chapter 11 cases. NAFTA Chapter 11 has generated 27 disputes so far: 9 cases against the United States (4 concluded and 5 pending);[22] 8 cases against Canada (3 concluded and 5 pending);[23] and 10 cases against Mexico (6 concluded and 4 pending).[24] The first two arbitrations under DR-CAFTA are now on the horizon, with a U.S. investor recently announcing its intention to bring claims against the Republic of Guatemala,[25] and another U.S. investor signaling its plan to initiate proceedings against the Dominican Republic.[26] The Energy Charter Treaty is also responsible for an increasing number of investment disputes: there have

20. See ICSID website at http://www.worldbank.org/icsid/cases/cases.htm.
21. UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Monitor n. 4 (2006), at 2, available at http://www.unctad.org/sections/dite_pcbb/docs/webiteiia200611_en.pdf.
22. See list of cases at http://www.state.gov/s/l/c3741.htm. One of the pending cases represents a consolidation of three cases (*Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America* and *Tembec, Inc. et al. v. United States of America*).
23. See list of cases at http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp. In addition to the 5 pending cases, Canada has received 3 notices of arbitration, but these proceedings have not yet commenced.
24. See list of cases available at http://www.dfait-maeci.gc.ca/tna-nac/mexico-en.asp. In addition to the 5 pending cases, Mexico has received 4 more notices of arbitration, but these proceedings have not yet been initiated.
25. See Investment Treaty News, March 16, 2006, available at http://www.iisd.org/pdf/2007/itn_mar16_2007.pdf.
26. See http://www.globalarbitrationreview.com/news/news_item.cfm?item_id=3747.

been 15 cases filed so far (11 are still pending, 2 were settled by the parties, and 2 cases are concluded).[27]

A significant number of investment arbitrations to date have arisen from investments in the Americas. Before ICSID, 42 claims have been lodged against Argentina (most relating to the country's financial crisis in 2001-2002). Another 9 cases have been brought against Ecuador, 7 against Venezuela, 5 against Peru, 3 against Chile, 2 against Bolivia, and 1 each against Costa Rica, El Salvador, Honduras, Nicaragua and Paraguay. Mexico has been a respondent in 12 cases, most arising under NAFTA. Many of these cases have been brought by investors from industrialized nations in Europe or the United States. But recently there has been movement towards ICSID being used also by Latin American investors in other Latin American countries, such as by Chilean investors against the Republics of Peru[28] and Bolivia,[29] and by a Peruvian investor against the Republic of Paraguay.[30]

The growing use of investor-State arbitration is evidence of the attractiveness to investors of this system of "direct claims." Some of the 226 cases that have been presented to ICSID thus far arise from concession contracts with State entities, which provide recourse to ICSID for breach of contract, and a few invoke host State investment legislation that consents to investor submission of claims to ICSID. But the vast majority of claims before ICSID concern challenges to regulatory or administrative acts independent of contractual relations, such as revocation of permits or imposition of onerous operating conditions that are inconsistent with local law or due process requirements, or are targeted specifically at, or disproportionately impact, one or more foreign investor.

The respondent States in these ICSID cases have frequently brought threshold challenges to ICSID's jurisdiction. Although many different objections have been presented, the principal areas of challenge to date have concerned claims that investors either did not qualify to invoke applicable investment treaties by virtue of third-party (or even host State nationals') ownership or control of the claimant entity, or that investors were restricted to local forums by contractual dispute resolution clauses or "fork in the road" provisions of applicable treaties. Most of these objections have not ultimately proved to be an obstacle to ICSID's retaining the case. ICSID tribunals have found claimants to have standing so long as either they, or an entity they directly or indirectly control or in which they own a significant shareholding stake, are incorporated in a State that is party to an investment treaty with the respondent State. Tribunals have also drawn a sharp distinction between contractual or administrative claims and treaty claims, and rejected arguments that pursuit of the former in host State courts or administrative tribunals, or forum selection clauses obligating such pursuit, bars access to ICSID for treaty claims notwithstanding similar

27. See list of cases available at http://www.encharter.org/index.php?id=213.
28. *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case n. ARB/03/4.
29. *Quimica e Industrial del Borax Ltda. et al. v. Republic of Bolivia*, ICSID Case n. ARB/06/2.
30. *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case n. ARB/98/5.

factual underpinnings. ICSID tribunals have also proved willing to overlook procedural requirements in some treaties, such as Argentine treaties mandating that investors submit disputes to the local courts 18 months before filing claims at ICSID, on the grounds that "most favored nation" clauses in the same treaties allow investors to invoke other Argentine treaties that omit such procedural prerequisites.[31]

But sovereign States should not view investor-State arbitration as inevitably stacked against them.[32] Several recent decisions by ICSID tribunals have underscored that sovereigns have powerful tools available to obtain dismissal of ICSID claims even at the jurisdictional stage. In one recent case, El Salvador was successful in convincing an ICSID tribunal to dismiss all claims brought by a European investor, on the ground that the investor had obtained its rights under a State concession contract through serious fraud in a public bidding process, thereby excluding the investment from protection under so-called "in accordance with law" clauses in the applicable treaty.[33] In another recent decision, Hungary obtained a full jurisdictional dismissal of claims brought by a European telecommunications provider, on the grounds that the applicable treaty limited ICSID jurisdiction to conduct constituting expropriation, and the sovereign's regulatory actions did not cross this threshold requirement as a matter of international law.[34] In both cases, the investor was ordered to repay the sovereign for some or all of its legal and arbitration costs, a result that previously had been less common in the ICSID context than in the world of pure commercial arbitration.

Even in cases where jurisdictional objections are not sustained, sovereigns have had success on the merits, both in defending claims on substantive grounds

31. See, *e.g.*, *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case n. ARB/03/17, Decision on Jurisdiction, May 16, 2006; and *National Grid plc v. The Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction, June 20, 2006.
32. Although statistics have limited accuracy because some decisions (especially non-ICSID decisions) are not released to the public, it is estimated that out of 41 awards publicly available as of 2005, States prevailed in 17 cases. See UNCTAD, *Investor-State Disputes Arising From Investment Treaties*: A Review, Series on International Investment Policies for Development, at 11 (2005), available at http://www.unctad.org/en/docs/iteiit20054_en.pdf. In addition, States have been successful in significantly reducing the amount of compensation awarded by arbitral tribunals to investors. For instance, in the NAFTA case *Metalclad v. Mexico*, the investor sought compensation in the amount of U$ 43 million, and the Tribunal awarded only US$ 17 million; and in *S.D. Myers v. Canada*, also a NAFTA case, the Tribunal rejected the investor's claim for US$ 70 to US$ 80 million, and awarded it US$ 6 million, i.e. less than 10% of the amount sought, *Id.* at 10.
33. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case n. ARB/03/26, Award, Aug. 2, 2006.
34. *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case n. ARB/04/15, Award, Sept. 13, 2006.

and in limiting damage exposure to acceptable levels. Paraguay defeated ICSID claims arising out of the bankruptcy of a Paraguayan financial institution, demonstrating that its supervision of the bank's activities had not fallen below the standards required by the applicable treaty and that the claimant's loss of deposits did not amount to expropriation of his investment.[35] Other sovereign States have defeated ICSID claims alleging interference with investments by local administrative authorities or regulatory agencies, on the basis that such interference did not rise to the level of an international treaty violation, and ICSID's function was not to serve as an administrative review body short of such egregious violations.[36] In another sort of victory, Venezuela was found to have infringed investor rights by dispensing with a previously negotiated concession for an airport toll road, due to massive public protests, but convinced an ICSID tribunal to limit the damages award to only a fraction of the massive lost profit figure the investor initially had sought.[37] And in October 2006, an ICSID tribunal accepted Argentina's "state of necessity" defense to exempt it from a duty to compensate certain U.S. investors for damages suffered from adjustment of tariffs during a 17-month period between December 2001 and April 2003, but found Argentina still liable for damages related to treaty violations occurring outside of that window.[38]

