TIME TO JOIN THE “BIT CLUB”? PROMOTING AND PROTECTING BRAZILIAN INVESTMENTS ABROAD

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“Emerging? No. Brazil has already emerged.”

I. INTRODUCTION

The tables have turned. Multi-National Enterprises (“MNEs”) hailing from developed countries are no longer exclusive protagonists in the Foreign Direct Investment (“FDI”) arena. Indeed, the world has begun to focus attention on MNEs from emerging markets. Brazil, with its thriving economy and growing international presence, is a case in point.

Endowed with the seventh largest economy in the world, Brazil has attracted considerable attention from investors, economists and governments around the world. 1 Jamie Dimon, CEO of JPMorgan Chase & Co, quoted in Claudia Vassalo, Letter to Our Readers: Country of the Present, EXAME MAGAZINE (Special Edition), Dec. 30, 2009 (on file with author).

2 Emerson de Almeida et al., Foreword, in FOREIGN DIRECT INVESTMENT FROM EMERGING MARKETS: THE CHALLENGES AHEAD at vi (Karl P. Sauvant et al. eds., 2010) (noting that “[t]he growth of MNEs from emerging markets has begun to focus attention around the world on the role of these new players”)(emphasis added).


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This resource-rich country is home to prominent global companies, such as Petrobras, one of the world’s largest oil companies, and Vale, the world’s biggest iron ore producer. Although commodities are undoubtedly one of Brazil’s economic strengths, the country also boasts thriving banking and insurance communities, as well as a well-developed technological industry.

4 BRAZIL AS AN ECONOMIC SUPERPOWER? UNDERSTANDING BRAZIL’S CHANGING ROLE IN THE GLOBAL ECONOMY 1 (Lael Brainard & Leonardo Martinez-Diaz eds., 2009) (noting that “Brazil’s economy has yet again become an object of fascination and speculation for international investors, academics, pundits and policymakers in the United States and Europe”).

5 See Edmund Amann, Technology, Public Policy, and the Emergence of Brazilian Multinationals, in Brainard & Martinez-Diaz, supra note 4, at 215 (“The growing prominence of homegrown multinational corporations has been one of the most striking features of the recent resurgence of the Brazilian economy”); see also GETULIO VARGAS FOUNDATION, THE PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY: SECOND BRAZILIAN CENSUS 27 (Mar. 2012), available at http://gvcepe.com/site/secondcensus-privateequityventurecapital (“Brazil has become a showcase for business opportunities, a paradigm of macroeconomic management, institutional development and a consolidation of democracy”).


8 Alexander Ragir, Hedge-Fund Paradise, BLOOMBERG MARKETS, Jul. 2011, at 106 (noting that “Brazilian Banks have overtaken U.S. M&A advisers . . . Brazil saw 143 mergers and acquisitions totaling $84.8 billion in 2010.”) (on file with author).


Along with this rosy economic picture, Brazil’s FDI story has been quite impressive. Brazil has been the recipient of significant FDI since 2005 and the country’s economy has been consistently taking the “lion’s share” of FDI in Latin America. Brazilian FDI inflows amounted to $48 billion in 2010, making it one of the largest FDI recipients in the developing world. Further, Brazilian inward FDI stock was $400 billion in 2009 (the second highest figure amongst developing nations after China), and increased to almost $500 billion in 2010.

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12 Id. at 52, Fig. A; UNCTAD, Global and Regional FDI Trends in 2010: Highlights, in 6 GLOBAL INVESTMENT TRENDS MONITOR (2011), available at http://www.unctad.org/en/docs/webdiaedia20111_en.pdf (“Nearly all the big recipient countries saw inward flows increase, with Brazil remaining the largest destination for the fourth consecutive year”).


16 Id.
But inward FDI is only one part of the story. An increasing number of Brazilian companies are now jumping on the internationalization bandwagon and consequently contributing to the exponential growth of outward FDI ("OFDI") from emerging economies.17 As Theodore Moran notes, “the spread of multinational enterprises outward from emerging markets is an increasingly important phenomenon.”18 Brazil was one of the first countries to emerge from the recent global recession. This enabled Brazilian companies to adopt an aggressive acquisitions strategy around the world, spending its cash reserves on investments in diverse industries.19 In 2010, Brazilian companies spent $7.8 billion in acquiring foreign entities20 and Brazilian OFDI flows amounted to $11.5 billion – making it the largest outward foreign direct investment from a country in South America.21 Furthermore, Brazilian OFDI stock reached a peak of $200 billion in 2012.22 These statistics tell us something significant: Brazil has not only become a “hot spot” for foreign investors, but it is also becoming a “key player” abroad, too.

