CHAPTER 13

The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption

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As recently as 2013, the Brazilian government made a significant shift in its policy to foreign investments. It was in that year that it broke with a long-standing position and embarked on a series of negotiations of investment agreements with other countries. By the end of 2015 Brazil had signed investment treaties—named *Agreement on Cooperation and Facilitation of Investments* (ACFI)—with Angola, Chile, Colombia, Malawi, Mexico, Mozambique and Peru. Later, in 2017, Brazil signed an investment treaty with the other States parties of the MERCOSUR

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(Argentina, Uruguay and Paraguay) which is heavily inspired by the ACFI. The reasons that make these developments worthy of interest are twofold: Firstly, until then, Brazil stood out as one of the major economies *never* to have had any international investment agreement in force. This is a remarkable fact in itself, as virtually the entire globe has signed treaties of this type—in particular the so-called Bilateral Investment Treaties (BITs)—especially after the 1990s (Elkins et al. 2006). Secondly, although Brazil decided to join the club of countries having investment agreements, it did so bringing along its own model of agreement—a model that is unique among other factors because it radically departs from the globally widespread BIT format.

How do we make sense of this recent shift of the Brazilian government towards the voluntary late adoption of a specific endogenous variety of investment agreements? Following the literature on comparative public policy, patterns of adoption can be seen as the consequence of diffusion processes, whereby decisions made in a given jurisdiction are influenced by other decisions made elsewhere. Late adoption—occurring when the cumulative distribution of adopted policy is well above fifty percent of the reference population, as it is the case of investment agreements—can be the consequence of two very different diffusion mechanisms: on the one hand, the attainment of a critical mass of previous adopters could make further adoption inevitable as the policy innovation becomes taken for granted (Rogers 2010); on the other hand, decision-makers could learn over time from policy solutions that have proven successful in other jurisdictions (Berry and Baybeck 2005). As we will see, in the case under investigation, the new policy centered around the ACFI appears to be more in line with the latter mechanism—a process of policy learning—, as Brazil did not simply adopt a pre-defined model of investment agreement, but rather developed a new, different type of bilateral treaty. This approach was possible because Brazil did not experience time pressure: the country remained attractive for investors even in the absence of an agreement. We shed light on the elements that account for the particular design of the Brazilian approach to its investment treaties.

Our chapter seeks to validate and qualify this expectation of a learning process by exploring three main research questions: (1) Whether the adoption of international investment treaties can be considered as an instance of policy learning; (2) Whether the learning process, if any, went along a Bayesian rational process or a rationally bounded process; and (3) Whether the learning process, if any, was reflexive and geared towards political and/or policy outcomes. In other words, the question is whether the new model serves strategic or instrumental purposes. Finally, by way of conclusion, we will try to distil the scope conditions for this type of late adoption, contributing thus more generally to the literature on policy diffusion.

After a short theoretical section, this chapter proceeds by contextualizing the case studied here. It presents the relevant elements of the international rules governing foreign investments, in particular the global expansion of BITs in the 1990s as well as the increasing criticism this type of treaties confronts today, in the developed and developing world alike. This is followed by an examination of why and how Brazil stayed out of the reach of the BIT-boom wave and has remained an outlier in the investment regime until very recently. The experience of Brazil during this period provides a number of lessons that explains the contours of the new policy expressed in the ACFIs. These lessons, along with others stemming from the Brazilian experience in other policy areas, are viewed in the subsequent section, where the main features of the ACFIs are studied with the specific purpose of spelling out how much the design of this model agreement can be explained as the result of policy learning. Indeed, the design of the Brazilian model agreement can be grasped only by understanding the trajectory of Brazil as a player in the global regimes of investment and trade, as well as by taking into consideration recent developments in the global governance of investment. The lessons emerging therefrom account for the main outlines of the new Brazilian policy to investment agreements. Therefore, while the emergence of the ACFI represents an important shift in the Brazilian policy for foreign investments—as well as an innovative approach to rule-making in this area, when viewed in the global context—, it draws on a number of discernable policy preferences that have been shaped over the years by the interaction of Brazil with international regimes, especially those of trade and investments.

Policy Learning and Late Adoption

When decision-makers voluntarily adopt a policy model after a 'late majority' of adopters already did so (Rogers 2010), two sets of competing explanations shall be considered. On the one hand, an emulative dynamic could be at work, whereby the attainment of a critical mass of previous adopters makes the further adoption of a policy innovation inevitable (Rogers 2010). Accordingly, in the case considered in this chapter, investment agreements would have become a take-for-granted solution once they are widespread, regardless their instrumental properties (Hannan and Carroll 1992). On the other hand, decision-makers could have learnt lessons over time from policy solutions—such as investment agreements—that have proven successful in other jurisdictions (Berry and Baybeck 2005). In terms of observable implications, the mindless implementation of the "standard model" would support the former dynamic, while the development of an endogenous model would speak in favor of the latter process.

