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Brazil's New Investment Treaty Model: Why Now?

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Abstract. The investment treaty regime, unlike other economic regimes, lacks common substantive multilateral rules and depends on countries signing bilateral or plurilateral investment treaties. As the regime presented a pro-developed country bias, developing countries, especially in Latin America, avoided signing investment treaties up to the 1980s. Brazil followed this trend and did not start an investment treaty program until the late 1990s. However, the treaties never entered into force. The country also avoided acceding to the World Bank agency responsible for investment arbitration proceedings — the International Centre for Settlement of Investment Disputes (ICSID). In 2015, Brazil started a new investment treaty program. However, the timing seems counterintuitive. The investment treaty regime had already been criticized, including inefficiency in attracting foreign investment, the potential to encroach on countries' regulatory sovereignty and the lack of legitimacy of its investor-state dispute settlement (ISDS) procedure. Furthermore, the favorable foreign economic scenario did not force the country to seek an inflow of foreign capital at that time. The new Cooperation and Facilitation Investment Agreement (CFIA) is presented as an investment treaty model for developing countries, since it responds to major criticisms to the investment treaty regime, and at the same time meets the demands of an important domestic interest group, the Brazilian industrial sector, for a legal framework that mitigates the political risk of its increasingly internationalized operations. Brazil's CFIA may be viewed as a model that other developing countries could emulate in the face of the failure of the traditional paradigm of investment dispute settlement.

Key words: cooperation and facilitation investment agreements, Brazil, Investment Treaty Regime, foreign direct investment, investor-state dispute settlement

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Новая модель инвестиционного договора Бразилии: почему именно сейчас?

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Аннотация. Международный режим инвестиционных договоров, в отличие от других экономических режимов, не предполагает общих многосторонних материально-правовых норм и зависит от стран, подписывающих двусторонние или плюрилатеральные инвестиционные договоры. Поскольку режим предоставлял несправедливые преимущества развитым странам, многие развивающиеся страны, особенно в Латинской Америке, избегали подписания инвестиционных договоров вплоть до начала 1980-х гг. Бразилия следовала заданному тренду, инициировав собственную программу инвестиционных договоров только в конце 1990-х гг. Однако договоры так и не вступили в силу. Бразилия также не присоединилась к Международному центру по урегулированию инвестиционных споров (МЦУИС), агентству Всемирного банка, ответственному за проведение арбитражных процедур в международных инвестиционных спорах. В 2015 г. Бразилия запустила новую программу инвестиционных договоров. Однако выбор времени для подобного решения не совсем логичный. Международный режим инвестиционных договоров уже подвергался критике по причине неэффективности в привлечении иностранных инвестиций, возможности нарушения государственного суверенитета и недостатка легитимности процедуры разрешения споров между инвесторами и государством. Кроме того, в тот период у Бразилии не было необходимости в привлечении иностранных инвестиций ввиду благоприятных внешних условий. Новые соглашения о сотрудничестве и содействии инвестициям представляются как модель инвестиционного договора, которая учитывает все недостатки международного режима, а также реагирует на запросы важной внутренней группы давления — бразильского промышленного класса — о создании правовых рамок для минимизации политических рисков их деятельности, степень интернационализации которой увеличивается. Бразильская модель соглашения о поощрении и взаимной защите капиталовложений может быть заимствована другими развивающимися странами в условиях кризиса традиционной парадигмы разрешения инвестиционных споров.

Ключевые слова: соглашения о поощрении и взаимной защите капиталовложений, Бразилия, режим инвестиционных договоров, прямые иностранные инвестиции, урегулирование споров между инвесторами и государством

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Introduction

Since the World Bank started monitoring global capital flows, the total outflow of foreign direct investment (FDI) has grown from USD 13.4 billion in 1970 to a peak of USD 3.2 trillion in 2007 — an increase of approximately 240 times.[1] Although it represents only a fraction of the international trade volume, FDI is attributed a fundamental role in promoting

[1] World Development Indicators: DataBank // The World Bank. URL: https://databank.worldbank.org/source/world-development-indicators (accessed: 10.02.2020).

economic development and growth (Ahmad, Draz & Yang, 2018; Aust, Morais & Pinto, 2020). This apparent connection between FDI and development is especially relevant for the economies of low and middle-income countries, which are primarily net recipients of investment (Bonnitcha, Poulsen & Waibel, 2017).