2. BRAZIL'S HISTORIC RESISTANCE TO INVESTOR-STATE ARBITRATION

As mentioned above, Brazil remains a notable exception to the current global trend towards resolution of investment disputes through investor-State

35. *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case n. ARB/98/5, Final Award, July 26, 2001.
36. See, *e.g.*, *ADF Group Inc. v. United States of America*, ICSID Case n. ARB(AF)/00/1, Award, Jan. 9, 2003 (rejecting all claims by a Canadian investor under NAFTA based on alleged injuries from Mexican regulation regarding transportation); *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, Nov. 15, 2004 (dismissing in their entirety NAFTA claims by a U.S. investor contesting Mexican regulations to revitalize the sugar industry); *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 3, 2005 (dismissing NAFTA claims by a Canadian company alleging damages from a California ban on the use or sale of the gasoline additive MTBE; Methanex had claimed $ 970 million in damages); *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Arbitral Award, Jan. 26, 2006 (dismissing claims by a Canadian investor for alleged injuries from the regulation and closure by Mexican authorities of gaming facilities); *EnCana Corp. v. The Republic of Ecuador*, UNCITRAL, LCIA n. UN3481, Award, Feb. 3, 2006 (rejecting jurisdiction over all claims arising out of Ecuadoran tax regulations denying VAT credits and refunds, except an expropriation claim, which the Tribunal denied on the merits).
37. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case n. ARB/00/5, Award, Sept. 23, 2003.
38. *LG&E v. Argentina*, ICSID Case n. ARB/02/1, Decision on Liability, Oct. 3, 2006.

arbitration.[39] Brazil has neither signed nor ratified the ICSID Convention; it has not ratified the 14 BITs concluded in the 1990s that provide for investor-State arbitration; and it has not ratified two Mercosur Protocols regarding promotion and protection of investments that include investor-State arbitration. As a result, no foreign investor in Brazil may assert treaty claims against the Republic of Brazil in the event the State, or any of its political subdivisions or State entities, takes measures that in the hands of other States would clearly be actionable under international law.

2.1 Brazil's refusal to join the ICSID Convention

Despite its ultimate refusal to sign the ICSID Convention, Brazil participated actively in international consultations regarding the Convention's terms, conducted by the World Bank in 1964.[40] Yet Brazil's delegate to the World Bank meetings, Francisco da Cunha Ribeiro, signaled the State's resistance early on. At a key Consultative Meeting of Legal Experts held in Santiago, Chile, on June 12, 1964, for example,

"Mr. Ribeiro (Brazil) considered that the proposed Centre possessed certain characteristics that set it apart from the principles that had traditionally inspired international arbitration, a legal institution designed for the peaceful solution of disputes between nations. Moreover, the draft Convention raised constitutional problems, since it implied a certain curtailment of the scope of national legal processes. Brazilian constitutional law guaranteed the judicial power a monopoly of the administration of justice (see Art. 141, paragraph 4, of the Brazilian Constitution) and therefore it would be inadmissible to create within the territory of the nation a body entrusted with decisions in the field of law. Were such activities to be delegated to an international organization, the violation of this constitutional precept would be even more flagrant. Another aspect of the problem that raised doubts in his mind was that despite the optional character of the draft Convention, foreign investors would be granted a legally privileged position, in violation of the principle of full equality before the law." [41]

As reflected above, the criticism of the ICSID Convention was primarily directed at its investor-State arbitration mechanism, which Brazil's delegate believed contradicted the practice of direct State to State arbitration to resolve disputes involving treatment of their respective nationals. Brazil's delegate also suggested that investor-State arbitration violated constitutional principles inherent in the Brazilian legal system, such as the principle that the Judiciary holds the monopoly of justice.[42] The final criticism presented by Brazil's delegate was that it favored foreign investors to the prejudice of domestic investors.[43]

These concerns were echoed by the then legal consultant for the Brazilian Foreign Service (Itamaraty), Augusto de Resende Rocha, who issued an opinion raising serious objections to the Brazil's adoption of the ICSID Convention.[44] According to this opinion, adoption of the proposed dispute resolution mechanism (i) would violate guarantees enshrined in the Brazilian Constitution; (ii) was unnecessary, in that the Brazilian government for more than 150 years had consistently resolved meritorious claims raised by foreigners, through diplomatic channels or judicial proceedings; (iii) would contradict Brazilian law, by forcing foreign investors to waive their right to diplomatic protection; and (iv) would imply that Brazilian courts lacked the necessary independence to hear and decide meritorious claims by foreigners against the Brazilian government.[45] The opinion also stated that creation of ICSID would "reinforce and almost institutionalize the state of tension, so difficult to eradicate in international political relations, between dominant and dominated economies."[46] The opinion concluded with the observation that

"we do not believe that the acknowledgement of structural deficiencies and circumstantial distress of the Brazilian economy – which clearly puts it into the roll of dominated economies – should be a reason for our government to accept, from a political and legal standpoint, the creation of an arbitral tribunal to resolve economic conflicts between private parties and governments, within the World Bank structure, where we have already felt clearly the prevalence of the interests of developed countries."[47]

This opinion was entirely consistent with the political positions adopted by other Latin American countries at the time, influenced by the Calvo Doctrine as discussed above.[48] In the legal sphere, it was also in line with the traditional resistance Brazil had demonstrated towards international arbitration even of purely commercial disputes.[49] But more than 50 years later, the sands have shifted dramatically throughout the region. Other Latin American countries since the 1980s have overcome their initial rejection of the ICSID Convention, and in great part have ratified it as discussed above. Brazil's own approach to international commercial arbitration has evolved considerably, and its old resistance is no longer in place. Today, Brazil has a modern and effective Arbitration Law (Law n. 9,307 of 1996), and with each new pronouncement by Brazilian

39. See Suzana Medeiros. *Arbitragem internacional investidor-estado*: um caminho inevitável para o Brasil? [*Investor-state international arbitration*: an inevitable way for Brazil?], Aluisio de Lima-Campos, 2 Ensaios em Comércio Internacional 173-214 (2006).
40. Flavio Marega, O Mecanismo Arbitral de Solução de Controvérsias Investidor Estrangeiro-Estado nos Acordos Internacionais sobre Investimentos: Implicações para o Brasil 31 (2005) (unpublished thesis, *Curso de Altos Estudos do Ministério das Relações Exteriores*) (on file with author).
41. History of the ICSID Convention, v. II-1, at 306. See also Flavio Marega, supra note 40, at 38.
42. *Id.*
43. *Id.* at 39.
44. *Id.* at 40-41. See also Guido Soares, Órgãos das Soluções Extrajudiciárias de Litígios 81 (1985) (strongly criticizing the referred opinion as being politically oriented and not legally grounded).
45. Flavio Marega, supra note 40, at 40-41.
46. *Id.* Translation provided by the authors.
47. *Id.* at 41. Translation provided by the authors.
48. *Id.* at 42.
49. *Id.* at 41.

commentators and courts, a more pro-arbitration approach is confirmed. The old view that arbitration violates the constitutional guarantees protected by the Brazilian Constitution has been totally abandoned, as stated in Brazilian Supreme Court decisions.[50] In sum: the reasons behind Brazil's rejection of ICSID in 1964 can no longer justify its current position.