- H1a: The adoption of ACFI in Brazil followed an emulative dynamic.
- H1b: The adoption of ACFI in Brazil followed a learning process.

Secondly, if the hypothesis of learning is confirmed, one can distinguish between a rational process based on the Bayesian updating of prior beliefs (Meseguer 2009) and a rationally bounded process structured along cognitive heuristics (Weyland 2009). According to a rational Bayesian process, governments have prior beliefs about the consequences of policy choices that are updated and produce policy change when decision-makers observe and take stock of the successful experience of other governments with other polices in the view of maximizing their expected utility. Instead, the use of cognitive heuristics implies the application of normative shortcuts that cause distortion and biases in the judgement of decision-makers. A well-known example is the tendency of attributing a disproportionate importance to the experience of a country whose information is easily available, regardless of its pertinence for the policy problem at stake.

- H2a: Learning, if any, went along a Bayesian rational process.
- H2b: Learning, if any, went along a rationally bounded process.

Thirdly, we will determine whether the learning process (if any) is 'reflexive' (Dunlop and Radaelli 2013) and, thereby, mostly oriented towards political and/or policy outcomes (Gilardi 2010). Political learning occurs when the success of a policy model is evaluated in terms of the strategic advantages directly provided to the decision-makers, for example in terms of electoral competition. Conversely, the yardstick by which policy learning is assessed corresponds to the instrumental properties of a policy model, that is, to the expected capability of solving the policy problem under investigation. It is worth noting that in this case the two hypotheses are not alternative but complementary.

- H3a: The learning process, if any, was geared towards political learning.
- H3b: The learning process, if any, was geared towards policy learning.

To examine the plausibility of these hypotheses, we will evaluate their congruence with existing evidence on the patterns of adoption in the Brazilian case using primary and secondary sources.

Contextualizing the Case: Bilateral Investment Treaties, from Global Expansion to Growing Criticism

Differently from many areas in international politics—such as trade, human rights and the environment—where there exist *multilateral* rules by which a significant portion of the countries in the world agree on common legal standards, the protection of foreign investments is largely covered by *bilateral* treaties.[1] These agreements—of which there exist nearly 3300 today,[2] signed by virtually every government in the world—often take the form of what is called Bilateral Investment Treaties (BITs).[3] They lay down rules aimed at protecting investments by a national of one of the (State) parties to the treaty against measures taken by the other (State) party, in the jurisdiction of the latter—in cases, for example, of acts of expropriation taken by one of the parties. Figure 13.1 shows the cumulative number of BITs signed worldwide over time.

Although there are variations across BITs, a common legal commitment to most of them are Investor-State Dispute Settlement (ISDS) clauses.[4] These provisions enable investors to subject States to international arbitration to rule on measures adopted by the latter. ISDS provisions set BITs apart from international treaties in general since traditionally disputes submitted to international tribunals have as parties exclusively States, not natural or legal persons.[5]

The justifications often invoked for the existence of ISDS clauses are the alleged risks that would ensue if investors were left to seek redress before national courts (where governance problems might be a reality) for any harm to their investments they might suffer having origin

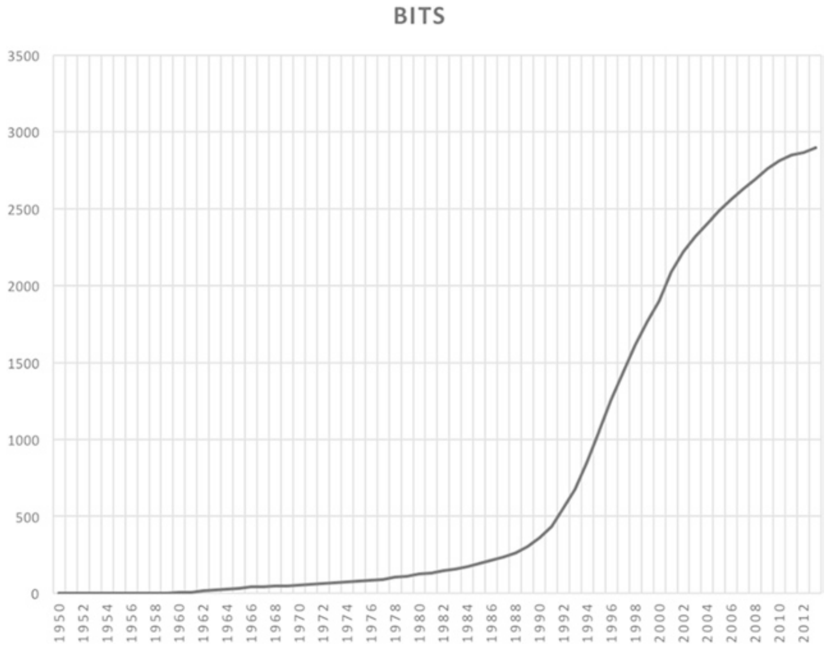

Fig. 13.1 Cumulative BITs signed (*Source* UNCTAD, dataset compiled by Poulsen)

in measures adopted by the local authorities of the host State. Another would be the 'de-politicization' of investment disputes, since under ISDS mechanisms the decision to pursue international litigation is taken exclusively by the investor. It is argued that if the home State of the investor were required to decide on whether or not to move forward with the dispute settlement, this decision would inevitably be a political one—with the risk that the investors' grievance might be put aside or downgraded in importance in view of broader political considerations regarding the bilateral relations between the involved States.