The surge in international capital flows is accompanied by an increase in the number of investment treaties in force. These agreements are intended to protect international investors from arbitrary and confiscatory actions of their host states and create more favorable conditions for investment inflows. The United Nations Conference on Trade and Development (UNCTAD) data show that more than 2,000 of these treaties have been signed and are currently in force.[2] Developed countries proposed the first modern investment treaties in the post-World War II period. These countries were interested in creating legal mechanisms to ensure the protection of their investors abroad. The primary enforcement mechanism of these treaties is the investor-state dispute settlement (ISDS), a *sui generis* kind of arbitration that endows foreign citizens and corporations with the ability to seek remedies against treaty violations by their host states (Bonnitcha, Poulsen & Waibel, 2017).

Initially, Brazil avoided signing these investment agreements following the example of its Latin American neighbors. The country found the protection offered to foreign citizens to be excessive and even superior to that of national investors. The Brazilian government backtracked in its attempt to join the regime in the 1990s, considering that several of the treaty clauses granted excessive prerogatives to multinational companies in a manner incompatible with the domestic constitutional order. From the 2010s, a new attempt to create a Brazilian model of investment agreement has attracted the attention of researchers and policymakers as an alternative to the previous investment protection paradigm, especially for its lack of use of the investor-state arbitration mechanism (Badin & Morosini, 2017).

This reorientation of the Brazilian policy towards the investment treaty regime stands out both due to the more favorable external economic conditions, which makes attracting FDI a less urgent matter, and the erosion of the legitimacy of the international investment treaty regime, that has been severely criticized since the 2000s. The regime's legitimacy crisis has been widely reported, among others, with scandalous arbitral complaints against Uruguayan and Australian health policies. That, in turn, led to denunciation or renegotiation of investment treaties by developed and developing countries, particularly in Latin America (Amorim, Baccarini & Menezes, 2021). These developments shed light on the importance of the institutional innovation proposed by Brazil to deal with investment protection and promotion without limiting its space for implementing public policies.

To better understand Brazil's new position, Section 1 of this paper explains how the investment treaty regime acquired the current hybrid configuration based on substantive bilateral and regional treaties, with procedural rules guaranteed by multilateral agreements. Section 2 explores the historical relationship of developing countries, especially in Latin America, with investment treaties. Special attention will be paid to the changes in the economic and ideological landscape over the 1980s and 1990s. Finally, Section 3 analyses Brazil's position on the regime both originally in the 1990s and more recently after the implementation of the CFIA model-promoted by the Ministries of Trade (MDIC)[3] and Foreign Affairs (Itamaraty) with important contributions from the national industrial sector.

The Configuration of the Investment Treaty Regime

What would become of global trade governance without the World Trade Organization (WTO)? Although it is difficult to conceive, investment flows are regulated by an international economic regime that lacks similar

[2] Investment Policy Monitor // UNCTAD. 2019. No. 22. P. 1—28. URL: https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d8_en.pdf (accessed: 02.01.2020).

[3] The department of the Brazilian government responsible for foreign trade had the status of a ministry up to 2018. It is currently a special secretariat under the Ministry of the Economy.

multilateral rules. Since the 1940s, there have been several attempts to regulate international investments. The Havana Charter, which, if approved, would have given rise to the International Trade Organization, already provided for the negotiation of a multilateral investment agreement.[4] Other attempts to create a multilateral investment regime, more recently the Uruguay Round negotiations, were met with insurmountable opposition, mainly from developing countries. Even when the negotiations were shifted to the Organization for Economic Co-operation and Development (OECD), the "rich men's club," a consensus could not be reached.[5]

Although various attempts at multilateralization have been in vain, this has not prevented the regime from perpetuating itself in a different way. Given the impossibility of reconciling even the interests of like-minded developed countries in a multilateral forum, the approach was to concentrate efforts on negotiating bilateral investment treaties (BITs). This change in strategy was accelerated by the efforts of Third World countries in the United Nations General Assembly in the 1960s and 1970s. The New International Economic Order agenda recognized expropriation or nationalization of the industries under the control of foreign investors as a sovereign right of developing countries.[6] Therefore, the signing of numerous investment treaties throughout the 1980s, which reinforced the protection of property rights, is viewed as a "counter-offensive" against the attempt by the Third World to bring about an international economic order favorable to them. As a result of these efforts, the number of bilateral investment treaties in force has reached 2,651 by October 2019.[7] Keeping the analogy with the multilateral trade regime, it would be as if global trade flows were regulated exclusively by preferential agreements (Bonnitcha, Poulsen & Waibel, 2017).

Without a central institution that coordinates this legal framework, is it possible to call it a regime according to the traditional understanding? Four elements collaborate to guarantee a certain degree of cohesion in this entanglement of bilateral agreements.

