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Investment Arbitration in Brazil

Revisiting Brazil’s Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration

by JEAN KALICKI* and SUZANA MEDEIROS**

ABSTRACT

As investment arbitration has grown rapidly throughout Latin America as a favoured 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 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 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.

I. INTRODUCTION

IN THE last decades, the relevance of foreign direct investment (FDI) as a tool for economic growth and development has received increasing attention, and FDI has been recognised as the main source of finance to developing countries.1 Through the proliferation of bilateral and regional investment treaties, investors have received assurances that their investments in developing countries will be afforded internationally recognised standards of treatment, and that they will have meaningful access to impartial fora for presenting claims of alleged violations,

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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 – have significantly reduced the political risk of investing in developing economies, and have helped justify and encourage dramatically increased FDI throughout the world, and in Latin America in particular.2

The global trend towards resolving investment disputes through investor-state arbitration can be illustrated by the impressive number of Contracting States to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘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 favour, 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 manoeuvring 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 nationalisation measures taken by Brazil’s neighbours, 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 the region.

This article is organised 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. Secondly, 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 to review its position towards investor-state arbitration, the ICSID Convention and investment treaties.

II. GLOBAL TREND TOWARDS CONSENT TO INVESTOR-STATE ARBITRATION

(a) 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 recognised enforcement remedies in state-to-state proceedings even in the event of favourable 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 recognised 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, which obliges them to enforce ICSID awards as if they were final judgments of their own highest courts. More states have ratified the ICSID Convention than have ratified the New York Convention on Recognition and Enforcement of Arbitral Awards (137 ratifications), which governs enforcement of commercial arbitration awards and which is widely perceived as having broad acceptance throughout the world.

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 nineteenth and early twentieth centuries was widely invoked to limit the interference of developed nations in the internal affairs of the region. Generally speaking, the Calvo doctrine was based...
on the idea that foreign investors should not be entitled to treatment more favourable 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 defence 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.⁴ 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. 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 BITs and FTAs.⁵ Presently, the great majority of Latin American countries have ratified the ICSID Convention.⁶ In South America, in particular, all countries ratified the Convention, with the exception only of Brazil.⁷

(b) Investment Treaties

Developed and developing countries have been entering into BITs since the 1960s, but the pace and number of such treaties have dramatically increased

⁴ See Biggs, supra n. 3.
⁷ Bolivia denounced the ICSID Convention by notice sent to the World Bank on 2 May 2007 (effective on 3 November 2007). The effects of denunciation, however, remain unclear. In any event, because Bolivia is still part of a framework of BITs in force with several countries, it therefore may be subject to investor-state arbitration in venues other than ICSID depending on the terms of each BIT. See www.worldbank.org/icisid/highlights/05-16-07.htm. Ecuador notified ICSID’s Secretary-General on 4 December 2007 that, pursuant to Article 25(4) of the ICSID Convention, it would no longer consent to the arbitration of disputes concerning natural resources. See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&P ageType=Announcements&Frame=FromPage=Announcements&pageName=Announcements9. Venezuela, Argentina and Nicaragua have announced their intention either to denounce the Convention or limit in some degree its scope, but none of them has done so officially as yet.
since the 1990s. There are now more than 2,392 BITs in existence, involving more than 176 countries. Most of these treaties have been concluded between traditional ‘capital exporting’ countries, on the one hand, and traditional ‘capital importing’ countries, on the other. An increasing number of BITs, however, are being concluded between countries within the developing world.

BITs 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 favoured 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 amongst: (i) international arbitration under the ICSID Convention (available 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 (where 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.

FTAs, 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), Chapter 10 of the 2004 Central America-Dominican Republic-United States Free Trade Agreement (‘DR-CAFTA’), Chapter 10 of the 2003 Chile-United States FTA, and the Dispute Settlement Chapter of the 1994 Energy Charter Treaty (ECT).

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 that Latin American countries were reluctant to adhere to the ICSID Convention, they initially resisted entering into BITs. This resistance
began to wane in the 1980s. Today, the vast majority of Latin American countries have signed and ratified significant numbers of BITs. 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.

(c) 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 nine lodged in the first trimester of 2007. Overall, ICSID now has resolved 116 investor-state cases, and another 110 are presently pending. 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 four cases before the ICC. 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.