It should be evident that this type of provision ultimately limits the exercise of the sovereign prerogative of a State to determine the conformity to law of events taking place in its jurisdiction. It is also unique in that it subjects decisions taken by a State to the authority of an international arbitration tribunal in pursuance of a claim brought by a private party. Yet, many countries signed up to BITs containing ISDS clauses—especially developing countries—as this was considered an important signal by cash-strapped economies to attract much-needed foreign investment.[6] It is for these reasons that originally most of the BITs were signed between a developed and a developing country.

In addition to ISDS clauses, BITs also often contain a number of standard rules that commit the States parties to afford an investor of the other party a minimum level of protection. It is these standards that will be applied, if needed, by international arbitrators should a dispute arise. These rules are, for example, the commitments by which States agree to grant investors—nationals of the other party—'fair and equitable treatment', or that protect investors against measures 'having an equivalent effect' to an act of expropriation or also that accord investors treatment as favourable as that granted to investors of third States with which a host State has entered into an investment agreement ('most-favoured nation' treatment).

The 1990s saw the most significant expansion of the BITs, with the number of agreements increasing from 385 at the end of the 1980s to 1857, involving 173 countries, by the end of the 1990s.[7] There are now 2958 BITs.[8]

Previous research has found that this impressive spread of investment treaties depends on both competition and coercion as diffusion mechanisms (Elkins et al. 2006). On the one hand, growing international competition among potential host countries creates pressures to improve the credibility of their domestic legal frameworks to attract foreign direct investment flows and thereby to sign investment agreements. On the other hand, conditionalities such as those provided by IMF assistance plans and loans frequently act as drivers for entering into BITs. A recent piece of research argued convincingly that, in view of the strong interest to attract investments, many developing countries signed BITs under such a degree of bounded rationality that they did not engage in the 'careful scrutiny and bureaucratic review' expected in the context of negotiations entailing potentially costly international obligations. What is more, even after arbitration decisions started to emerge ruling against public policies adopted by States, 'officials failed to seek and consider relevant information about the liabilities and regulatory constraints that could arise from investment treaty arbitration' (Poulsen 2015, p. 17). In other words, the potential of international arbitrators to second-guess on national public policies by means of the interpretation of rules such as 'fair and equitable treatment' to an investor has not been duly assessed when negotiating and signing investment agreements. As this chapter shows, the experience in Brazil points to another, complementary explanation.

To begin with, the growing number of cases investors brought against States before international arbitrators contributed to wane the global appeal that had led most of the countries to sign BITs. A total of 767 ISDS cases are reported by the UNCTAD between 1987 and 2016.[9] Arbitration cases emerged where investors would claim that measures taken by public authorities in areas such as environment, utilities and financial stability would impair their rights stemming from a BIT. Initially, most cases were filed against developing countries. According to the UNCTAD, '(…) at least 73 governments—45 of them in developing countries, 16 in developed countries and 12 in South-East Europe and CIS [the Commonwealth of Independent States]—were involved in investment treaty arbitration by end 2007. (…) As many as 90% of known disputes were initiated by firms headquartered in developed countries'.[10]

More recently, investors have been increasingly taking to international arbitration also measures adopted by developed countries—and this (literally) brought home to traditional capital-exporting countries the concrete implications of the BITs, in particular of ISDS provisions. Claims brought against developed countries accounted for 40% of the total in 2015.[11] High-profile cases against developed countries in public policy areas such as public health and the environment have contributed to give an unprecedented (negative) visibility to the concrete operation of the BITs and their ISDS clauses, spurring public debates on the very appropriateness of ISDS. In Europe, for example, public outcry against ISDS almost derailed the EU-Canada trade agreement, the Comprehensive Economic and Trade Agreement (CETA).

The conjunction of the experiences of developing and developed countries has ushered in the current stage in which the reform of the international investment agreements is the mainstream policy orientation. While some countries are denouncing or not renewing their BITs,[12] others are working on proposals that simultaneously preserve the core features of the ISDS mechanisms but address what have been considered institutional shortcomings of the arbitration system.[13]

It is in this moment of reform that Brazil decided to join the system, but it did so drawing on a different experience as the ones described above.