First, the fact that the treaties were negotiated with a common objective and initiated by developed countries ensures cohesion in the guiding principles of the regime. The investment treaty regime assumes a positive role of FDI and that property rights protection can foster investments. Besides, given the need to counter the Third World wave of the 1970s, the dominant view in the post-Cold War period emphasized the creation of institutions and regimes that helped advance a liberal-internationalist agenda contributing to the relative uniformity of provisions of the agreements (Bonnitcha, Poulsen & Waibel, 2017).

Second, it is important to consider the influence that failed multilateral agreement projects had on the bilateral treaties. Taking the OECD agreement proposals as a standard, developed countries interested in expanding their

[4] Final Act of the United Nations Conference on Trade and Employment // United Nations Conference on Trade and Employment. 1948. URL: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed: 07.11.2019).

[5] These previous treaty drafts can be consulted in the following websites, see: International Investment Instruments: A Compendium. Volume V: Regional Integration, Bilateral and Non-governmental Instruments // United Nations Conference on Trade and Development. Geneva and New York, 2000. P. 301—303. URL: http://unctad.org/en/Docs/dite2vol5_en.pdf (accessed: 02.10.2017); The Multilateral Agreement on Investment: Draft Consolidated Text // OECD. 1998. URL: http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (accessed: 29.07.2019). See also: (Zeng, 2014); Chomsky N. Domestic Constituencies // Z Magazine. May 1, 1998. URL: https://zcomm.org/zmagazine/domestic-constituencies-by-noam-chomsky/ (accessed: 28.12.2020).

[6] See: Resolution Adopted by the General Assembly 3201 (S-VI). Declaration on the Establishment of a New International Economic Order // United Nations General Assembly. May 1, 1974. URL: http://www.un-documents.net/s6r3201.htm (accessed: 07.09.2021); Resolution Adopted by the General Assembly 3281 (XXIX). Charter of Economic Rights and Duties of States // United Nations General Assembly. December 17, 1974. URL: http://www.un-documents.net/a29r3281.htm (accessed: 07.09.2021).

[7] Investment Policy Monitor // UNCTAD. 2019. No. 22. P. 1—28. URL: https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d8_en.pdf (accessed: 02.01.2020).

network of investment agreements set their own BIT models. The process of negotiating these agreements with developing countries is marked by the power asymmetry between the parties. Traditionally, the agreements are signed between a capital-exporting developed country and a capital-importing developing country. Consequently, it is implausible that a developing country will achieve significant concessions during the negotiations. The situation when a developed country offers a model agreement based on the OECD multilateral proposals that are subsequently rubberstamped by developing countries has given rise to the expression "boilerplate treaty." Despite some differences in the treaty provisions, generally, they guarantee similar substantive rights and procedural mechanisms for dispute settlement which arbitrators interpret in a quasi-jurisprudential framework that seeks homogeneous decisions.[8]

Perhaps, the most important element of the regime is the enforcement capacity found in the dispute settlement mechanisms of the investment treaties and its centrality in the formulation of new rules. Unlike many schemes that have soft law enforcement mechanisms, based on the moral weight of international bodies at best, investor-state arbitration is firmly established by international treaties. Especially if carried out under the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank Group, awards are immediately enforceable without the possibility of an appeal before national courts. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[9] which has 161 contracting parties, gives little leeway to a country ordered to pay damages to the foreign investor ostensibly harmed by its actions or omissions (Bonnitcha, Poulsen & Waibel, 2017).

Finally, the legal construction of the regime favors investor-state arbitration not only as a space for rule enforcement but also for rulemaking. The Deutsche Richterbund, a professional association of German judges and prosecutors, expressed concern over the possibility of creating a multilateral investment court proposed by the European Commission.[10] The argument is that international investment law is currently composed of well-established procedural rules and considerably vague substantive rules that resemble weaker, vaguer legal principles. The difference in the wording of the agreements is further weakened by the Most Favoured Nation clause, which effectively extends the most favorable provisions to all investment treaty partners of a country.

Investment Agreements and Developing Countries

Why have the countries not given up signing investment agreements despite all the obstacles to establishing a multilateral regime? It may seem trivial that the interest in signing a BIT proceeds from a mutual will to increase investment flows between the two countries. However, the analysis of a country's motivations to accede to investment agreements necessarily involves a country's position *vis-à-vis* international investment flows as either a net exporter or importer of investments. They are relatively stable, so it is possible to generalize that investments flow from developed countries that are abundant in capital towards developing countries that are abundant in labor. This assumption follows from the Heckscher — Ohlin model, which is also used to explain international trade. Although relatively outdated, it serves well to illustrate the understanding of the world economy at the time when the first investment agreements were signed (Bonnitcha, Poulsen & Waibel, 2017).