Despite the outward exodus of investment, Brazil lags behind the international community with respect to international investment protection, particularly investor-state arbitration.23 It remains the only South American country not to have ratified a Bilateral Investment Treaty ("BIT").24 Consequently, Brazilian

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17 WORLD INVESTMENT REPORT 2012, supra note 11, at 38 (“The rise in FDI outflows was driven mainly by the growth of FDI from developed countries”); see, e.g., Brazil’s Gerdau to Invest $253 Million in Peruvian Unit, FOX BUSINESS, Sept. 13, 2012, available at http://markets.m.foxbusiness.com/quickPage.html?page=32642&content=79911087.
19 This strategy is part of a larger trend in developing countries, and in Latin America and the Caribbean in particular. See UNCTAD Global and Region Trends of FDI Outflows in 2010, 6 GLOBAL INVESTMENT TRENDS MONITOR, Apr. 27, 2011, at 4, available at http://www.unctad.org/en/docs/webdiaeia20114_en.pdf (“The region’s TNCs, bolstered by strong economic growth at home, have increased their acquisitions abroad, particularly in developed countries where investment opportunities have arisen in the aftermath of the crisis”).
20 Id. at 7; see also UNCTAD, WORLD INVESTMENT REPORT 2010: BRAZIL, available at http://www.unctad.org/sections/dite_dir/docs/wir10_fs_br_en.pdf (noting the figure was $2.5 billion in 2009).
21 In April 2011, figures from Brazil’s Central Bank showed that outward FDI was $8 billion, indicating that outward FDI for 2011 would surpass 2010 figures. See Central Bank of Brazil, Economic Indicators: Direct Investments Abroad (2012), Brazil Central Bank Statistics, available at http://www.bcb.gov.br/?INDICATORS.
23 Jean Jalicki & Suzana Medeiros, Investment Arbitration in Brazil: Revisiting Brazil’s Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration, 24 ARB. INT’L 431 (2008) (noting that “Brazil remains a notable exception to the current global trend towards resolution of investment disputes through investor-state arbitration”).
24 See Leany Lemos & Daniela Campello, The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation, WORKING
investors find themselves in an unfavorable position when investing abroad, as they are unable to benefit from protections typically covered by BITs, a fact which investors from other countries may be able to benefit from. To this end, Brazilian MNEs, leading lawyers and scholars have already expressed their concern regarding the country’s lack of an outward foreign investment policy. As one lawyer put it, “Brazil now has some of the most sophisticated multinationals in the world. However, the country’s stance on BITs has become a barrier to them protecting their interests outside Brazil.” Further, a 2008 survey

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25 See Atração de Investimento Estrangeiro Direto (IED) no Brasil, CENTRO BRASILEIRO DE RELAÇÕES INTERNACIONAIS, NOTICIAS, NO.11, JAN./FEB./MAR. 2005 available at http://www.cebri.com.br/midia/documentos/janeiromarco2005.pdf (arguing that Brazil needs to develop microeconomic policies to stimulate FDI, as well as reform its political outlook on FDI policies in general); see also Flavia Pereira De Carvalho et al., Understanding Brazilian FDI – An Investigation on the Relationship between Internationalization and Economic Structure, 3(4) INT’L J. OF BUS. ENVIRONMENT 393, 407 (2010) (“The country has never had an explicit policy to foster the internationalisation of domestic firms. On the contrary, for some time the export of capitals was a restricted move, due to Balance of Payments restrictions.”); Luis Afonso Lima & Octavio de Barros, The Growth of Brazil’s Direct Investment Abroad and the Challenges It Faces, 13 COLUMBIA FDI PERSPECTIVES, (Aug. 17, 2009) (“Notwithstanding its remarkable recent growth, OFDI from Brazil needs additional support through sound public policies”); É um bom momento para investir, Entrevista com Karl Sauvant, O GLOBO, Nov. 22, 2010, at 21(“[O] pais praticamente não tem política para investir no exterior”) (Author’s translation: “[T]he country [i.e. Brazil] has virtually no outward investment policy”).