2.2 *Brazil's refusal to ratify bilateral investment treaties*

Brazil was one of the last developing countries to engage in the negotiation of BITs.[51] In the 1990s, Brazil concluded 14 BITs, mostly with developed countries (Portugal, Chile, United Kingdom, Switzerland, Finland, Italy, Denmark, France, Venezuela, Korea, Germany, Cuba, the Netherlands and the Belgo-Luxembourg Economic Union),[52] but none of these agreements was approved by the Brazilian Congress. In fact, 6 of these agreements were submitted to the Brazilian Congress for approval, but the request for approval was withdrawn soon thereafter.[53] One of the main reasons for the withdrawal was the investor-

50. See, *e.g.* Judge Jobim's vote in the judgment of *MBV Commercial and Export Management Establishment v. Resil Industria e Comercio Ltda.*, STF, AgRg SE 5.206-7, Nov. 22, 2000, which upheld the constitutionality of the Brazilian Arbitration Law ("There is no prohibition in the Brazilian Constitution for parties, in their full capacity, to agree to submit disputes arising from contracts to arbitration. There is no abstract waiver to the right of access to courts. Rather, this is an arbitration agreement concerning future and possible conflicts related to contractual relations and subject to specific determination.") See also the opinion issued by the then *Procurador Geral da República*, Mr. Geraldo Brindeiro, in the same case ("What the principle of non-exclusion of access to the Judiciary provides is that 'the law shall not exclude from access to the Judiciary any damage or threat to a right.' Therefore, it does not establish that the parties cannot waive the right to bring to the Judiciary their disputes and conflicts. It does not provide that individuals shall always bring to the Judiciary their claims. If it is possible for a party to settle claims object of a suit, there can be no violation of the Constitution to waive the right of access to courts by entering into an arbitration clause."). About the constitutionality of the Brazilian Arbitration Law, see Jacob Dolinger & Carmen Tiburcio, Arbitragem Comercial Internacional [International Commercial Arbitration], Chapter 3 (2004).
51. Flavio Marega, supra note 40, at 108.
52. Portugal (Feb. 9, 1994), Chile (March 22, 1994), United Kingdom (July 19, 1994), Switzerland (Nov. 11, 1994), Finland (March 28, 1995), Italy (April 3, 1995), Denmark (May 4, 1995), France (May 21, 1995), Venezuela (July 4, 1995), Korea (Sept. 1, 1995), Germany (Sept. 21, 1995), Cuba (June 26, 1997), The Netherlands (Nov. 25, 1998), Belgo-Luxembourg Economic Union (Jan. 6, 1999). See Adriana Noemi Pucci, supra note 9, at 18.
53. See, e.g., *Mensagem* n. 1,084, sent by President Fernando Henrique Cardoso to Congress asking that request for approval of the BIT concluded with France be withdrawn, as reported by Adriana Noemi Pucci, supra note 9, at 18. See also Celso de Tarso Pereira, supra note 9, at 92 (noting that the main obstacles for

State arbitration mechanism contemplated in those agreements.[54] If and when Brazil decides to review its position regarding BITs, it should seek to renegotiate these BITs signed in the 1990s, rather than simply submit them for ratification, as their investment promotion and protection provisions reflect an older model demanded by capital exporting-States. New agreements should follow the new generation of BITs, which endeavor to balance the interests of both investors and governments, clarifying the scope of treaty rights and the power of States to regulate on matters of public interest.[55]

2.3 *Brazil's refusal to ratify the Mercosur protocols for the promotion and protection of investments*

Two protocols for the promotion and protection of investments have been concluded among Mercosur members (Brazil, Argentina, Uruguay and Paraguay). The first protocol – entitled "Protocol of Colonia for the Promotion and Reciprocal Protection of Investments" – was concluded in 1993 and concerns investments within the Mercosur bloc.[56] The second protocol – entitled "Protocol of Buenos Aires for the Promotion and Protection of Investments from Non-Member Countries" – was concluded in 1994 and, as its title suggests, concerns investments arising from non-Mercosur States.[57] The Colonia Protocol has been ratified by Argentina only, and the Buenos Aires Protocol has been ratified by Argentina, Paraguay and Uruguay.[58]

Brazil has not ratified any of these Protocols. Curiously, the Buenos Aires Protocol was submitted to the Brazilian Congress for approval, but the request for approval was withdrawn soon thereafter.[59] The Protocol of Colonia has

ratification of these agreement were the provisions on transfers, expropriation and dispute settlement).
54. Flavio Marega, supra note 40, at 144-45 (noting that the main objections to the investor-State arbitration provision were that (a) it did not provide for exhaustion of local remedies and waiver of this requirement would represent a serious precedent for the country; (b) the assertion of claims directly by private parties against the State would place on the same level two subjects that traditionally acted on distinct legal planes; (c) it would generate ungrounded suspicion against the Brazilian Judiciary; (d) investor-State arbitration would violate national sovereignty and the constitutional principle of non-exclusion of access to judicial courts; and (e) arbitration as a unilateral option of the investor violates basic principles under which arbitration normally requires bilateral agreement).
55. Bernardo M. Cremades, supra note 6, at 59.
56. The text of the Colonia Protocol is available at http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp.
57. The text of the Buenos Aires Protocol is available at http://www.cvm.gov.br/ingl/indexing.asp.
58. Flavio Marega, supra note 40, at 82.
59. Projeto de Decreto Legislativo n. 301/1999 and Mensagem n. 162/2004, see information available (in Portuguese) at http://www.camara.gov.br/mercosul/Proposicoes/prop_cam.htm.

never been submitted to Congress for approval.[60] One of the main objections to ratification was the investor-State arbitration mechanism provided in these two protocols.[61]

2.4 *Arbitration involving the Brazilian state and its subdivisions*

As discussed above, Brazil is not a party to any international treaty that gives broad consent to investor-State arbitration. Brazil's antiquated Foreign Investment Law (Law n. 4,131 of 1962) likewise does not provide investors access to investor-State arbitration. In light of this reality, a question that inevitably arises is whether an investor would at least be able to bring an international arbitration against the Brazilian State or its subdivisions based on an arbitration clause contained in a contract signed with a State entity. While this question is still subject to debate under Brazilian law, it should be acknowledged that Brazil has made great progress and taken significant steps towards allowing State entities (particularly State-owned companies) to submit to arbitration. Although it is outside the scope of this article to address this issue in detail, a brief description of the main aspects of the debate is presented below.[62]

The debate over the ability of State entities to consent and submit to arbitration in Brazil turns on the concepts of subjective and objective arbitrability.[63] With regard to subjective arbitrability, the main obstacle has been the so-called "principle of legality" enshrined in Article 37 of the 1988 Brazilian Constitution, under which State entities and State officials may only act in accordance with what is expressly permitted by law. In other words, it is not enough that there is no law *prohibiting* particular conduct; it is necessary to have a law expressly

60. Flavio Marega, supra note 40, at 91, explains that the Colonia Protocol was not submitted to Congress for approval due to divergences among the Contracting States regarding the translation of the agreement into Portuguese.
61. *Id.* at 82. According to the author, the objections raised by Congress against the investor-State arbitration mechanism included that: (a) it violates the requirement of exhaustion of local remedies and the State's jurisdictional sovereignty; (b) it puts two distinct subjects in international law (private parties and States) on the same level; (c) it creates a privilege for the foreign investor that is not offered to the domestic investor; and (d) it violates basic arbitration principles requiring bilateral agreements, because it permits the investor to initiate arbitration as a unilateral option. *Id.* at 99.
62. About this topic, see Jacob Dolinger & Carmen Tiburcio, supra note 50; and Suzana Medeiros, Arbitragem Envolvendo Empresas Públicas no Direito Brasileiro [Arbitration Involving State Companies under Brazilian Law] (2005) (unpublished Master of Laws' thesis, UERJ, Supervisor Professor Carmen Tiburcio) (on file with author).
63. Gilberto Giusti & Adriano Drummond C. Trindade, As Arbitragens Internacionais Relacionadas a Investimentos: A Convenção de Washington, o ICSID e a Posição do Brasil [International Arbitration Regarding Investments: the Washington Convention, ICSID and Brazil's Position] 7 *Revista de Arbitragem e Mediação* 49, 73 (2005).