[8] Peterson L. The End of Boilerplate Investment Treaties (BITs) // Kluwer Arbitration Blog. May 20, 2009. URL: http://arbitrationblog.kluwerarbitration.com/2009/05/20/the-end-of-boilerplate-investment-treaties-bits (accessed: 28.12.2020). See also: (Zeng, 2014).

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards // United Nations Commission on International Trade Law. New York, 1958. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf (accessed: 28.12.2020).

[10] Opinion on Recommendation of a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (COM (2017) 493 final) // Deutsche Richterbund. November, 2017. URL: https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2017/en_stellungnahme.pdf (accessed: 28.12.2020).

As discussed in the previous section, the initiative to create an international investment regime was put forward by developed countries. Developing countries, initially, did not take this idea favorably. According to Poulsen (2011), despite the effort of developed countries to expand their network of investment treaties, very few developing countries adhered to BITs throughout the 1960s and 1970s. Those who did were often ex-colonies seeking to maintain the *status quo* by replacing the special treatment accorded to investors of the former metropole (i.e., imperial preferences) with a new relationship based on international law (Choi, 2007).

In Latin America, the opposition to the liberalization of capital flows and the internationalization of disputes between the state and foreign investors was much fiercer. In the 19th century, the region's countries adopted the Calvo doctrine as a part of their legal systems. Proposed by Carlos Calvo, an Argentine jurist and diplomat, it excluded the possibility of foreign intervention in case of an investment dispute (Calvo, 1896). Initially, the doctrine covered only the use of diplomatic protection, i.e., when the home country of the affected investor interceded diplomatically with the state that generated the alleged damage on behalf of its national. It was common that after the diplomatic means had been exhausted, the situation deteriorated to violence. The use of force, especially naval, for the resolution of investment disputes is known as "gunboat diplomacy." A more extreme example is represented by French interventions in Mexico under the pretext of violation of French citizens' property rights (Garcia-Mora, 1950; Lazo, 2014; Lowenfeld, 2009).

This situation changed during the second half of the 20th century. The distrust of foreign investors stemmed from a development strategy based on import substitution industrialization that privileged the protection of domestic industries. In this context, foreign companies were seen as potential competitors that could crush domestic firms that had not yet reached the necessary productivity level. During that period, even peaceful investment dispute resolution tools, such as arbitration, were rejected by Latin American nations. The cohesion around this joint position is exemplified by an episode called *El No de Tokio* that occurred in 1964. At the time, out of the 21 votes cast against the creation of ICSID, 19 came from Latin American countries, the largest collective vote against any World Bank initiative ever.[11]

This situation started to reverse from the 1980s onwards. A sharp increase in the basic interest rate carried out by the United States Federal Reserve complicated the situation for Latin American countries that financed their economies through cheap foreign loans resulting from the accumulation of the so-called petrodollars. These funds were generally invested in European and American banks and "recycled" into low-interest loans to developing countries. The repatriation of these resources to the U.S. economy dried up funding and made it prohibitively expensive to sustain a development model based on international credit. The first country to default was Mexico in 1982, which led to a chain reaction that made the 1980s known as *Década Perdida*, the Lost Decade, for the region (Tavares, 1992; Hirsch, 2010).

Akin to financial unsustainability caused by the increase in the cost of loans, there was the erosion of the academic consensus on import substitution industrialization. Dependency theorists blamed this policy for intensifying the economic subordination of periphery countries to the so-called core countries. Liberals, on the other hand, pointed to stagnant productivity and exports caused by the protection of national industries (Baer, 1972). Hira (2007, p. 348) points out that although the emergence of a new non-liberal paradigm of development was possible, the few voices that defended a new model "were drowned out by the sea of literature espousing neoliberalism."

The decision of the Latin American countries to abandon the Calvo doctrine and adhere to numerous investment agreements over the 1980s and 1990s reflects the move to a

[11] Broad R. Remembering the "Tokyo No" Fifty Years Later // Triple Crisis. December 5, 2014. URL: http://triplecrisis.com/remembering-the-tokyo-no-fifty-years-later/ (accessed: 28.12.2020).

development model that sought FDI as an important source of funding. The number of agreements signed by the Latin American and Caribbean countries in the 1980s was 30, a fivefold increase compared to the preceding decade. In the 1990s, the number of agreements signed by the countries of the region reached 337. In contrast to the previous decades, the adoption of bilateral investment treaties was widespread and not concentrated in a few small economies, so it is not frivolous to claim that the adoption of the new economic paradigm was pervasive.[12]

The CFIA Model: An Outlier?