26 Alison Ross, Brazil’s BIT Dilemma, 4(6) GLOBAL ARB. REV. (Dec. 17, 2009), quoting Odebrecht’s external dispute advisor, Jonathan Hamilton.
of Brazilian multinationals concluded that “the great majority of [Brazilian] corporate executives . . . would like to see the government put in place a number of concrete policy instruments and implement them effectively,” including the “conclusion of bilateral and regional treaties to protect investment abroad.”

Brazil’s absence from the BIT regime is particularly intriguing given the global proliferation of BITs in the past few decades. According to the United Nations Conference on Trade and Development (“UNCTAD”), the number of BITs rose “from 385 in 1990 to 2,392 in 1999 [and] by 2005, no fewer than 177 countries had signed at least one investment treaty, with most negotiating far more.” Interestingly, by the end of 2008, 37% of the total number of BITs had been signed between emerging markets. Brazil remains an outlier in this context.

The growing internationalization of Brazilian organizations calls for a greater array of investment protections available to them, particularly as they weave through an increasingly competitive and uncertain global economy. This article argues that the Brazilian government should consider ratifying BITs so as to provide greater protections to its own – domestic – investors. In 2006, Bolivia’s nationalization of two oil refineries owned by Petrobras (a partially state-owned Brazilian oil company) sent shockwaves through the Palacio do Planalto (the Brazilian equivalent of the United States’ White House), “causing considerable tension between the two countries.” As Brazil did not hold a BIT with Bolivia, Petrobras was unable to commence arbitration proceedings against Bolivia to seek redress for the expropriation of Petrobras’ assets. Although Petrobras was awarded some compensation in 2007, this was reportedly below its market

30 Brazil should also be willing to ratify BITs to provide greater protections for foreign investors, but it is argued that the negotiations for these instruments should be initiated by those states who wish to afford greater protections for their investors in Brazil. There is an argument, however, for Brazil to initiate such negotiations so as to further demonstrate its investor-friendly attitude and attract even greater volumes of FDI (assuming that BITs increase FDI inflows, see infra A.1.(a)); see also Lemos & Campello, supra note 24, at 29 (noting that “the growth of Brazilian multinationals brings about ‘offensive interests’ on the regulation of FDI and create new constituencies for the protection of Brazilian investment abroad.”).
32 Though it could have done so via the ICSID Additional Facility, see infra Sec. IV.A.
value. The Petrobras-Bolivia “incident” highlights both the extent of Brazilian OFDI’s growth and the concurrent need to devise policy instruments that are capable of protecting Brazilian investors abroad.

BITs provide an optimal mechanism to protect Brazilian investments abroad. Recourse to international arbitration, coupled with substantive rights, such as a right to be compensated following an expropriation, highlight some of the key advantages of equipping investors with BITs. The leap will not require a monumental mobilization of political capital, nor will it disrupt fundamental principles of Brazilian law. Brazil has firmly established itself as an arbitration-friendly jurisdiction, and has gained the trust of the international investment community by not engaging in the nationalization campaigns of neighboring countries. As Gabriel da Costa notes, Brazil “now has reliable and experienced arbitral institutions, highly sophisticated lawyers and arbitrators, and a clear policy favoring arbitration.”

Given this pro-arbitration trend, this article argues for Brazil’s ratification of the ICSID Convention to expand the repertoire of investment protections available to Brazilian investors abroad.

Accordingly, this article is divided in five parts, including this introduction. Part II explores the advantages and disadvantages of BITs in the Brazilian context. In considering the benefits of investor-state arbitration clauses, this part also

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35 Gabriel Alves Da Costa, Brazil, in LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION IN COLOMBIA, MEXICO, PANAMA, AND BRAZIL 78 (Association of Corporate Counsel ed., 2012).

considers how the Brazilian legal system treats arbitration, and whether it is compatible with investor-state arbitration under BITs. Part III considers the macroeconomic and business reasons for Brazil’s ratification of BITs. It provides an overview of Brazil’s FDI trends, including a historical overview of Brazil’s inward and outward FDI trajectory. It also sketches the growth of the internationalization of Brazilian MNEs over the past few decades. Part IV argues that the advantages of BIT ratification outweigh its disadvantages in the case of Brazil. Accordingly, Brazil should join the “BIT Club” for reasons which can be best grouped under two broad categories, namely to (i) promote Brazilian OFDI and (ii) protect Brazilian investments abroad. Part V considers alternative ways for Brazilian companies to protect their investments abroad, and shows how such alternatives are not as attractive as BITs. These alternatives include treaty shopping, reliance on local courts and remedies, diplomatic protection, alternative methods, and customary international law. Part VI concludes by recommending that Brazil develop an outward investment protection policy that utilizes BITs as its principal instrument.