Some of the disputes heard before ICSID’s Additional Facility are NAFTA Chapter 11 cases. NAFTA Chapter 11 has generated 27 disputes so far: nine cases against the United States (four concluded and five pending); eight cases against Canada (three concluded and five pending); and 10 cases against Mexico (six concluded and four pending). The first two arbitrations under DR-CAFTA...
are now on the horizon, with a US investor recently announcing its intention to bring claims against the Republic of Guatemala,\textsuperscript{17} and another US investor signalling its plan to initiate proceedings against the Dominican Republic.\textsuperscript{18} The ECT is also responsible for an increasing number of investment disputes: there have been 15 cases filed so far (11 are still pending, two were settled by the parties, and two cases are concluded).\textsuperscript{19}

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 nine cases have been brought against Ecuador, seven against Venezuela, five against Peru, three against Chile, two against Bolivia, and one 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 industrialised 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\textsuperscript{20} and Bolivia,\textsuperscript{21} and by a Peruvian investor against the Republic of Paraguay.\textsuperscript{22}

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.

\textsuperscript{19} See list of cases available at www.encharter.org/index.php?id=213.
\textsuperscript{20} Empresas Lucchetti, SA and Lucchetti Peru, SA v. Republic of Peru, ICSID Case no. ARB/03/4, Award, 7 February 2005, and Decision on Annulment and Dissenting Opinion, 5 September 2007.
\textsuperscript{21} Quimica e Industrial do Boves Ltda and others v. Republic of Bolivia, ICSID Case no. ARB/06/2 (pending).
\textsuperscript{22} Eufra A. Olgin v. Republic of Paraguay, ICSID Case no. ARB/98/5, Decision on Jurisdiction, 8 August 2000, and Final Award, 26 July 2001.
But sovereign states should not view investor-state arbitration as inevitably stacked against them. 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. 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. 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 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. 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. In another sort of victory, Venezuela was found to have

23 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 (2005), p. 11; available at wwwunctad.org/en/docs/iid20054_en.pdf.


26 See e.g., ADF Group Inc. v. United States, ICSID Case no. ARB(AF)/00/1, Award, 9 January 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, 15 November 2004 (dismissing in their entirety NAFTA claims by a US investor contesting Mexican regulations to revitalise the sugar industry); Methanex Corp. v. United States, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 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 US$970 million in damages); International Thunderbird Gaming Corp. v. Mexico, UNCITRAL, Arbitral Award, 26 January 2005 (dismissing claims by a Canadian investor for alleged injuries from the regulation and closure by Mexican authorities of gaming facilities); EnCana Corp. v. Republic of Ecuador, UNCITRAL, LCIA no. UN5481, Award, 3 February 2006 (rejecting jurisdiction over all claims arising out of Ecuadorian tax regulations denying VAT credits and refunds, except an expropriation claim, which the tribunal denied on the merits).
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. And in October 2006, an ICSID tribunal accepted Argentina’s ‘state of necessity’ defence to exempt it from a duty to compensate certain US 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.

III. 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 arbitration. 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.

(a) 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. Yet Brazil’s delegate to the World Bank meetings, Francisco da Cunha Ribeiro, signalled the state’s resistance early on. At a key Consultative Meeting of Legal Experts held in Santiago, Chile, on 12 June 1964, for example:

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28 Autopista Concessionaria da Venezuela, CA v. Bolivarian Republic of Venezuela, ICSID Case no. ARB/00/5, Award, 23 September 2003. Other examples where states have been successful in significantly reducing the amount of compensation awarded to investors include the NAFTA case Metalúrgica v. Mexico, where the investor sought US$43 million but was awarded only US$17 million; and S.D. Myers v. Canada, another NAFTA case where the tribunal rejected a claim for US$20 to 80 million and awarded just US$6 million, i.e. less than 10 per cent of the amount sought. See UNCTAD, supra n. 23 at p. 10.

29 LG&E v. Argentina, ICSID Case no. ARB/02/1, Decision on Liability, 3 October 2006.


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.  

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. The final criticism presented by Brazil’s delegate was that it favoured foreign investors to the prejudice of domestic investors.

These concerns were echoed by the then legal consultant for the Brazilian Foreign Ministry (Itamaraty), Augusto de Resende Rocha, who issued an opinion raising serious objections to Brazil’s adoption of the ICSID Convention. 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. The opinion also stated that creation of ICSID would reinforce and almost institutionalise the state of tension, so difficult to eradicate in international political relations, between dominant and dominated economies. The opinion concluded with the observation that:

[W]e 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
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governments, within the World Bank structure, where we have already felt clearly the prevalence of the interests of developed countries.\textsuperscript{35}

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. In the legal sphere, it was also in line with the traditional resistance Brazil had demonstrated towards international arbitration even of purely commercial disputes.\textsuperscript{36} 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 no. 9,307 of 1996), and with each new pronouncement by Brazilian 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.\textsuperscript{37} In sum: the reasons behind Brazil’s rejection of ICSID in 1964 can no longer justify its current position.