Brazil, like other Latin American countries, initially resisted signing investment agreements throughout the 1960s and 1970s. In Brazil, this period extended until the mid-1990s, with the country being among the laggards in the race for foreign investment. After the re-democratization — starting during the presidency of Itamar Franco but intensifying under Fernando Henrique Cardoso — Brazil abandoned the Calvo doctrine and tried to jump on the investment treaty bandwagon. The government signed 14 bilateral investment treaties from 1994 onward. Despite having submitted several of the treaties to the legislature, President Cardoso requested Congress not ratify them in 2002 (Campello & Lemos, 2015; Morossini & Xavier Jr., 2015). According to the explanatory memorandum signed by foreign minister Celso Lafer, after the negotiation of the Multilateral Agreement on Investment (MAI) it became clear that the terms of investment treaties granted excessive rights and privileges to multinational companies to the detriment of the jurisdiction of the State and the social order.[13]

The fruitless "first wave" of BITs signed by Brazil in the 1990s was mainly the result of two developments in the economy of Latin America: the need to obtain foreign currency inflows through the capital account and the enactment of neoliberal economic policies based on the IMF recommendations spelled out in the Washington Consensus. These agreements were aimed at establishing Brazil as a recipient of foreign capital. This is easily noticeable when analyzing the profile of Brazil's partners. As seen in Table 1, of the 14 agreements signed by Brazil in the 1990s, only 3 feature other developing countries as partners.

Table 1

Investment Treaties Signed by Brazil in the 1990s — The First Wave

Partner	Year
Portugal	1994
Chile	1994
United Kingdom	1994
Switzerland	1994
France	1995
Finland	1995
Italy	1995
Denmark	1995
Venezuela	1995
South Korea	1995
Germany	1995
Cuba	1997
Netherlands	1998
Belgium / Luxembourg	1999

Source: Investment Policy Hub: International Investment Agreements Navigator // UNCTAD. URL: https://investmentpolicy.unctad.org/international-investment-agreements (accessed: 06.01.2020).

According to Badin and Morosini (2017), a striking feature of this attempt to adhere to the investment treaty regime was the lack of a Brazilian investment agreement model. On the contrary, the predominance of investment agreements with developed countries as partners indicates that Brazil simply adhered to the investment agreement model which was the norm then. These agreements established specific standards of protection for foreign investments. Among the less polemic clauses of the treaties, we find "direct expropriation" that prohibits nationalization of foreign investor's property without compensation, "national treatment" and

[12] Investment Policy Hub: International Investment Agreements Navigator // UNCTAD. URL: https://investmentpolicy.unctad.org/international-investment-agreements (accessed: 06.01.2020).

[13] Ata da 2348 Sessão Solene, Matutina, em 12 de dezembro de 2002 // Diário da Câmarados Deputados. Mesa da Câmara dos Deputados (Biênio 2001/2002). República Federativa do Brasil. 2002. P. 21. URL: http://imagem.camara.gov.br/Imagem/d/pdf/DCD13DEZ2002.pdf (accessed: 02.06.2022).

"most favored nation" clauses which equate the treatment offered to foreign investors with that of the residents and foreign investors from third countries, respectively (Bonnitcha, Poulsen & Waibel, 2017).

The more problematic clauses offered foreign investors a "minimum standard of treatment" along with "fair and equitable treatment" and "full security and protection." These three standards of treatment were markedly vague and granted arbitrators undue interpretative space, which led to overreaching decisions that frustrated many countries. The "indirect expropriation" clause, which was meant to protect investors from governmental actions "tantamount to expropriations," was also construed to prevent countries from adopting good faith regulations in the public interest.[14] Procedurally, the traditional paradigm of investment treaties privileged litigious dispute settlement, such as investor-state arbitration, rather than less confrontational procedures such as mediation and conciliation (Bonnitcha, Poulsen & Waibel, 2017).

At the time, Brazil's role in the investment treaty regime reflected the traditional North — South paradigm. While the treaty clauses were constructed to create symmetrical rights and obligations between the parties, this was not true in practice. The "developed" party supplied the investments and, accordingly, its investors benefited from the legal protection offered by the agreement. On the other hand, the "developing" party had to comply with the treaty provisions expecting increasing foreign investment inflow. The Brazilian interest in signing the treaties proceeded, therefore, from what Elkins, Guzman, and Simmons (2008) call rational competition for capital. Even if the country was not interested in granting special treatment to foreign investors, the fact that neighboring states advanced further in the process of joining the international regime forced Brazil to sign agreements through a competitive logic of attracting investments. Congress' decision to reject the six agreements on the grounds of unconstitutionality marked the end of the Brazilian BITs initiative.