authorizing particular conduct or acts.[64] In the absence of any law generally authorizing State entities to consent to arbitration, the question arises whether such entities are free to do so, either through arbitration clauses in State contracts or through submission to arbitration proceedings in particular disputes. (As will be discussed below, there are some specific laws authorizing submission to arbitration in particular areas, but the scope of such authorizations is debated). Another obstacle to the submission of State entities to arbitration addresses the subject-matter of the dispute and the nature of the rights concerned, *i.e.* objective arbitrability. This obstacle arises because, according to the Brazilian Arbitration Act (Law n. 9,307 of 1996), only disputes concerning "disposable rights" – generally speaking, rights arising from commercial and private transactions – are arbitrable. Because State entities usually deal with matters of public interest, and therefore are not freely entitled to dispose of their economic or "patrominonial" rights without legislative authorization, their rights are considered "non-disposable," and consequently, not arbitrable. Based on these two obstacles – the principle of legality combined with non-arbitrability of rights related to the public interest,[65] some Brazilian courts have declared arbitration clauses contained in contracts signed by Brazilian State entities, including State corporations, to be null and void.[66]

The most remarkable case in which a Brazilian court saw in these two obstacles a prohibition on State entities' submission to arbitration, and invalidated an arbitration clause signed by a State company, is *COPEL v. UEG*.[67] In that case, a court of first instance in the state of Paraná, in the South of Brazil, declared null and void an arbitration clause in a contract between UEG Araucária, a special purpose company jointly held by the American investor El Paso and the Brazilian companies Petrobras and COPEL, against COPEL, a mixed-capital State corporation (controlled by the State but not 100% owned by it) that holds the concession for generation, transmission and distribution of electrical energy in Paraná. The court accepted COPEL's argument that under Brazilian law, State-

64. See Bernardo M. Cremades, supra note 6, at 51 (explaining that this principle is found on the idea that the disposition of public assets and rights are always subject to prior authorization by the legislator).
65. *Id.* (explaining the combined effects of these two obstacles: "Thus, without the proper legislative authorization, the subject matter of the dispute would fall outside the scope of matters within the free disposition of the parties and therefore not subject to an arbitration agreement.").
66. See Suzana Medeiros, supra note 62; see also Clávio Valença Fillho & João Bosco Lee, *Brazil's New Public-Private Partnership Law*: One Step Forward, Two Steps Back, 22(5) J. Int'l Arb. 419 (2005) (noting that since 1996, there have been three important cases where Brazilian judges have held arbitration to be incompatible with certain well-established principles of Brazilian administrative and constitutional law).
67. *Copel v. UEG Araucaria*, 3ª Vara de Fazenda Pública, Falências e Concordatas da Comarca de Curitiba, Estado do Paraná, Ação Declaratória 24.334, Decision of June 3, 2003 (injunction); and 3ª Vara de Fazenda Pública, Falências e Concordatas da Comarca de Curitiba, Estado do Paraná, Ação Declaratória 24.334, Decision of March 15, 2004 (final decision).

owned entities could not validly submit to arbitration disputes involving matters of public interest, without an express legal authorization. The court therefore enjoined UEG Araucária from continuing to participate in arbitral proceedings before the ICC International Court of Arbitration in Paris, under threat of penalty for violating the court's injunction.[68] UEG Araucária subsequently sought an order suspending the effects of the first instance decision pending appeal, but before the appeal was heard, the parties settled the case before the ICC and the judicial proceedings in Brazil consequently were terminated. Had Brazil had a BIT in force with the United States, of course, the majority shareholder of UEG Araucária (a U.S. investor) could have filed an investment arbitration against the Republic of Brazil (not against COPEL) for violation of the country's obligation to protect the investment against measures arguably tantamount to indirect expropriation.[69]

The *COPEL* case sent shock waves throughout the international investment community interested in Brazil. But the bad image that resulted from the case has since been mitigated by three important developments: (i) the increasing number of legislative authorizations for the use of arbitration by State entities in specific circumstances; (ii) the consensus of most Brazilian commentators in favor of submission of State entities to arbitration; and (iii) the recent court decisions upholding arbitration clauses signed by State entities, including a decision rendered by the Brazilian Superior Court of Justice. These developments are highlighted briefly below.

First, the Brazilian Congress has approved several laws (particularly during the 1990s following the wave of privatization and opening of the Brazilian market) granting State entities authorization to submit to arbitration in specific circumstances, particularly in situations where it is necessary to attract private investments. Submission to arbitration is authorized for international banking transactions, for example, by Law n. 5,662 of 1971 (BNDES), Article 5; for international financial transactions, by Decree-Law n. 1,312 of 1974, Article 11; for concession contracts, by Law n. 8,987 of 1995, Article 23; for the telecommunications sector, by Law n. 9,472 of 1997, Article 93; for petroleum, by Law n. 9,478 of 1997, Article 43; and for electricity, by Law n. 10,848 of 2004, Article 4. Furthermore, three legislative events reinforced Brazil's pro-arbitration attitude as regards State contracts. The first was Congress' rejection, in the course of

68. This was a type of "anti-arbitration injunction" even though the injunction was addressed to the party and only notified to the ICC.
69. Brazil signed in 1965 and ratified in 1966 (Decree n. 57,943/66) an agreement with the United States concerning investment guarantees. The agreement applies only to investments covered by guarantees provided by the governments of the United States or Brazil in the territory of the other. It does not contain the guarantees normally found in BITs and does not provide for investor-State arbitration in the event of violation; the only remedy is State to State arbitration, and is subject to several limitations and restrictions (excluding, for example, disputes related to matters that are within the internal jurisdiction of a sovereign State; and excluding disputes related to expropriation until local remedies have been exhausted and only then in circumstances of denial of justice).

approving a Constitutional Amendment in 2004 (Constitutional Amendment n. 45), of a proposed provision expressly prohibiting State entities' submission to arbitration.[70] The second event was enactment of the Public-Private Partnership Law (PPP Law – Law n. 11,079 of 2004) for the purpose of attracting private investments to infrastructure projects in Brazil, with an express provision allowing use of arbitration in these PPP contracts (Article 11(III)). The last event was approval of an amendment to the Concession Contracts Law in order to explicitly allow the inclusion of arbitration clauses into concession contracts (Article 23-A). Both the PPP Law and the amended Concession Contracts Law require, however, that arbitration take place in Brazil and proceedings be conducted in Portuguese and pursuant to the procedural rules set forth in the Brazilian Arbitration Act (Law n. 9,307 of 1996). In other words, the progress made by Brazil in enacting these two new provisions expressly contemplating arbitration for concession and PPP contracts was limited by the fact that the laws (at least apparently)[71] provide only for domestic arbitration, rather than international arbitration as would be preferred by international investors.[72]

Second, the great majority of Brazilian commentators support the ability of State entities, particularly State corporations, to submit to arbitration.[73] The