\textbf{(b) Brazil’s Refusal to Ratify Bilateral Investment Treaties}

Brazil was one of the last developing countries to engage in the negotiation of BITs.\textsuperscript{38} In the 1990s, Brazil negotiated 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),\textsuperscript{39} but none of these agreements was approved by the Brazilian Congress. In fact, six of these agreements were submitted to the Brazilian Congress for approval, but the request for approval was withdrawn soon thereafter.\textsuperscript{40} One of the main reasons for the withdrawal was the investor-state arbitration

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\textsuperscript{35} Marega, supra n. 31 at pp. 40–41 (authors’ translation).

\textsuperscript{36} ibid. pp. 41–42.

\textsuperscript{37} See e.g., Judge Jobim’s opinion in the judgment of MBV Commercial and Export Management Establishment v. Reul Indústria e Comercio Ltda., STF, Agr. Reg. SE, no. 5.206–7, 22 November 2008, 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, Geraldo Brindeiro, in the same case. As to the constitutionality of the Brazilian Arbitration Law, see Jacob Dolinger and Carmen Tiburcio, Arbitragem Comercial Internacional [International Commercial Arbitration] (2006), ch. 3.

\textsuperscript{38} Marega, supra n. 31 at p. 108.

\textsuperscript{39} Portugal (9 February 1994); Chile (22 March 1994); United Kingdom (19 July 1994); Switzerland (11 November 1994); Finland (28 March 1995); Italy (3 April 1995); Denmark (4 May 1995); France (21 May 1995); Venezuela (4 July 1995); Korea (1 September 1995); Germany (21 September 1995); Cuba (26 June 1997); the Netherlands (25 November 1998); Belgo-Luxembourg Economic Union (6 January 1999). See Noemi Pucci, supra n. 5 at p. 18.

\textsuperscript{40} See e.g., Mensagem no. 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 Noemi Pucci, supra n. 5 at 18. See also, de Tarso Pereira, supra n. 5 at p. 92 (noting that the main obstacles for ratification of these agreement were the provisions on transfers, expropriation and dispute settlement).
mechanism contemplated in those agreements. 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 endeavour 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.

(c) 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 negotiated 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. The second protocol, entitled 'Protocol of Buenos Aires for the Promotion and Protection of Investments from Non-Member Countries', was negotiated in 1994 and, as its title suggests, concerns investments arising from non-Mercosur states. The Colonia Protocol has been ratified by Argentina only, and the Buenos Aires Protocol has been ratified by Argentina, Paraguay and Uruguay.

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. The Protocol of Colonia has never been submitted to Congress for approval. One of the main objections to ratification was the investor-state arbitration mechanism provided in these two protocols.

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41 Marega, supra n. 31 at pp. 144–145 (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).

42 Cremades, supra n. 3 at p. 59.


44 Marega, supra n. 31 at p. 82.


46 Marega, supra n. 31 at p. 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.

47 Ibid. p. 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. Ibid. p. 99.
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 no. 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.

The most remarkable case in which a Brazilian court concluded that state entities could not validly submit to arbitration, and therefore invalidated an arbitration clause purporting to do just that, is COPEL v. UEG.49 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 owned by the US investor El Paso and the Brazilian companies Petrobras and COPEL, a mixed-capital state corporation (controlled by the state but not 100 per cent 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-owned entities could not validly submit to arbitration disputes involving matters of public interest, without an express legal authorisation. 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. UEG Araucária subsequently sought an order suspending the effects of the first instance decision pending appeal, but before the

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49 The debate in Brazil over the ability of state entities to consent and submit to arbitration focuses on two main obstacles: the principle of legality (under which state entities and state officials may act only in accordance with what is expressly permitted by law) and the principle of non-arbitrability of rights related to the public interest. Based on these two obstacles, some Brazilian courts have declared arbitration clauses contained in contracts signed by Brazilian state entities, including state corporations, to be null and void. On this topic, see Dolinger and Tiburcio, supra n. 36; Suzana Medeiros, Arbitragem Envolvendo Empresas Públicas no Direito Brasileiro [Arbitration Involving State Companies under Brazilian Law] (2005) (unpublished Master of Laws thesis, UERJ, Supervisor Prof. Carmen Tiburcio) (on file with author); Gilberto Giusti and 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] in (2005) 7 Revista de Arbitragem e Mediação 49 at p. 73; see also, Cláudio Valença Filho and João Bosco Lee, ‘Brazil’s New Public-Private Partnership Law: One Step Forward, Two Steps Back’ in (2005) 22(5) J. Int'l Arb. 419 (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).