Over the next decade, the investment treaties issue did not come up in Brazilian political debate either due to their defeat in Congress or lack of interest on behalf of the center-left governments that held power after 2003. It was only in the second half of the 2010s that Brazil saw the need to start a new program of agreements, now under a new paradigm. The model was developed in collaboration between the Ministry of Foreign Affairs and the Ministry of Trade and was called the Cooperation and Facilitation Investment Agreement (CFIA). Some of the innovations the Brazilian CFIA model introduced are the exclusion of the controversial clauses cited above such as "indirect expropriation", "full security and protection" and "fair and equitable" treatment (Baumann, 2020).

In addition, the new model does not provide for ISDS as a means of dispute settlement. Instead, the CFIAs replaces ISDS by a progressive series of instances of mediation and conciliation that goes through an Ombudsperson, who receives complaints and proposals of foreign investors, a mixed committee, which seeks to settle issues not resolved by the previous instance, and finally, interstate arbitration provided all other options have been exhausted. The Brazilian government is not secretive about the motivation for a new treaty model. When submitting its proposal to the United Nations Commission on International Trade Law (UNCITRAL), Brazil stated that the CFIA model "emerged in the context of increasing dissatisfaction with the traditional Bilateral Investment Treaties containing ISDS provisions."[15] The Brazilian delegation listed a few of the shortcomings found in the old model:

[14] The indirect expropriation clause has already been interpreted as preventing the State from revoking environmental licenses (*Metalclad v Mexico*), introducing a "sin tax" on high fructose corn syrup products (*Cargill v Mexico*) and has been used unsuccessfully in *Philip Morris v Uruguay* to prevent the state from adopting anti-smoking measures. A summary of the cases can be found in Investment Policy Hub, see: Investment Dispute Settlement Navigator // UNCTAD. URL: https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed: 06.01.2020).

[15] Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Brazil //

— lack of evidence that BITs promote FDI;

— controversial nature of investment agreements that give undue protection to the investors at the expense of the host country's right to regulate in the public interest;

— growing demand for a more balanced approach between investors and states that reinforced Brazil's willingness to develop a model that would overcome the shortcomings of traditional BITs.

However, while opposition to a dysfunctional institution, such as ISDS, is a necessary condition for change, it does not always lead to its replacement. To understand how institutions overcame paralysis and created an innovative agreement model, it is necessary to explore the change in the dynamics of investment flows in 1980—2010. Unlike the 1980s, after the 2008 Great Depression, the countries of the Global South enjoyed a new period of cheap credit and lax monetary policy in the Global North. According to Carvalho, "in 2010—2013 emerging economies received almost half of global capital flows. Before the crisis, in 2002—2008 this share never reached 20%. This increase happened due to monetary expansion in developed countries. In Latin America, almost half of net capital inflows was speculative and short-term, with Mexico and Brazil being the main destinations" (Carvalho, 2018, p. 60).

These favorable external developments indicate that it is unlikely that the reorientation of Brazilian investment treaty regime policy is merely another attempt to attract investments as it used to be. The government's hands were no longer tied by the balance of payments constraints or attempts to resolve them by increasing capital inflow. Furthermore, as noted in the Table 2, the CFIA program targeted the countries of the Global South that could potentially act as recipients of investments by Brazilian companies rather than those that traditionally invested in Brazil. According to the Ministry of Foreign Affairs, fourteen Cooperation and Facilitation Investment Agreements were signed by December 2020, with two more free trade agreements with investment chapters based on the CFIA model signed with Chile and Peru.

Table 2

Investment Treaties Signed by Brazil since 2015 — The Second Wave

Partner	Year	Modality	Status
Mexico	2015	CFIA	In force
Mozambique	2015	CFIA	Ratified by Brazil, awaiting ratification by the other party
Malawi	2015	CFIA	Ratified by Brazil, awaiting ratification by the other party
Angola	2015	CFIA	In force
Colombia	2015	CFIA	Ratified by Brazil, awaiting ratification by the other party
Chile	2015	CFIA	Replaced by the 2018 Brazil—Chile FTA
Peru	2016	FTA with an investment chapter	Ratified by Brazil, awaiting ratification by the other party
Intra-MERCOSUR	2017	CFIA	In force
Ethiopia	2018	CFIA	Pending in Congress
Suriname	2018	CFIA	Pending in Congress
Guyana	2018	CFIA	Pending in Congress
Chile	2018	FTA with an investment chapter	In force
United Arab Emirates	2019	CFIA	Pending in Congress
Ecuador	2019	CFIA	Pending in Congress
Morocco	2019	CFIA	Pending in the Executive
India	2020	CFIA	Pending in the Executive