70. The arbitration community in Brazil led the movement against such a provision, and the constitutional amendment finally was approved without it. Jornal Valor Econômico, news of Aug. 11, 2004 and Nov. 22, 2004.
71. Although the provision does not state specifically that the "seat" of arbitration shall be in Brazil, it seems that this will be the prevailing interpretation (see note 72 below). There is, however, room for debate whether the provision was intended to require simply that proceedings physically be conducted in Brazil, while leaving the parties free to locate the formal seat of the arbitration abroad and thereby provide for "international" arbitration.
72. See Clávio Valença Fillho & João Bosco Lee, supra note 66, at 424-426. The authors strongly criticize the PPP Law for providing for arbitration in Brazil, in Portuguese, and in accordance with Brazilian procedural law. They suggest that it is unclear whether Brazilian courts will allow hearings and meetings to be held and arbitrators to deliberate in a location other than the seat. They also observe that because Brazilian courts (the court of the seat) will have jurisdiction to hear a request to set aside or suspend an award, the PPP provision regarding arbitration "is counterproductive since the parties may find themselves ensconced in endless proceedings before Brazilian state courts, something which they were seeking to avoid by inserting an arbitration clause into their contract." Finally, the authors note that the requirement that the proceedings be conducted in the Portuguese language leaves the parties with a very limited number of potential neutral (non-Brazilian) arbitrators. *Id.*
73. See, e.g., Caio Tácito. *O juízo arbitral em direito administrativo* [*Arbitration under Administrative Law*]. In: Pedro A. Batista Martins& José Maria Rossani Garcez (Eds.). *Reflexões sobre arbitragem*: In Memorian do Desembargador Cláudio Vianna de Lima, at 26-27 (2002); Cláudio Vianna de Lima. A lei de arbitragem e o art. 23, XV, da lei de concessões [The Arbitration Law and Art. 23, XV, of the Concession Contracts Law], 209 *RDA* 91, 98 (1997); In: Pedro A. Batista Martins, *O Poder judiciário e a arbitragem*: quatro anos da Lei 9.307/96 (3ª Parte)

basis for such authority and its scope are, however, not the subject of consensus. For instance, some authors support a mitigation of the principle of legality and consequently argue that State entities may submit to arbitration regardless of whether there is specific legislative authorization, so long as the State entity is acting in its commercial capacity and the contract at issue involves merely secondary public interest. Others extend the scope of existing legislative authorizations to other types of State contracts and therefore view these laws as including a broad authorization for State entities to submit to arbitration. Still others, more conservatively, suggest that State entities may submit to arbitration only within the limits of the specific legislative authorizations approved.

Recent court decisions have adopted a pro-arbitration approach and have upheld arbitration clauses signed by State corporations.[74] Of greatest note is the celebrated decision of the Superior Court of Justice in October, 2005, reversing a lower court decision and acknowledging the validity of an ICC arbitration clause in a contract between Companhia Estadual de Energia Elétrica (CEEE), a Brazilian mixed-capital State corporation, and AES Uruguaiana Empreendimentos.[75] The Court rejected CEEE's attempt to invalidate the arbitration clause, and observed that an arbitration clause is a bilateral agreement that cannot be unilaterally revoked. More importantly, the Court found that mixed capital

[The judiciary and arbitration: the fourth year of Law n. 9,307 (Third Part)], 359 *Revista Forense* 165, 173 (2001); Pedro Batista Martins, *Lei do petróleo*: fragmentos da arbitragem [Petroleum Law: Arbitration Provisions], Marilda Rosado (Ed.), Estudos e Pareceres: Direito do Petróleo e Gás (2005), at 702; Adilson Abreu Dalari, Arbitragem na Concessão de Serviço Público [Arbitration in Concession Contracts], 13 *Revista Trimestral de Direito Público* 5, 7 (1996); Diogo de Figueiredo Moreira Neto, Arbitragem nos Contratos Administrativos [Arbitration in Administrative Contracts], *Mutações do Direito Administrativo* (2000), at 226-228; Mauro Roberto Gomes de Mattos. Contrato Administrativo e a Lei de Arbitragem [Administrative Contract and the Arbitration Law], 223 *RDA* 122, 131 (2001); Arnoldo Wald, Novos Rumos da Arbitragem no Brasil [New Directions for Arbitration in Brazil], 14 *Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem* 341, at 352-356 (2001); Clávio Valença Filho, Arbitragem e Contratos Administrativos [Arbitration in Administrative Contracts], 8 *Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem* 359, at 372 (2000); Selma M. Ferreira Lemes, A Arbitragem e os Novos Rumos Empreendidos na Administração Pública: a Empresa Estatal, o Estado e a Concessão de Serviço Publico [Arbitration and New Directions Taken by the Administration: State Companies, the States and Concession Contracts]. In: Pedro A. Batista Martins, Selma M. Ferreira Lemes & Carlos Alberto Carmona, Aspectos Fundamentais da Lei de Arbitragem (1999), at 183; and Clávio Valença Fillho & João Bosco Lee, supra note 66.

74. See, e.g., *Companhia Paranaense de Gás – Compagás v. Consórcio Carioca Passarelli*, TA Paraná, AgIn. 137.401-6, Decision of Feb. 11, 2004; and *Energética Rio Pedrinho S/A v. Copel Distribuidora S/A*, 1ª Câm. Civ. do TJPR, AgIn 174.874-9/02, Decision of May 10, 2005.
75. *AES Uruguaiana Empreendimentos Ltda. v. Companhia Estadual de Energia Elétrica – CEEE*, STJ, REsp 612.439-RS, Decision of Oct. 25, 2005.

corporations performing an economic activity are subject to Brazil's private legal regime and that there is no doubt they may validly enter into agreements to arbitrate, without the need for any prior legislative authorization.[76]

In sum, although Brazil has not yet taken positive steps towards acceptance of investor-State arbitration, it has taken several important steps towards accepting that State entities, particularly State corporations governed by private legal regimes, may validly consent to arbitration and participate in arbitration proceedings. Despite this progress, however, without an investment treaty providing for investor-State arbitration, a foreign investor in Brazil will be limited to raising contractual claims against the party with whom its contract was concluded, with no possibility of recourse against the State for non-contractual (e.g., regulatory) infringements of investor rights. In many instances, moreover, the investor will be limited to arbitration in Brazil, in Portuguese and governed by the procedural rules of the Brazilian Arbitration Act, as is the case under the PPP Law and Concession Contracts Law. In other words, the investor will not have the possibility of raising treaty claims against the Republic of Brazil in a neutral international forum such as ICSID, as investors in identical circumstances in other host States could effectively do to vindicate their rights and obtain appropriate relief.

3. Considerations for Brazil to weigh in considering investor-State arbitration

Sections I and II demonstrate that on the one hand, there is a global trend towards implementation of investor-State arbitration, and on the other hand, Brazil continues to resist joining such a trend, by refusing to ratify the ICSID Convention and BITs providing for investor-State arbitration.[77] So far Brazil has accepted only State to State arbitration as a means of resolving international disputes, within the Mercosur bloc. The situation is aggravated, as discussed above, by the fact that Brazil did sign several BITs and two Mercosur protocols providing for investor-State arbitration, but subsequently failed to ratify any of them. In light of this history, and the inevitable concern it raises among potential foreign investors, Brazil may wish to revisit the issue of investor-State arbitration in the near future, taking into account the different economic, legal and political factors involved.[78]

3.1 Foreign direct investment inflows to Brazil

Brazil's reluctance to accede to international instruments for the promotion and protection of investments (including in this broad definition both the ICSID

76. *Id.*
77. Suzana Medeiros, supra note 39, at 173-214.
78. In fact, Brazil has been promoting some initiatives in this sense, such as the creation by CAMEX – Brazil's International Trade Chamber, on Dec. 4, 2003, of a interministerial working group in charge of reviewing Brazil's position towards the BITs signed in the 1990s and the two Mercosur protocols. See Flavio Marega, supra note 40, at 12.

Convention, BITs and investment chapters of FTAs) may in part reflect a confidence that such agreements are not necessary to attract FDI,[79] as Brazil for several years has led Latin America (second only to Mexico) in capital inflow from abroad.[80]

This positive scenario should not, however, support complacency, or provide excuses for Brazil to decline further improvements to its investment environment. Undoubtedly, Brazil's FDI volume – no matter how impressive – could be increased. Statistical data suggests that considering the size of Brazil and its economy, the country has the potential to attract greater amounts of investment, and of a better quality.[81] Brazil likely will face difficulties increasing the volume and quality of FDI inflows,[82] particularly in light of its strong competitors, such as Mexico, Colombia and Chile in the Americas; and China and India elsewhere.