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 US 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.50

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 authorisations for the use of arbitration by state entities in specific circumstances; (ii) the consensus of most Brazilian commentators in favour 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 privatisation and opening of the Brazilian market) granting state entities authorisation to submit to arbitration in specific circumstances, particularly in situations where it is necessary to attract private investments. Submission to arbitration is authorised for international banking transactions, for example, by Law no. 5,662 of 1971 (BNDES), art. 5; for international financial transactions, by Decree-Law no. 1,312 of 1974, art. 11; for concession contracts, by Law no. 8,987 of 1995, art. 23; for the telecommunications sector, by Law no. 9,472 of 1997, art. 93; for petroleum, by Law no. 9,478 of 1997, art. 43; and for electricity, by Law no. 10,848 of 2004, art. 4. Furthermore, three legislative events reinforced Brazil’s pro-arbitration attitude as regards state contracts. The first was Congress’ rejection, in the course of approving a Constitutional Amendment in 2004 (Constitutional Amendment no. 45), of a proposed provision expressly prohibiting state entities’ submission to arbitration.51 The second event was enactment of the Public-Private Partnership Law (Law no. 11,079 of 2004, ‘PPP Law’) for the purpose of attracting private investments to infrastructure projects in Brazil, with an express provision allowing use of arbitration in these PPP contracts (art. 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 (art. 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

50 Brazil signed in 1965 and ratified in 1966 (Decree no. 57,943/1966) an agreement with the United States concerning investment guarantees, but 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.

51 The arbitration community in Brazil led the movement against such a provision, and the constitutional amendment finally was approved without it. Jornal Valor Econômico, 11 August 2004 and 22 November 2004.
pursuant to the procedural rules set forth in the Brazilian Arbitration Act (Law no. 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) provide only for domestic arbitration, rather than international arbitration as would be preferred by international investors.53

Secondly, the great majority of Brazilian commentators support the ability of state entities, particularly state corporations, to submit to arbitration.54 The basis for such authority and its scope are, however, not the subject of consensus. Recent court decisions have adopted a pro-arbitration approach and have upheld arbitration clauses signed by state corporations.55 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. The Superior 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 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 authorisation.56

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

52 Although the provision does not state specifically that the 'seat' of arbitration shall be in Brazil, this is the prevailing interpretation. 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.
53 See Valença Filho and Bosco Lee, supra n. 48 at pp. 424–426.
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.

IV. CONSIDERATIONS FOR BRAZIL TO WEIGH IN CONSIDERING INVESTOR-STATE ARBITRATION

The discussion above has demonstrated 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. 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 pointed out 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.58

(a) 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 Convention, BITs and investment chapters of FTAs) may in part reflect a confidence that such agreements are not necessary to attract FDI,59 as Brazil for

57 Medeiros, supra n. 50 at pp. 173-214.
58 In fact, Brazil has been promoting some initiatives in this sense, such as the creation by CAMEX, Brazil's International Trade Chamber, on 4 December 2003, of a inter-ministerial working group in charge of reviewing Brazil's position towards the BITs signed in the 1990s and the two Mercosur protocols. See Moreira, supra n. 31 at p. 12.
59 As to the impact of BITs on host country FDI inflows, see Tobin and Rose-Ackerman, supra n. 8 at pp. 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').
several years has led Latin America (competing closely with Mexico only) in
capital inflow from abroad.\textsuperscript{60}

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.
Brazil likely will face difficulties increasing the volume and quality of FDI inflows,\textsuperscript{61}
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.\textsuperscript{62} This
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 (e.g 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’. 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’.\textsuperscript{63} This view is
consistent with the recent ICSID case law, described above, that has ruled in
favour of respondent states in several instances, confirming that ICSID tribunals
do not reflexly 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.\textsuperscript{64} Chile’s performance regarding foreign investment may be

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\textsuperscript{60} 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, supra n. 1 at pp. 23 and 26.

\textsuperscript{61} 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, supra n. 1

\textsuperscript{62} Ibid, pp. 23 and 26 (‘Mexico’s FDI inflows have been remarkably stable and voluminous’).