II. SHOULD BRAZIL JOIN THE “BIT CLUB”? 

There are strong arguments in favor of Brazil joining the BIT Club. 37 This article argues that Brazil should join the BIT Club for two reasons. First, the attractiveness of the BIT system and Brazil’s pro-arbitration policy are sufficiently compelling to merit Brazil’s participation in the Club. Second, the current economic and business trends support, if not require, Brazil’s formal participation in the BIT Club. This Part considers the first reason.

A. Institutional and Legal Framework

1. Advantages of BIT Ratification

The advantages of BITs are well documented. 38 Indeed, BITs play a central role in the international investment protection system. 39 Here, only some advantages to BIT ratification are considered, namely as a tool to (a) attract and

37 See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 8 (2008) (noting that each state should “weigh . . . the economic and financial benefits of a treaty-based promotion of foreign investments against the consequences of being bound to the standards of protection laid down in the treaty”).
39 Zachary Elkins, Andrew Guzman & Beth Simmons, Competing For Capital: The Diffusion Of Bilateral Investment Treaties, 1960-2000, 60 INTERNATIONAL ORGANIZATION 811, 811 (Fall 2006) (Over the past forty-five years, bilateral investment treaties (BITs) have become the most important international legal mechanism for the encouragement and governance of foreign direct investment.)
promote investments, (b) resolve disputes; (c) protect investments; and (d) control risk.

a. **BITs as a beacon: attracting and promoting investments**

For some time now, the literature has debated – both conceptually and empirically – whether the ratification of BITs increases, or attracts, FDI. However, the answer is far from settled. As Porzecanski and Galagher put it, “The jury is still out on the question of whether new treaties for trade and investment have independently led to attracting FDI.”

Conceptually, it has been noted that “[d]eveloping countries have signed BITs on the assumption that these treaties would result in increased flows of FDI . . .” As Tobin and Busch note, “The intuition is that by forsaking uncompensated expropriation and submitting to provisions for third-party dispute settlement, they are likely to receive more FDI, lower their cost of capital at home, and gain better

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40 This advantage arguably does not directly benefit Brazilian investors expanding abroad because it focuses on inward rather than outward investment. However, inward investment may create incentives to compete globally as well as empower national organizations with the resources, know-how and expertise to expand abroad. Furthermore, this analysis works as a two-way process, depending on one’s perspective, as the inflow of FDI originates from the country outflowing FDI. There is no inflow without a source, or an outflow. In other words, an investor from country X investing in country Y is categorized – from country’s X perspective – under outward FDI lenses, whereas the same investment is viewed by country Y as inward FDI. Thus, whether the debate as to whether BITs increase FDI is also relevant to the OFDI context.

41 See Peter H. Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMPARATIVE ECON. 788, 789 (2004) (“Formally, BITs regulate FDI-related issues such as admission, treatment, expropriation, and the settlement of disputes at the bilateral level. Ex ante, they establish transparency about risk and, thus, reduce the risk of investing in a country. Ex post, BITs ensure that firms have certain rights, e.g., property rights, and preserve them from expropriation.”).

42 Tobin & Busch, *supra* note 28, at 3 (“the literature is currently stalemated on the question of whether BITs attract FDI); SORNARAJAH, *supra* note 38, at 172, n.5 (noting that the literature on the subject is “large”); see generally Jerswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties And Their Grand Bargain, in The Effect of Treaties on Foreign Direct Investment, Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 109 n.1 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (“The literature and doctrinal commentary on Bilateral Investment Treaties (BITs) are abundant and have expanded over the years as the number of BITs has grown”).


44 Salacuse & Sullivan, *supra* note 42, at 138; see also Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?, 33(10) WORLD DEVELOPMENT* 1567, 1567 (2005) (noting that “there exists very little evidence answering this question”).
access to technology and managerial skills.”