Mexico has been Brazil's closest competitor for FDI in Latin America. Both in 2004 and 2005, Mexico surpassed Brazil in the amount of FDI inflows.[83] This

79. About the impact of BITs on host country FDI inflows, see Jennifer Tobin & Susan Rose-Ackerman, supra note 11, at 30-31 (concluding that "BITs do indeed have a positive impact on FDI flows to developing countries, but that "this general positive impact is highly dependent on the political and economic environment surrounding both FDI and BITs").
80. In 2005, Brazil attracted approximately US$ 15 billion in FDI, second only after Mexico, which attracted approximately US$ 17 billion. The United States continued to be the single dominant national source of investment in Brazil, and the European Union continued to be the largest bloc investor in the country. See UN-ECLAC, *2005 Foreign Investment in Latin America and the Caribbean*, supra note 1, at 23 and 26.
81. UN-ECLAC, *2004 Foreign Investment in Latin American and the Caribbean*, at 74 and 105-107, available at http://www.eclac.cl/publicaciones/DesarrolloProductivo/9/LCG2269PI/2004%20IED-2004-ING-WEB.pdf ("The fact that Brazil has nevertheless received significant investments over the last decade indicates that, in the past, it did not need these mechanisms in order to attract investments. If Brazil aims to attract a new type of investment, for which it will be competing with other locations, however, the existence of an efficient, impartial and credible system for settling FDI-related disputes could be a decisive factor... Thanks to its relatively diversified and developed industrial network, which could be brought up to international standards of production fairly easily, Brazil has a substantial advantage over other countries in attracting the types of efficiency-seeking investments that have a high probability of generating long-term benefits.")
82. It should be noted that in 2005 FDI in Brazil amounted to approximately US$ 15 billion, a relative decrease compared with the US$ 18 billion attracted in 2004. This decrease, however, does not represent a dramatic change in recent patterns, as the year before had been atypical because of an especially large inflow caused by the acquisition of the trans-Latin Ambev by the Belgian company Interbrew. See UN-ECLAC, *2005 Foreign Investment in Latin America and the Caribbean*, supra note 1, at 26.
83. *Id.* at 23 and 26 ("Mexico's FDI inflows have been remarkably stable and voluminous").

perhaps may be explained by the fact that Mexico has taken significant steps to create a pro-investment environment, for example by entering into a free trade agreement with the United States and Canada (NAFTA) and having 18 BITs in force with countries around the world. Although Mexico has not ratified the ICSID Convention, it consented to investor-State arbitration (for example before ICSID's Additional Facility) under Chapter 11 of NAFTA, and the dispute settlement provisions of its BITs routinely reflect such consent. It is interesting to note the view of a Mexican commentator about Mexico's experience with investor-State arbitrations, namely that "Mexico has no reason to fear arbitration [as it has been proved] that it may prevail in cases against foreign investors with great financial resources."[84] According to the same commentator, "even in cases where Mexico has lost an arbitration, the situation can be used in Mexico's favor by voluntarily complying with the award and hence 'sending the message' to the international community that Mexico honors its commitments and therefore, has a good investment climate." He concludes by reflecting that "[i]n the medium and long run this attracts more foreign investment than a thousand promises, and it also forces authorities to be careful and to avoid acting arbitrarily."[85] This view is consistent with the recent ICSID case law, described above, that has ruled in favor of respondent States in several instances, confirming that ICSID tribunals do not reflexively adopt some sort of "pro-investor bias."

Within South America, Brazil should pay attention mainly to Chile and Colombia. Chile is Brazil's second largest competitor in Latin America, as it has been attracting great amounts of FDI even considering its relatively small size compared to Brazil.[86] Chile's performance regarding foreign investment may be explained, among other factors, by the fact that it is a member of the ICSID Convention, it has 38 BITs in force and it has recently concluded an important free trade agreement with the United States (the Chile-U.S. FTA). Regarding Colombia, there has been a notable upturn in FDI inflows to that country in 2005.[87] Although Colombia has only one BIT in force, it ratified the ICSID Convention in 1997, and it has also recently concluded a FTA with the United States containing consent to investor-State arbitration to safeguard the security of foreign investment.

Outside the Americas, Brazil should consider China and India as strong competitors. China, for instance, is considered the big threat to Latin America, as it has attracted alone over US$ 60 billion in 2005, compared to US$ 72 billion attracted by Latin America and the Caribbean as a whole in the same year.[88] China has been a Contracting State to the ICSID Convention since 1993, and it

84. Francisco González de Cossío, supra note 2, at 244.
85. *Id.*
86. Chile attracted approximately US$ 7 billion of FDI in 2005. See UN-ECLAC, *2005 Foreign Investment in Latin America and the Caribbean*, supra note 1, at 23 ("Chile has continued to be a popular country for FDI").
87. *Id.* at 23 (explaining that such upturn is mostly due to the sale of the Bavaria brewery to the South African company SABMiller).
88. *Id.* at 20 ("China was the world's third largest recipient [of FDI] and accounted for 22% of all FDI going to developing countries").

has signed an extraordinary number of 115 BITs, over 85 of which already are in force.[89] Although China's first generation of BITs either did not provide for investor-State arbitration or considerably limited its scope, since 1998 China has entered into about 30 "new generation" BITs which contain a much broader investor-State arbitration clause that allows investors effectively to enforce the treaties' substantive protections through international arbitration.[90] In addition, China has signed at least one free trade agreement containing an investment chapter with Pakistan.[91]

3.2 *Argentina's negative experience*

When analyzing Brazil's possible entry into the ICSID Convention and into the worldwide framework of BITs, one cannot ignore the negative experience of Argentina, which as addressed above has been subject to a wave of 42 ICSID arbitrations,[92] most initiated by foreign investors as a result of harm to their investments from Argentina's response to its economic crisis in late 2001 and early 2002.[93] It is true that Brazil and other Latin American countries should take caution from Argentina's example, particularly in light of the region's broader history of economic instability. However, Argentina's experience should not be overstated, as Brazil's current stage of economic and political stability shows that the country is far from being exposed to an economic crisis with the proportions of the one suffered by Argentina. Moreover, a direct consequence of Argentina's crisis is that foreign investors will be more insecure concerning the risks of investing in Latin America (an insecurity only reinforced by the recent nationalization measures adopted by Argentina's neighbors, Bolivia and Venezuela), and therefore will probably demand that Latin American countries offer more guarantees to investors, such as the critical guarantees reflected in investor-State arbitration. Brazil could meet these concerns by a general move towards reconsidering entry into BITs, while trying to neutralize the risk of such BITs coming to haunt it in situations of major national economic crisis, by including a provision excluding the treaties' protections (both substantive and

89. John Savage & Elodie Dulac, The New Generation of Chinese BITs: Will More Investor Protection Mean More Arbitration?, Global Arbitration Review, at 1, available at http://www.globalarbitrationreview.com/apar/china_bits.cfm.
90. *Id.*
91. *Id.*
92. See Paolo Di Rosa, *The recent wave of arbitrations against argentina under bilateral investment treaties:* background and principal legal issues, 36 U. Miami Inter-Am. L. Rev. 41 (2004).
93. Argentina has signaled a new policy of actively seeking to renegotiate concession contracts with aggrieved investors, as a way of resolving pending disputes and returning the focus to expanding business opportunities in Argentina. In the past year, investors have withdrawn several high profile ICSID claims against Argentina as a result of concession renegotiations. Other claims are nonetheless proceeding, with the first award against Argentina on the merits issued in 2005.

procedural) in the event of such a national crisis causing harm to investors in a general and non-discriminatory fashion.