Source: Concórdia: Acervo de atos internacionais do Brasil [Brazil's Treaty Series] // Ministério das Relações Exteriores. URL: https://concordia.itamaraty.gov.br/ (accessed: 04.07.2022); Investment Policy Hub: International Investment Agreements Navigator // UNCTAD. URL: https://investmentpolicy.unctad.org/international-investment-agreements (accessed: 04.07.2022).

Brazil's position paper to UNCITRAL's working group on ISDS reform further states that "the creation of Brazilian CFIA responds to a demand from the national private sector," not the state's macroeconomic needs at that time.[16] The

United Nations General Assembly. 2019. URL: https://undocs.org/en/A/CN.9/WG.III/WP.171 (accessed: 28.01.2019).

[16] Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Brazil // United Nations General Assembly. 2019. URL:

timing of the implementation of the new model reinforces this argument. The elaboration of the CFIA model coincided with the implementation of a new economic agenda by the Dilma Rousseff government. According to Carvalho (2018, p. 56), "the center of the [new economic] model would be to better use foreign markets and investments" as opposed to the domestic market and consumption. The FIESP Agenda, as the economic program is hereafter referred to, was conducted in favor of portions of the Brazilian industrial sector represented by the Federation of Industries of the State of São Paulo (FIESP) and the National Confederation of Industry (CNI).

Similar to the FIESP Agenda, the CFIA program seemed to address the demands of a group of large companies that were interested in accelerating their internationalization and increasingly invested in other developing countries. The Brazilian think tank *Fundação Dom Cabral* (FDC) shows that while in 2001 a staggering 93% of global FDI outflows originated in developed economies, by 2018 this number reduced to 55%, with 45% of FDI outflows originating in a more dynamic developing world.[17]

Brazil's FDI follows this new pattern of increasing South — South cooperation. The internationalization of Brazilian companies gained momentum in the second half of the 2000s, whereas in 2018 the stock of Brazilian FDI abroad reached impressive USD 381 billion.[18] The Brazilian Central Bank concedes that determining the final destination of capital outflows is not an easy task as companies often make use of fiscal havens as an intermediate step for operating abroad. However, the available data show that traditional partners in Latin America, along with Europe and the United States, are still among the most common destinations of Brazilian FDI.[19] Nevertheless, according to UNCTAD, an increasing share of these investments flows towards other developing countries.[20]

While aggregated data on FDI in Africa may seem unimpressive, other metrics may better capture Brazilian investment presence. White affirms that 30% of mining investments in the continent come from Brazil, ahead of other leading players such as China, South Africa, and Australia (White, 2013). The author also highlights the importance of multinational companies such as Petrobras, Vale, and Odebrecht in the USD 20 billion stock of Brazilian investment in Africa. For instance, Odebrecht, most famous for its construction projects, is currently the largest private employer in the Portuguese-speaking nation of Angola.

Documents published by FIESP itself reveal the Federation's concern about the need for formulating public policies given the recent South — South investment dynamics: legal mechanisms that bring greater stability, predictability, and legal certainty to Brazilian direct investments and adequately modulate investors' expectations regarding the security of operating in a foreign market can be an extremely relevant element for the internationalization of Brazilian firms.[21]

The CNI echoes FIESP's concern about the need for public policies that promote and facilitate Brazilian international investments. The Confederation lists negotiating "investment promotion and protection agreements (IPPAs) to mitigate the growing political risks faced by Brazilian companies in their investments

https://undocs.org/en/A/CN.9/WG.III/WP.171 (accessed: 28.01.2019).

[17] Global LATAM: série investimentos estrangeiros [Foreign investment series] // FDC. 2019. URL: https://www.fdc.org.br/conhecimento-site/blog-fdc-site/Documents/Global_LATAM_Brasil.pdf (accessed: 02.04.2021).

[18] Ibid.

[19] Direct Investment Report // Banco Central do Brasil. 2020. URL: https://www.bcb.gov.br/content/publications/directinvestmentreport/2019/DIR_2020.pdf (accessed: 19.05.2021).

[20] Country Fact Sheet: Brazil. World Investment Report 2020 // UNCTAD. 2020. URL: https://unctad.org/system/files/non-official-document/wir20_fs_br_en.pdf (accessed: 19.05.2021).