\textsuperscript{63} González de Cossío, supra n. 2 at p. 244.

\textsuperscript{64} Chile attracted approximately US$7 billion of FDI in 2005. See UN-ECLAC, supra n. 1 at p. 23.
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 ("Chile-United States FTA"). Regarding Colombia, there has been a notable upturn in FDI inflows to that country in 2005.65 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.66 China has been a Contracting State to the ICSID Convention since 1993, and it has signed an extraordinary number of 115 BITs, over 85 of which already are in force. 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. In addition, China has signed at least one free trade agreement containing an investment chapter, with Pakistan.67

(b) Argentina's Negative Experience

When analysing 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,68 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. 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 nationalisation measures adopted by Argentina's neighbours, Bolivia and

65 Ibid. p. 23.
66 Ibid. p. 20.
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 neutralise 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 procedural) in the event of such a national crisis causing harm to investors in a general and non-discriminatory fashion.

(c) Flip-Side of the Coin: Brazil as 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 internationalisation of activities of Brazilian companies, such as Petrobras, Companhia Vale do Rio Doce (CVRD), Odebrecht, Embraer, Gerdau, Camargo Correa, Usiminas and CSN.69 From January to November 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.70

Petrobras’ recent history presents an apt illustration. In 2006, Brazil’s oil and gas giant saw its investments in Bolivia being nationalised 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

69 See UN-ECLAC, supra n. 1 at pp. 15-16.
70 See ‘Investimento Externo vai a US$16 bi [Foreign Investment Reaches US$16 billion]’ in O Estado de São Paulo, 20 December 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.
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 favour of ICSID’s jurisdiction. In *Aguas del Tunari v. Bolivia*, the majority of the tribunal held that ‘national routing’ of investment (i.e. organising or structuring an investment through a third country so that it comes under the protective canopy of a BIT) is a legitimate exercise. 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. 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.

(d) 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 neighbours. 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 United States: Uruguay concluded an agreement with the United States in 2005, and a draft Paraguay-United States BIT is under consideration.

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.

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72 *Ibid. paras. 330(d), 332.
73 See e.g. NAFTA, Art. 1113.2. Similar clauses can be found in US BITs and a number of ASEAN country BITs. See UNCTAD, supra n. 25 at p. 21.
74 See Bilaterals.org, News, 10 September 2006, available at www.bilaterals.org/article.php3?id_article=6167 ("United States offer to Paraguay to sign an investment agreement").
75 See Marega, supra n. 31 at p. 80.
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. Moreover, Brazil could wisely use its consent to investor-state arbitration as an important tool to obtain trade concessions from the United States, especially with regard to market access.

(e) 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 no. 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; and (iv) Brazilian commentators and courts have adopted a strong policy in favour 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.

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76 It should be noted that the 2004 United States-Australia FTA does not provide for investor-state arbitration to resolve investment disputes. The United States 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 wwwustr.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 p. 11).


79 '2007 Statistics' in (2008) 18(1) ICC International Court of Arbitration Bull. (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, DC, on 20 March 2007.
V. 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. As 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 the future, given the emergence of strong regional and international competitors which have widely adhered to international investment protection instruments. The fact that Brazil has adopted other types of measures to attract investors and has no history of broad violations of general international law standards regarding treatment of aliens are positive factors, but may not be enough in the future to satisfy foreign investors, who are becoming more demanding in their

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80 The few Brazilian commentators who have already addressed the topic have urged Brazil to agree to investor-state arbitration. See e.g., de Tarso Pereira, supra n. 5 at p. 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 instruments that would better prepare it to face the challenges of international trade); Noemi Pucci, supra n. 5 at pp. 30–31 (as Brazil has a legitimate interest in attracting foreign investments, it must offer investors the guarantee that the State agrees to resolve its disputes concerning investments through international arbitration and will comply with arbitral awards, even if they are made against the State...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 from the experience of other countries in the region in recent years as regards international arbitration, and relying on international arbitration they can balance their interests: on the one hand, the State’s interest to preserve itself and its capacity to attract investments, and on the other hand, the investor’s interests to have guarantees for its investments and to make profits in the country); Giusti and Drummond C. Trindade, supra n. 48 at p. 75 (arguing that conditions are favourable 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); and Marques Moreira, supra n. 1 at p. 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. Rubens, ‘Investment Arbitration in Brazil’ in (2003) 4 JWI 1071 at p. 1091 [‘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’].


82 Gremades, supra n. 3 at p. 55.
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 recognise, 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 specialised 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?