3.3 *The flip-side of the coin: Brazil as a FDI Exporter*

Another important factor that Brazil should take into account in considering its position towards investment protection agreements and investor-State arbitration is the increasing role played by Brazilian companies as *exporters* of foreign direct investment. In today's economy, Brazil is not only a recipient of FDI and therefore a potential respondent in investor-State arbitrations; in addition, Brazilian companies are increasingly investing abroad, and ICSID, BITs and the investment chapters of FTAs can be a powerful tool to protect such companies from potential harm attributable to the actions of authorities in other States. This shift in mindset is particularly important given the growing internationalization of activities of Brazilian companies, such as Petrobras, Companhia Vale do Rio Doce (CVRD), Odebrecht, Embraco, Gerdau, Camargo Correa, Usiminas and CSN.[94] From January to November of 2006, the volume of outgoing capital flows from Brazil was US$ 24.95 billion, an amount that exceeded the volume of FDI inflows into Brazil in the same period, which was US$ 16.29 billion.[95]

Petrobras' recent history presents an apt illustration. In 2006, Brazil's oil and gas giant saw its investments in Bolivia being nationalized by President Evo Morales. Had Brazil previously entered into a BIT with Bolivia, Petrobras would have been entitled to initiate an investment arbitration directly against the Republic of Bolivia, to seek compensation under international law for Bolivia's expropriation of its assets. In the absence of such a Brazil-Bolivia BIT, Petrobras could have proceeded against Bolivia only because in originally structuring its investment, it had shown the foresight to invest in Bolivia indirectly, through a Netherlands-incorporated intermediary company, thereby arguably entitling the Netherlands company to invoke the Netherlands-Bolivia BIT. Although this case has thus far been addressed through political channels, it remains to be seen how ICSID tribunals in the long term will approach this type of "corporate engineering," intended to extend to a country's investors the protection of third-country BITs (along with other corporate and tax benefits) when the investor's own home State has no equivalent BIT of its own.

So far, at least one ICSID tribunal has decided a case involving a similar situation and found in favor of ICSID's jurisdiction. In *Aguas del Tunari v.*

94. See UN-ECLAC, *2005 Foreign Investment in Latin America and the Caribbean*, supra note 1, at 15-16.
95. See Investimento Externo vai a US$ 16 bi [Foreign Investment Reaches US$ 16 bi[llion]], *O Estado de S. Paulo*, News of Dec. 20, 2006, available at http://clipping.planejamento.gov.br/Noticias.asp?NOTCod=327647. The significant level of FDI outflows was highly influenced by the Brazilian company CVRD's acquisition of Canadian mining company Inco, a transaction valued at US$ 18 billion. It is estimated that in 2007, Brazilian investors will invest some US$ 10 billion abroad.

Bolivia,[96] the majority of the tribunal held that "national routing" of investment – *i.e.* organizing or structuring an investment through a third country so that it comes under the protective canopy of a BIT – is a legitimate exercise.[97] Indeed, the majority observed that "bilateral" investment treaties may "serve in many cases more broadly as portals" for investments emanating from a multitude of different countries, and targeted at some other country, but "routed" through an intermediary (third) country so as to enjoy treaty protection.[98] It should be noted, however, that the possibility of "shopping" for a "home country of convenience" is now beginning to be addressed by some BITs, in which Contracting States include a provision allowing a party to deny the benefits of the agreement to investors that have no "substantial business activities" in their putative home country.[99]

3.4 Brazil's isolation in Latin America with respect to investment arbitration

Brazil's continuing reluctance to negotiate or ratify BITs and FTAs containing an investment chapter has resulted in the country's isolation on this issue among its neighbors. As discussed above, other Latin American countries began to relax their traditional resistance to international arbitration in general, and to investment arbitration in particular, in the 1980s, and today, the majority of Latin American countries have ratified the ICSID Convention and have at least several (and in some cases many) BITs and FTAs in force. For instance, the United States has now concluded regional FTAs with Mexico (NAFTA, including Canada) and with Central American countries and the Dominican Republic (DR-CAFTA), and bilateral FTAs with Chile, Colombia, Panama and Peru (though the last three are not yet in force). In addition, while Brazil insists that it will negotiate FTAs with the United States only through Mercosur as a bloc, other Mercosur countries are freely entering into BITs with the U.S.: Uruguay concluded an agreement with the U.S. in 2005, and a draft Paraguay-U.S. BIT is under consideration.[100]

Moreover, the inclusion of an investment chapter in the still-uncertain Free Trade Area of the Americas (FTAA) seems less probable as the Contracting States have not been able to agree on this topic, in part due to Brazil's resistance to the inclusion of an investment chapter that provides for investor-State arbitration.[101] Brazil seems willing to accept only State to State arbitration following Mercosur's dispute settlement model. It is unlikely that Brazil will succeed in convincing the United States to agree on an investment chapter that contains only the old-fashioned State to State arbitration.[102] Moreover, Brazil could wisely use its consent to investor-State arbitration as an important tool to obtain trade concessions from the United States, specially with regard to market access.[103]

96. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case n. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005. Aguas del Tunari ("AdT") was a company organized under the laws of Bolivia and controlled (55%) by a corporation registered in the Cayman Islands, which in turn was wholly owned (100%) by a U.S. corporation. In September 1999, AdT entered into a concession agreement with the Bolivian Water and Electricity Superintendence, which ultimately gave rise to public criticism shortly after the agreement was executed. A few months later, due to a corporate reorganization, control of AdT shifted from the Cayman corporation to a company registered in Luxemburg, followed by a change in the upstream ownership to a new Dutch corporation. For the purposes of ICSID jurisdiction, AdT identified itself as a legal person constituted in accordance with the laws of Bolivia which is "controlled directly or indirectly" by a Netherlands corporation, and argued that ICSID jurisdiction was based on the Bolivia-Netherlands BIT.
97. *Id.* at ¶ 330 (d) ("[I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or substantive law of the jurisdiction, including the availability of a BIT").
98. *Id.* at ¶ 332.
99. See, e.g. Article 1113.2 of NAFTA. Similar clauses can be found in U.S. BITs and a number of ASEAN country BITs. See UNCTAD, *Investor-state disputes arising from investment treaties*: A Review, supra note 32, at 21.
100. See Bilaterals.org, News, Sept. 10, 2006, available at http://www.bilaterals.org/article.php3?id_article=6167 ("United States offer to Paraguay to sign an investment agreement").
101. See Flavio Marega, supra note 40, at 80 (noting that after the FTAA's 8th Ministerial Conference, held in Miami, on November 20, 2003, it seems that a future FTAA would not contain an investment chapter similar to Chapter 11 of NAFTA. According to the Ministerial Declaration of Miami, the Contracting States will negotiate only a set of minimum rights and obligations regarding investments. Such understanding was confirmed during the 17th Meeting of the Committee on Commercial Negotiations, held in February, 2004. The reason for such limitation in the scope of the FTAA is because the Contracting States have been unable to agree on the terms of an investment chapter.); and Pedro da Motta Veiga, Foreign Direct Investment in Brazil: Regulation, Flows and Contribution to Development, *Paper presented at the II Regional Forum of the IICT*, São Paulo, May 2004, at 30, available at http://www.iisd.org/pdf/2004/investment_country_report_brazil.pdf ("In general the main polarization of positions within the group sets the United States against the Mercosur countries, especially Brazil, since the other members of the bloc have less restrictions than Brazil to negotiate a broad agreement on investments. These countries have ambitious agreements with European countries and the United States and Brazil is the only relevant player in FTAA negotiations player without any commitment to the WTO-plus in the area of investment.").
102. It should be noted that the 2004 U.S. – Australia FTA does not provide for investor-State arbitration to resolve investment disputes. The U.S. has explained that it made this highly exceptional concession only because of Australia's open economic environment and legal system similar to that of the United States. See http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_TPA_Report/asset_upload_file675_7516.pdf?ht=1994%20us%20prototype%20bit%201994%20us%20prototype%20bit (at 11).
103. Angela Teresa Gobbi Estrella, Proteção contra desapropriação em acordos de investimentos: ameaça à regulação em defesa de interesses públicos? – *Lições*

