

Perrone, Nicolás M.; de Cerqueira César, Gustavo Rojas

Research Report

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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Alex Weaver (amw2209@columbia.edu)

Brazil's bilateral investment treaties: More than a new investment treaty model?

by

Nicolás M. Perrone and Gustavo Rojas de Cerqueira César*

Brazil has finally become a player in the international investment regime, but it represents a peculiar case in foreign investment relations. In the 1990s, Brazil did not ratify its 14 signed bilateral investment treaties (BITs) because of concerns about national sovereignty. Ultimately, this was not an obstacle to becoming the main foreign direct investment (FDI) recipient in Latin America and the fifth largest in the world. Two decades later, Brazil has begun signing BITs again, but this time things are different. Brazil has signed – and is negotiating – treaties with countries that either have already received Brazilian investment or are potential destinations for it. These treaties have attracted the attention of practitioners and academics due to the inclusion of cooperation-facilitating mechanisms and the omission of the fair and equitable treatment standard and investor-state arbitration.

This is a dramatic change with respect to current negotiations, including the Transatlantic Trade and Investment Partnership. It poses the question to what extent Brazilian BITs are not just a new treaty model, but rather represent an alternative FDI policy. To explore this question one must look at the political economy and institutional setting of these new treaties.

At least since the 2006 expropriation of Petrobras in Bolivia, Brazil has been reconsidering its investment-treaty policy. The 2001 Argentine crisis confirmed Brazil's concerns about investor-state arbitration and national sovereignty. At the same time, the country was considering options to prioritize its South-South relations. Brazil's first move was not directed at Africa but at South America, where most of its outward FDI is located. Negotiations in MERCOSUR based on a Brazilian proposal stalled due to Argentine opposition. Later, Brazil decided to advance its agenda in Africa, signing BITs with Angola, Mozambique and Malawi¹ and negotiating with Algeria, Morocco, South Africa, and Tunisia. Recently, Brazil has turned back to Latin America, concentrating on the Pacific Alliance countries (Chile, Colombia, Mexico, Peru) as future investment

treaty partners. A treaty with Mexico was signed in May 2015, and a treaty with Colombia was signed in October 2015.

As Minister of External Relations Mauro Vieira explained, Brazil is relying on its investment-treaty policy not only to protect Brazilian FDI, but also to regain the initiative as an emerging capital exporter, which it lost after the financial crisis.² The strategy is to underline the differences between Brazil and China with respect to their policies toward countries in Africa and South America. Brazil claims to have no neo-imperial ambitions, as it promotes the creation of local jobs and training for local residents.

The way in which Brazil sees its overall FDI policy is, in fact, quite different from the usual narrative of the international investment regime, which describes BITs as a means to advance the rule of law and the respect of property rights in developing countries. The Brazilian agenda focuses instead on consolidating economic relations with its partners and establishing political mechanisms to promote FDI. A look at the Brazilian treaties confirms that, while FDI protection is a key part of these deals, they are more ambitious than the United States and European ones when it comes to promoting FDI and preventing disputes.

The Brazilian treaties strengthen state politics in FDI relations. Brazil asserts that BITs should be the basis for a permanent intergovernmental dialogue to both promote and protect FDI. State-to-state arbitration is a solution consistent with a paradigm of FDI relations where states recover part of the prominent role lost since the 1970s. The core of Brazil's model is not investment arbitration, but rather the Focal Points (i.e., a foreign investment ombudsperson) and the Joint Committee between the two treaty partners.³ This committee is in charge of promoting technical cooperation, exploring mutual investment opportunities and dealing with foreign investor complaints about host country treatment.

With this model, Brazil plans to continue doing what it has been doing for the past decade or so: representing the interests of its firms as national interests, sometimes having been actively involved in designing their business strategies and financing projects. The Brazilian investment treaties respond to the Brazilian model of capitalism, where state politics continue to play a large role despite current fiscal challenges.

In sum, the Brazilian BITs are arguably part of an alternative FDI policy. They go beyond alternative treaty drafting. In the Brazilian approach, states have more power over foreign investors and their activities.

What remains to be seen is whether the Brazilian approach will remain a peculiarity of one country, or whether the emergence of this alternative will have an impact on the global governance of FDI and, in particular, on the current transatlantic and transpacific negotiations. This will probably depend on the success of the Brazilian investment-treaty program, as well as on the increasing backlash against investor-state arbitration.

* Nicolás M Perrone (nicolas.perrone@uexternado.edu.co) is an Assistant Professor at Universidad Externado de Colombia; Gustavo Rojas de Cerqueira César (grojascc@gmail.com) is a Fellow at the

Centre for Analysis and Diffusion of the Paraguayan Economy (CADEP) and a private consultant in trade policy and development strategy. The authors are grateful to Martin Dietrich Brauch, Daniela Campello and Catharine Titi for their helpful peer reviews. **The views expressed by the authors of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ The official versions of these treaties are available at <http://www.itamaraty.gov.br>. Unofficial translations are available at <http://www.iisd.org/publications/side-side-comparison-brazil-mozambique-and-brazil-angola-cooperation-and-investment>.

² Press conference of the Brazilian Minister of Foreign Affairs, Brasília, March 26, 2013, available at <https://www.youtube.com/watch?v=pvJ1MDbV9g0>.

³ Rabih Nasser and Nathalie Tiba Sato, “O novo modelo brasileiro de acordos de investimento,” *Valor Economico*, May 12, 2015.

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