The Experience of Brazil with the Investment Regime: Learning from the Outside

Brazil did not exactly miss the signing spree of BITs during the 1990s. In fact, the country signed 14 BITs during that period and 6 of these agreements were submitted to the Brazilian National Congress as a step in the process of ratification.

The debates in Congress reveal a strong resistance to letting these agreements be ratified by the Brazilian government in the terms they had been negotiated, that is, following the standard content of BITs. Lawmakers opposing the approval of the BITs were not a numerical majority, but they have been influential enough to convince other lawmakers of their case. This led the Brazilian Executive to withdraw from Congress all the BITs that had been previously submitted for approval after appraising the political cost of forcing its way through parliamentary resistance (Campello and Lemos 2015, pp. 1055–1086).

One of the interesting aspects in this process is the contrast between the existence of a rather sophisticated debate in the Brazilian Congress on the implications of BITs—which could easily be confused as part of the current discussions on the reform of investment agreements—with the apparently altogether scarcity of discussions in a number of developing countries that by then were entering into this type of agreements. The debates reveal a unique degree of awareness to the risks that BITs could entail to the decision-making capacity of the State. According to the text of the *rapporteur* of the Brazil-Germany BIT, adopted unanimously in more than one committee in the Brazilian Chamber of Deputies (lower house of the federal-level Legislative branch), '(…) the need to attract foreign investments should not, in our view, prevent the necessary debate on the legal, economic and political implications that will ensue from agreeing with' the BITs.[14]

Lawmakers at the time warned about the risks of limiting the policy space enjoyed by authorities. It was argued that the BITs would constrain the possibility of, for example, implementing domestic policies aimed at fostering local industrial and technological capacity, since this could entail some sort of discrimination against non-nationals. Dealing with the BIT provision that prescribed the need for compensation in case of measures that would amount to indirect expropriation, the report adopted by the lawmakers contains language that would easily pass for a text currently being discussed on investment agreements: "(…) the poorly-drafted and open-textured wording of this provision might lead to a wide range of interpretations. (…) [T]his provision would open the way for abusive claims by a foreign company at the same time that it would limit the capacity of the State (…) to regulate economic activities having in view labor, environmental, public health and other concerns, as well as the national interest."[15]

Another area that risked being affected was the ability of the government to regulate the flow of capital in the case of balance of payments emergencies, as the BITs prescribe the free flow of funds invested in the host State.[16]

In addition, although at the time the number of investor-State disputes was not as pronounced as today, the ISDS clause attracted a great degree of criticism. In particular, parliamentarians made the political argument that the ISDS provisions "would put at the same level two completely different subjects: the Brazilian State, an entity endowed with international legal personality, and a domestic private law entity",[17] which caused concern in itself, aside from the fact that it enabled the foreign investor to escape the authority of the Brazilian courts. This argument, in turn, backed the legal claim, also raised at the time, that the ISDS clause would grant "the foreign investor a privilege denied to the national investor", who would not enjoy the same prerogative of bypassing the Brazilian judicial system.[18] Such discrimination would be inconsistent with the Brazilian constitution. For these reasons, lawmakers raised the possibility of conditioning the presentation of any claim by an investor before an international tribunal to the acquiescence of the Brazilian government—which in reality deprived the ISDS clause of a core element.

Lawmakers also questioned the claim that BITs would be important in the efforts of developing countries to attract foreign investment. They pointed to the fact, already visible at the time, that many countries had signed BIT and yet were not recipients of foreign investments.

As mentioned before, the criticisms raised during discussions in Congress were enough to motivate the Brazilian Executive to discontinue the domestic approval process of all the BITs the country had signed, not only the 6 submitted for parliamentary scrutiny. Although it was left wing lawmakers that led the efforts to propose adjustments to the BITs—so as to respond to concerns with the policy space as well as to afford equal treatment towards the national investors—, their arguments received support across party lines.

Table 13.1 Brazil as a destination of foreign investment (*Source* UNCTAD World Investment Reports)

Position in the top 20 global investment destinations 2006–2015	
Year	*Position in the ranking*
2006	19
2007	14
2008	10
2009	14
2010	5
2011	5
2012	5
2013	7
2014	6
2015	8

The lessons from the debates in Congress would persist and help shape the design of the ACFI years later.

Some of the claims raised during the congressional debates would be borne out. One of them concerns the causal link between BIT and the attraction of investment. Despite the decision not to be a party to any BIT, Brazil not only continued to be attractive to foreign investments in the period following the rejection of the BITs, but it became even more attractive over the years, as shown in Table 13.1.