3.5 *The legal obstacles*

As discussed above, the main objections raised by Brazil against the ICSID Convention and BITs relate to the investor-State arbitration mechanism, and the main objections to this mechanism arise from Brazil's traditional resistance to the international arbitration itself, particularly in the context of State entities. However, Brazil has already overcome such resistance in the commercial context, as: (i) it enacted a very modern and effective arbitration law in 1996 (Law n. 9,307); (ii) the Brazilian Supreme Court declared this law constitutional in 2001; (iii) it has ratified the main (multilateral and regional) conventions on international commercial arbitration;[104] and (iv) Brazilian commentators and courts have adopted a strong policy in favor of international arbitration. Brazilian companies increasingly enter into contracts containing arbitration clauses and have actively participated in domestic and international arbitration proceedings. To illustrate this point, it should be noted that Brazil is already the fourth most active country – led only by the United States, France and Switzerland – in number of cases before the ICC International Court of Arbitration, according to the Court's 2006 statistics.[105]

4. CONCLUSION

Foreign investments should be seen as a "two-way street," a "give and take" process. In this light, Brazil should revisit its position towards international instruments for the promotion and protection of investments and investor-State arbitration, as leading Brazilian commentators have already urged.[106] As

do Capitulo 11 do NAFTA [Protection Against Expropriation in Investment Agreements: Threat to Regulation In Order to Defend Public Interests? – NAFTA Chapter 11 Lessons], Aluisio de Lima-Campos, 2 Ensaios em Comércio Internacional 143 (2006).

104. 1975 Inter-American Convention on International Commercial Arbitration (in force in Brazil since 1996); 1992 Protocol of Mercosur for Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters (in force in Brazil since 1996); 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (in force in Brazil since 1997); 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (in force in Brazil since 2002); 1998 Protocol of Mercosur on International Commercial Arbitration (in force in Brazil since 2003). See Jacob Dolinger & Carmen Tiburcio, supra note 50.
105. 2007 Statistics, ICC International Court of Arbitration Bulletin, v. 18/ n.1 (forthcoming). This information was provided in advance by the Court's Secretary-General, Anne-Marie Whitesell, during a conference held at Arnold Porter LLP, Washington, D.C., on March 20, 2007.
106. The few Brazilian commentators that have already addressed the topic have urged Brazil to agree to investor-State arbitration. See, e.g., Celso de Tarso Pereira, supra note 9, at 93 (arguing that Brazil cannot maintain itself apart from the global trend towards negotiating investment agreements, and that critical reflection should lead Brazil to adopt international intruments that would better prepare it to face the challenges of international trade) (translation provided by

a threshold matter, Brazil should begin to view itself as an exporter of capital and not only as a recipient. But even as primarily a capital importer, no country can maintain for long the expectation of receiving growing amounts of foreign investment, without affording meaningful guarantees to investors regarding legal rights and meaningful avenues of enforcing those rights through fora that are perceived as neutral and experienced.

While Brazil has been able so far to attract enviable levels of foreign investment, it will be more difficult for it to maintain and grow its position in future, given the emergence of strong regional and international competitors that have widely adhered to international investment protection instruments. The fact that Brazil has adopted other types of measures to attract investors[107]

the authors); Adriana Noemi Pucci, supra note 9, at 30-31 ("As Brazil has the legitimate interest to attract foreign investments, it must offer investors the guarantee that the State accepts to resolve its disputes concerning investments through international arbitration and complies with arbitral awards, even if it is against it... We consider the present moment to be a unique moment for Brazil and foreign investors investing in the country as both of them can learn with the experience lived by other countries in the region in the last years as regards international arbitration, and relying on international arbitration they can balance their interests: on the one hand, the State's interests to preserve itself and its capacity to attract investments, and on the other hand, the investor's interests to have guarantees for its investment and have profits in the country.") (translation provided by the authors); Gilberto Giusti & Adriano Drummond C. Trindade, supra note 63, at 75 (arguing that conditions are favorable today for Brazil to ratify the ICSID Convention, particularly considering the country's present policy emphasis on attracting more foreign investments and the current stage of evolution of international arbitration in Brazil) (translation provided by the authors); and Marcílio Marques Moreira, supra note 1, at 10 (noting that Brazil's attitude towards BITs and investor-State arbitration "is not consistent with the growing role of Brazilian firms as large investors in other South America countries," and that the arguments raised by Brazil to justify its rejection of investor-State arbitration "are old fashioned and politically inspired, ignoring the new reality of the country as both host of inward FDI and generator of FDI."). The international community also supports reconsideration by Brazil of its approach to investment protection instruments and investment arbitration. See, e.g. Noah D. Rubins, *Investment Arbitration in Brazil*, 4 J.W.I 1071, 1091 (2003) ("There is much that may happen in the near future that will radically alter this legal landscape and allow Brazil to more successfully compete for foreign direct investment with other-developed countries that have already embraced international arbitration of investment disputes... If Brazil embarks on a bilateral investment treaty program, ratifies the investment treaties it has already signed and accedes to the Washington Convention, it will surely reap the benefits of a steady, increased flow of investment to the national economy, essential to the country's sustained development in the twenty-first century").

107. Measures designed to stimulate foreign capital flows introduced by Brazil in the early 1990s include: (i) the government lifted private capital controls and removed specific restrictions on foreign capital in selected areas (telecommunications, petroleum and natural gas, and information technology); (ii) operating

and has no history of broad violations of general international law standards regarding treatment of aliens[108] are positive factors, but may not be enough in the future to satisfy foreign investors, who are becoming more demanding in their expectations of legal remedies with regard to Latin America, and who also have growing alternatives of investment outside the region, including in China and India. Brazil should also recognize, as a reassuring factor, that there is no necessary correlation between the number of BITs a country enters into, and the number of investment claims a country ultimately may face. There are countries in the region (*e.g.* Chile) that have ratified many BITs, but still have been subject to relatively few ICSID claims, presumably because of their very stable environment for foreign investment.

Investor-State arbitration as provided in investment treaties and the investment chapters of FTAs certainly offers foreign investors a neutral and highly specialized remedy for investment disputes. But any discussion of "remedy" necessarily poses the question that Brazil inevitably will have to face in the near future: if other States throughout Latin America and more broadly the world have proven willing to take the "medicine" of ICSID and BITs to strengthen the "health" of their broader investment environment, why not Brazil? And for how long can Brazil afford to be an outlier to the global trend, without suffering adverse consequences in its quest for an ever more robust economic and investment profile?

procedures were changed in order to remove bureaucratic obstacles to foreign-exchange operations (for example, in August 2000, foreign capital flows began to be recorded electronically, and the requirement for advance authorization from the central bank for all regulated foreign exchange transactions was dropped); (iii) constitutional amendments were approved from 1995-2002 to put an end to public monopolies and fully open new markets to the private sector (these reforms paved the way for a broad program of privatization of federal and state assets from 1996 on); and (iv) in a number of services and infrastructure segments (including electricity, telecommunications and financial services), a specific policy was put in place to attract FDI, in the belief that the entry of private capital would not only help to improve public finances, but would also improve the quality, coverage and administration of public utilities. See UN-ECLAC, *2004 Foreign Investment in Latin American and the Caribbean*, supra note 82, at 71-72.

108. Bernardo M. Cremades, supra note 6, 55.