[21] Documento de Posição: Propostas de Integração Externa da Indústria [Position Paper: Proposals for External Integration of Industry] // FIESP. 2014. P. 24. URL: https://www.fiesp.com.br/arquivo-download/?id=159608 (accessed: 28.12.2020).

abroad”[22] among the main objectives that would help promote the internationalization of Brazilian companies.

In conclusion, an emerging consensus on the inadequacy of the old paradigm of investment protection kept Brazil from signing investment treaties since its last encounter with the regime in the 1990s. Up to the mid-2010s, the country had no incentive to change its position as more and more studies cast doubt on the effectiveness of these legal instruments in investment promotion and demonstrated that they exposed countries to possible regulatory interference, which made signing them increasingly undesirable.

After 2015, Brazilian multinational companies that worried about their own internationalization processes pressed their demands to implement an investment protection agreement program. The resulting CFIA reflects a compromise between the demand for investment protection by the Brazilian business community and growing dissatisfaction with the old paradigm of investment protection. Removing the most problematic, vague clauses from the CFIA, such as indirect expropriation and fair and equitable treatment, as well as investor-state arbitration, helped reduce anxiety about potential adverse effects of investment treaties and simultaneously addressed the demand for an institutional framework for investment cooperation.

Conclusion

It may be argued that the current investment treaty regime is the result of a historical process that has not been favorable to the implementation of a multilateral mechanism for the protection of foreign investors. This regime, that was established mainly through bilateral investment treaties and more recently through plurilateral and regional agreements, is an improvised way to resolve the impossible consensus between the diverging interests of capital importing and exporting countries as well as between countries with different development strategies within the same group. The result is a regime that, although based on isolated agreements, is relatively coherent due to the shared principles of the developed countries that promoted the adoption of the agreements emulating the attempts aimed at concluding a multilateral agreement, and due to legal characteristics of the regime, such as the centrality of investor-state arbitration — as both a dispute settlement and rulemaking mechanism — and its effectiveness *vis-à-vis* other international regimes.

We also explored how a country’s position as a net importer or exporter of capital influences its position towards the adoption of legal rules that guarantee different treatment for foreign investors compared to their own nationals. By analyzing the case of Latin America, it may be noticed that, contrary to what the developed countries defending the regime preach, the provisions of the agreements do not benefit both parties symmetrically. On the contrary, capital-exporting countries benefit twice as much by creating a forum that both guarantees special treatment for their investors and depoliticizes investment disputes, avoiding undesirable and costly consequences of having to intervene in defense of their nationals. In the case of Latin America, two factors contributed to the cessation of resistance to the investment treaty regime:

1) the end of the favorable financing conditions for the region's economies, which benefited from low-interest rates to maintain an economic model based on import substitution;

2) the loss of academic support for a protectionist, import substitutionist model of industrialization.

The strong dollar diplomacy ended up having the “collateral” effect of undermining Latin American economies. In this context of economic fragility and lack of an alternative development model, the attempt to attract investment through BITs seemed to be a low-cost choice. The signing of investment treaties throughout the 1980s and 1990s reflects a change in the foreign policy of Latin American countries and in the development model they began to adopt.

[22] Relatório dos Investimentos brasileiros no exterior 2013: Recomendações de Políticas Públicas para o Brasil [Report on Brazilian Investments Abroad 2013: Public Policy Recommendations for Brazil] // CNI. 2013. P. 12. URL: http://arquivos.portaldaindustria.com.br/app/conteudo_24/2014/01/16/429/20140116145719451313i.pdf (accessed: 28.12.2020).

The article analyzed the evolution of Brazil's policy towards the investment treaty regime and identified two waves of investment agreements, the first between 1994 and 1999 and the second between 2015. The first wave was marked by an unfavorable external context, with scarce credit and the implementation of the neoliberal agenda under the Washington Consensus. The second wave, however, happened in a relatively favorable external environment, with monetary expansion in the Global North resulting in a new cheap credit cycle for developing countries. In the ideational field, the 2010s were marked by general criticism of the international liberal order, and more specifically, of the investment treaty regime.

Brazil's CFIA may be viewed as a model that other developing countries could emulate in the face of the failure of the traditional paradigm of investment dispute settlement. Besides, it also reflects the period of a strong influence of the Brazilian industrial class that goes beyond the formulation of macroeconomic policies, as described by Carvalho (2018), also covering the reforms aimed at fostering internationalization of Brazilian companies. Therefore, the CFIA model significance is twofold. Internationally, it marks a moment of questioning and reformulation of the investment treaty regime, whereas, domestically, it reflects the quest of interest groups for international projection.

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