Brazil has also kept a continuous stance towards international dispute settlement. If approved, the BITs would have represented a break from a steady line in foreign policy by which Brazil only recognizes the authority of international tribunals that adjudicate on State-to-State disputes. Until today this remains the position adopted by Brazil. Perhaps the only noteworthy departure from this political preference is the recognition of the jurisdiction of the Inter-American Court of Human Rights, a tribunal with power to rule on violations of the Inter-American Convention on Human Rights. But even in this case private parties do not have direct access to the tribunal—as in the BITs—since they have to submit their claims to the Inter-American Commission on Human Rights, which is then entitled to submit the claim to the Court, if convinced of the need to do so.[19]

Furthermore, in the years following the rejection of the BITs in Congress, Brazil became one of the most active participants in trade litigation within the (quasi-judicial) dispute settlement system of the World Trade Organization, which exclusively admits State-to-State claims. This development certainly contributed to generate an important expertise in international trade disputes in Brazil, with possible cross-fertilization towards investment disputes. But, more deeply, it also reinforced the foreign policy preference for State-to-State dispute settlement before international tribunals.

Another experience with international dispute settlement was simultaneously gaining traction at the regional level, within the MERCOSUR, the free-trade bloc comprising Brazil, Argentina, Paraguay and Uruguay. Dispute settlement procedures within MERCOSUR are essentially divided between a first stage, where technical and diplomatic consultations are held between involved States with a view to finding a solution to a trade issue, and a final, last resort phase, where the claim is submitted for resolution before a regional tribunal.

While the total number of disputes taken to judicial resolution in MERCOSUR is not significant—14 cases over more than 20 years—the experience gained from addressing and/or solving disputes at the consultations stage is far from negligible. This experience exposed Brazilian officials to the permanent practice of alternative (i.e. non-judicial) methods of dispute settlement with their peers from other member States of MERCOSUR. Thus, if it may be argued that recourse to these methods might not always have proved successful, it is also fair to recognize that experience was gained nonetheless.

In sum, even if Brazil remained an outsider to the investment regime, its trajectory saw emerge a number of lessons that would prove instrumental once the country opted to become an actor in the investment regime. In particular, the Brazilian experience (1) demonstrated that BITs were not *sine qua non* to attract foreign investment; (2) revealed the existence of influential voices in Congress against granting foreign investors prerogatives that could encroach upon the policy space of public authorities; and (3) reinforced the perception that international disputes should be solved among States, whether at the diplomatic level or before international tribunals.

Designing the ACFI: Discerning the Impact of Policy Learning in the Outlines of the New Brazilian Policy for Foreign Investment

During the course of the 2000s, Brazil strengthened its position as a capital-exporting country, alongside remaining a traditional destination for foreign investment. The stock of Brazilian outward investment doubled

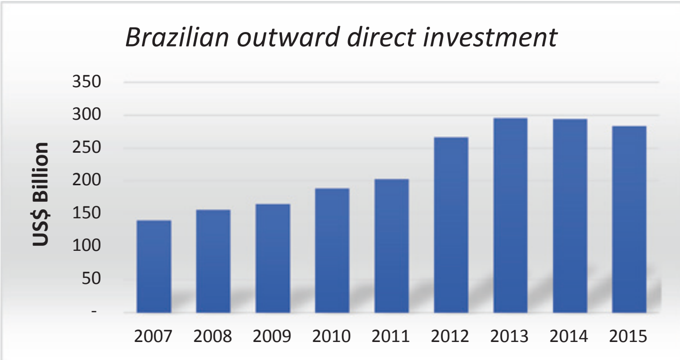

Fig. 13.2 Growth of Brazilian outward direct investment (*Source* Central Bank of Brazil)

between 2007 and 2015, from US$ 140 billion to over US$ 280 billion (Fig. 13.2).[20] In Europe, for example, the stock of investments detained by Brazilian nationals is larger than the one by the Chinese. While Brazil accounts for 2.2% of the total stock of investments in Europe (2015 figures), China is the origin of 2%.[21] According to recent research, in 2015 '*the top 20 Brazilian MNEs [multinational enterprises] had combined foreign assets of approximately US$ 96 billion (…) and 174,448 foreign employees*'.[22]

The increased internationalization of the Brazilian economy gave new momentum to the debate about the need for Brazil to join the international investment regime,[23] only now with a stronger focus on the outward expansion of Brazilian investments. The Brazilian government and the private sector saw in this new trend a window of opportunity to rethink the traditional position with respect to the BITs,[24] especially with a view to mitigate the political risks that Brazilian investors were beginning to experience as they ventured outside Brazil.

From the perspective of the Brazilian government, although the will was present to give a fresh look at this topic, there was the concern 'to avoid the problems emerging from the traditional agreements (…)',[25] that is to learn from the experience of third countries with the BITs.

The ACFI was therefore the product of the interplay between the interests of the private sector, the lessons learnt by the government during the recent past, the lessons observed from the experience of third countries with respect to the BITs, but also of a forward-looking approach to investment agreements that Brazil sought to introduce within the international investment regime.

This new approach finds expression in the idea of 'facilitation' of investments and in what undergirds this notion, namely the intention to lay down disciplines for fostering the long-term exchange of investments between the States parties. This represents a shift from the manner BITs govern investment protection, which is heavily focused on the disputes stage and on the rights an investor can claim against a respondent State. The ACFI, in contrast, places the emphasis on how the State's parties can streamline their respective domestic investment environments and on how possible emerging frictions can be dealt with without the need to resort to a full-blown dispute settlement procedure before an international tribunal.

But even this new element introduced by the ACFI within the framework of international agreements—the idea of 'facilitation'—draws on lessons stemming from another area, that of trade negotiations, where the World Trade Organization had successfully been able to adopt the Trade Facilitation Agreement in 2013. The experience of legislating on 'facilitation measures', in opposition to rules with little flexibility, an arguably new type of approach in trade law, provided a clear inspiration to the ACFI.

The ACFI also deliberately avoids provisions of BITs that have proved controversial over the years, such as 'fair and equitable treatment' to investors and protection of the investment against measures that could be considered equivalent to acts of expropriation. The option to leave out possible constraints on the ability to implement public policies is motivated by the interest of inhibiting far-reaching interpretations of these clauses as has been documented in previous decisions by international tribunals in cases involving countries that, differently from Brazil, are parties to BITs. Furthermore, this option also takes into consideration the concerns voiced during the debates of BITs in the Brazilian Congress in the early 2000s—concerns which arguably are still prevalent in Brazil.

The most notable feature of the ACFI, when placed in contrast to the traditional BITs, though, is the lack of Investment-State Dispute Settlement. The Brazilian model investment agreement provides exclusively for disputes to be settled on a State-to-State basis and conditioned on the failure to solve the case during the consultations stage.

Table 13.2 Why not opt for an agreement with ISDS provisions? Lessons from international and domestic experiences

Origin	*Lessons*
International-level	• Countries that had signed BITs faced constraints in their policy spaces as a result of decisions taken by arbitral tribunals established under investor-state dispute settlement rules
Domestic-level	• No evidence that lack of BIT (nor the commitment to accept ISDS mechanisms) dissuaded foreign investors to come to Brazil • Positive experience with state-to-state dispute settlement in trade matters at the World Trade Organization • Experience gained in MERCOSUR of dealing with state-to-state consultations as a condition to beginning dispute settlement by international tribunals • Negative experience when the Brazilian government tried to pass BITs in Congress (early 2000s). Provisions for ISDS contained in those treaties have been subject to intense criticism, including claims of inconsistencies with the Brazilian Constitution. Arguably, these claims remain valid

This option clearly owes to the lessons accumulated over the years, in particular to the perception that this traditional policy preference has been proving the right one for a country like Brazil.

In some respects, the decision not to incorporate an ISDS clause into the Brazilian model agreement summarizes the reasons that explain more broadly the main features of the ACFI. And these reasons, listed in Table 13.2, are in turn mostly due to the particular interaction of Brazil with the international investment regime, but also takes into account the (negative) experience of third countries with a regime where the BIT-format prevails.

How Much Policy Learning Is Built into the Design of the Brazilian Investment Model Agreement?

This chapter explores an empirical puzzle with important theoretical implications: as a late adopter of investment agreements, what accounts for the specific features of the Brazilian approach?

Firstly, the Brazilian government was faced with the challenge of rethinking its traditional stance with respect to international investment agreements, a challenge that was presented by the Brazilian private sector, an actor with increasing interest in a fresh approach to this policy area in view of the internationalization of the Brazilian economy. In designing this policy shift, though, the Brazilian authorities drew inspiration from lessons learned by Brazil not only in the area of foreign investments, but also from other areas, such as trade. Thus, while the ACFI marks a break with a tradition, it also represents the projection of preferences Brazil has long held in other areas now to the area of investment. Interestingly, at the same time that it reflects a collection of long-standing policy preferences promoted by Brazil, the Brazilian model of investment agreement is very innovative when put in contrast to the solutions being sought by actors who are currently engaged in reforming the regime of investment agreements—most of which are pursuing no more than incremental changes to the BITs. The development of such an endogenous approach corroborates the hypothesis (1b) of learning, while disqualifying the hypothesis (1a) of emulative dynamics.

Secondly, our analysis has shown that Brazil went through a learning process, which can be tentatively qualified as Bayesian, whereby prior beliefs are progressively updated in the light of available evidence. In particular, our narrative shows that the lessons learned from the past and from abroad were actually used by the government in a context-sensitive manner to develop the endogenous version of BITs, the Brazilian model of investment agreement. This finding (which supports hypothesis 2a) is in line with analogous research pointing to the 'pragmatic' approach of Brazil in international economic relations (Gabriel 2016; Trubek et al. 2017). Instead, no strong evidence pointing to the use of cognitive heuristics is found (hypothesis 2b).

Thirdly, the government was able to draw lessons from both negative and positive experiences (Stone 2001), in a context characterized by the increasing attractiveness of Brazil for foreign investments and its economic internationalization. Negative experiences concerned the existing constraints derived from BITs, at the international level, and the parliamentary rebuttal of BITs in the early 2000s, at the domestic level. Positive experiences were mostly derived from State-to-State management or settlement of disputes in international organizations such as WTO and MERCOSUR. This process of lesson-drawing that proceeds through the explicit evaluation of negative and positive experiences in terms of policy success is mostly consistent with a process of policy learning (hypothesis 3b), occurring when decision-makers are primarily interested in the instrumental implications of policy innovations (Gilardi 2010). Instead, since the late adoption of these agreements cannot be considered as particularly electorally palatable, the complementary hypothesis of political learning is not confirmed (hypothesis 3a).

More generally, this case also sheds light on processes of late adoption. First of all, it confirms that late adoption does not necessarily follow the attainment of a critical mass regardless the properties of the policy innovation at stake. Instead, it can be the outcome of a learning process. Furthermore, it suggests that a longer time span before adoption may enable Bayesian learning, as opposed to bounded learning, which would be more likely to take place within a shorter time frame.

Finally, a structural factor such as the growing economic attractiveness and international integration of Brazil seemed to have played a key role as trigger of an instrumental process of policy learning geared towards new policy solutions. This factor—perhaps more than the others that make unique the Brazilian case—might also be relevant to understand the conditions that could enable other countries to depart so significantly from the globally-disseminated BIT format of investment agreements.

In fact, this structural factor suggests that—at least in the realm of investment agreements—the possibility of engaging in a process of policy learning might not be an option to some actors, which would have no alternative than to subject to the dissemination of standards drafted elsewhere. This line of reasoning would explain the significant shifts in investment policy recently put in place by countries of a roughly comparable global presence to Brazil, such as India and South Africa. In fact, in 2015 India approved a new model BIT which to a large extent tilts the balance of the commitments towards safeguarding concerns with policy space. The new Indian model BIT also prescribes more strict conditions for investors to resort to dispute settlement (Hanessian and Duggal 2017). South Africa also redirected its investment policy, in a development that included the termination of some of its BITs as well as the adoption of legislation subjecting investor claims to domestic remedies and, ultimately, to State-to-State international arbitration (Mossallam 2015).[26]

It could be argued that these countries are endowed with the conditions to bear the political-economic costs that might be associated with altering their policies in such a significant manner. In other words, these countries can afford to turn their learning into policy-making input.[27]

Conclusions

In this chapter, we examine the experience of Brazil in the regime of investment agreements as a case study of policy learning. This regime is dominated by a type of international agreement—the BITs—which is vastly disseminated worldwide, across developed and developing countries. Despite enshrining commitments that restrict the policy space enjoyed by States, end does not seem to be in sight for the BIT. Although the idea of a reform of the investment regime is now mainstream, there remains a strong resistance to move beyond incremental adjustments to the BIT.

Brazil has never been a party to a BIT, a virtually unique position. Furthermore, when the country decided to bind itself to investment agreements—beginning in 2015 and with an eye on its growing outward investments—it did so under its own terms, following a model agreement it conceived, which departs significantly from the BIT.

The Brazilian experience also stands out from those of other developing countries, some of which, as mentioned in this chapter, signed up to BITs unaware of the full consequences of this decision. The debates currently seen in developed and developing countries around features of BITs—such as the Investment-State Dispute Settlement mechanisms—took place in Brazil in the late 1990s-early 2000s, especially in the Brazilian Congress. The upshot is that Brazilian authorities realized that parliamentary rejection to BITs are a concrete scenario.

Furthermore, the Brazilian case also apparently defies the argument that BITs were necessary to attract foreign direct investments. The recent changes in investment policies in countries such as India and South Africa should provide additional inputs to the future discussion on this alleged causal link between mainstream BITs and attraction of investments.

As argued in this chapter, Brazil drew on these and other experiences when it opted to change its policy towards investment treaties and join the network of investment agreements. The design of the Brazilian model investment agreement—the ACFI—was the result of an instrumental policy learning process geared towards the Bayesian updating of prior beliefs, whose features can be discerned in foreign policy preferences long held by Brazil as well as on the (negative) experiences of other countries. Interestingly, while the Brazilian model agreement stands out as innovative when compared to 'reformist' approaches adopted by other countries, it is by and large very faithful to the views of Brazil regarding the regulation of trade and investments.

Finally, the case studied here also suggests that this type of policy learning process—at least in the realm of investment agreements and treaties with similar characteristics—might be an option available only to actors possessing a number of enabling conditions (in the example of Brazil, the capacity to attract investment without committing to BIT-type rules due to its market size, growth and attractiveness). For actors lacking such conditions, the alternative could be no more than subjecting to the dissemination of standards drafted elsewhere.

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Notes

1. The draft *Multilateral Investment Agreement*, negotiated within the framework of the OECD between 1995 and 1998, foundered due to strong opposition from civil society but also because developed countries were unable to agree on a number of relevant elements of the treaty.
2. The precise number is a total of 3329 treaties, of which 2671 in force. See UNCTAD Investment Policy Hub, at http://investmentpolicyhub.unctad.org/IIA. Accessed 1 June 2017.
3. Aside from BITs, other international agreements may contain disciplines on investments quite similar to a BIT. These treaties, such as free trade agreements, are not the majority of instruments governing investment protection, though. BITs account for 2958 of the total 3329 agreements mentioned above. See UNCTAD Investment Policy Hub, at http://investmentpolicyhub.unctad.org/IIA. Accessed 1 June 2017.
4. Present in 2420 BITs. See UNCTAD Investment Policy Hub, at http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu. Accessed 1 June 2017.
5. Claims brought before international tribunals can, nonetheless, be originated on grievances suffered by natural or legal persons. But it is the States of which they are nationals that hold the prerogative to decide whether to pursue any sort of redress to this grievance before an international court, under what international lawyers call 'diplomatic

protection'. This is in essence the dynamics of trade disputes at the World Trade Organization, in which claims submitted by a State involve what originally might have been a complaint by a natural or legal person.

6. The causal link between a BIT and the actual attraction of investments is debated among the specialists, but we do not intend to discuss this topic here.
7. See UNCTAD. 'Bilateral investment treaties quintupled during the 1990s', Press release TAD/INF/PR/077, 14 December 2000, available at http://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=2655. Accessed 1 June 2017.
8. See UNCTAD Investment Policy Hub, at http://investmentpolicyhub.unctad.org/IIA. Accessed 1 June 2017.
9. UNCTAD, *Investor-State dispute settlement: Review of developments in 2016*, IIA Issues Note, number 1 May 2017, available at http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf. Accessed 12 June 2017.
10. UNCTAD, *World Investment Report 2008*, Geneva, United Nations Publication, p. 16.
11. UNCTAD, *World Investment Report 2016*, Geneva, United Nations Publication, p. 105.
12. South Africa and India, for example.
13. The European Commission is working on a proposal to create a multilateral permanent investment court, with a view to ensuring coherence and more predictability in the decisions on investor-State disputes, as aspect that has frequently been considered a disadvantage of the arbitrations, which are ad hoc. See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608. Accessed 12 June 2017.
14. Diário da Câmara dos Deputados (*Official Journal of the Chamber of Deputies*), August 2003, p. 37785.
15. *Idem*, p. 37791.
16. This was clear in the discussions in the Brazilian Congress on the Brazil-Germany BIT (Draft Legislative Decree—PDC 396/2000). See the conclusions by the rapporteur of the bill in Congress at http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=13764/.
17. Note 15 above, p. 37790.
18. Idem.
19. Still, in the case of the Inter-American Convention on Human Rights, Brazil did not immediately accept the jurisdiction of the Court. The country joined the Convention in 1992 but only recognized the authority of the Court to hear claims against Brazil in 1998.
20. Central Bank of Brazil.

21. Eurostat, 'The EU continues to be a net investor in the rest of the world', Press release of 12 January 2017, available at http://ec.europa.eu/eurostat/documents/2995521/7788281/2-12012017-BP-EN.pdf/684f355f-8fa6-4e75-9353-0505fa27f54f. Accessed 12 June 2017.
22. Columbia Center on Sustainable Development and Fundação Getúlio Vargas, 'The top 20 Brazilian multinationals: Divestment under crises', report of March 21, 2017, available at http://ccsi.columbia.edu/files/2013/10/EMGP-Brazil-Report-March-21-2017-FINAL.pdf. Accessed 12 June 2017. The figures are underestimated as they do not incorporate results from companies in the construction and in the financial sectors, where the Brazilian economy is also highly internationalized.
23. A point made by two actors directly involved in the drafting of the ACFI: (Cozendey and Cavalcante 2015), p. 89.
24. As, for example, in the 2009 report of the Brazilian National Confederation of Industry, available at http://areapublica.confea.org.br/arvore_hiperbolica/1.1.1.1.03.06/noticias/Integracao%20Internacional_ago09_WEB.pdf. Accessed 12 June 2017.
25. Cozendey and Cavalcante, *cit.* at 89.
26. *See* 2015 Protection of Investment Act, *Act No. 22 of 2015: Protection of Investment Act, 2015*, 15 December 2015, https://www.thedti.gov.za/gazzettes/39514.pdf. Accessed 24 October 2017.
27. The cases of China and Russia are somewhat different as these two BRICS countries, until the present moment, continue to by and large employ the traditional features of the BITs into their treaties.

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