Thus, in boosting investor confidence, BITs – so the theory goes – are likely to result in greater inflows of FDI.

Attracting FDI in turn has many benefits to the host country. Indeed, FDI is a source of capital and jobs. It also creates “knowledge-spillovers,” given the typically knowledge-intensive nature of FDI inflows. These spillovers occur via the transfer of technology, knowledge and expertise from foreign-owned firms to domestic firms. To this end, FDI means more negotiating power to the host state in the long-run. FDI can also generate foreign exchange as well as tax revenues, and increase the demand for business services (such as banking and legal services). These spillovers may, in turn, empower national enterprises to compete globally, and thus become more active participants in the OFDI arena. Indeed, Sauvant et al. argue that “FDI may improve overall efficiency and, through exports, facilitate entry into new markets, [thus acting as a] ‘passport’ into the international division of production which can improve the economic performance and competitiveness of the host country and indigenous firms.”

But the evidence of whether BITs increase FDI does not fully support its “speculative” conceptual assertions. Indeed, the empirical evidence on the issue is, at best, “mixed.” While some studies find that BITs do attract FDI, others

45 Tobin & Busch, supra note 28, at 10; see also UNCTAD, WORLD INVESTMENT REPORT 2001: PROMOTING LINKAGES (2001).

46 See, e.g., in the context of Argentina, Come and Get Me: Argentina is Putting International Arbitration to the Test, THE ECONOMIST, Feb. 18, 2012, available at http://www.economist.com/node/21547836 (“When Carlos Menem wanted to lure foreign companies to Argentina during his presidency in 1989-99, one of his favored tactics was the bilateral investment treaty. In 1991 he signed deals with the United States and France, among others. They required Argentina to protect foreign firms’ property rights, and to let companies with grievances present claims at . . . ICSID . . . Thanks in part to these treaties, foreign investment soared.”).

47 See RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 46-59 (1971) (noting that successful multinationals are often subject to an “obsolescing bargain,” whereby the skills and resources developed over time in the host state lead to greater negotiating leverage).

48 See Karl P. Sauvant, Wolfgang A. Maschek & Geraldine McAllister, Foreign Direct Investment by Emerging Market Multinational Enterprises, the Impact of the Financial Crisis and Recession and Challenges Ahead, in Sauvant et al., supra note 2, at 20.


50 Tobin & Busch, supra note 28, at 4; UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S, (1998) (finding that the impact of BITs on FDI is small and secondary to the effects of other determinants, particularly market size); Neumayer & Spess, supra note 44 (examining 119 developing countries – including 29 from Latin America – between 1970 and 2001 and finding that countries that sign more BITs with developed countries receive more FDI inflows).

51 See Salacuse & Sullivan, supra note 42; Neumayer & Spess, supra note 44.
view the data as “unclear” arguing that other factors also play an important role. These factors may include “potential financial risks and benefits to the investor, the stability of an investment environment, the availability of appropriate human capital, access to effective enforcement procedures, embedded personal and professional relationships, and other factors.”

Those who argue that “there exists very little evidence” pointing to a positive relationship between BIT ratification and increased FDI note that the correlation is “an untested claim” and that, in any event, “it is empirically untestable whether states will receive more investments if they conclude such treaties.” On this front, Professor Sornarajah concludes that “[i]n reality, attracting foreign investment depends more on the political and economic climate being favorable to such foreign investment than on the creation of a legal structure for its protection.” To this end, international legal instruments may, however, form part of the political attractiveness of a host state, thus further blurring the lines between what attracts FDI and what does not.

From the investor’s perspective, the ratification of a BIT signals that the host state is “prepared to accept standards of protection of investment and international
arbitration to settle investment disputes” as well as to build “market-friendly domestic institutions.” The corollary of BIT ratification is thus the promotion of an investment-friendly environment which welcomes private enterprises and economic growth. Furthermore, from a macro-perspective, “BITs help set the groundwork for concluding trade agreements with deeper and reciprocal obligations, and in this sense may have a greater indirect . . . effect on attracting FDI than has previously been appreciated.”

b. BITs as a sword: dispute resolution

Dispute resolution provisions in BITs have been characterized as “one of the strongest investor protection [provisions] in investment treaties.” It is therefore not surprising that “[i]nvestor-state arbitrations [have] experienced a dramatic increase” in the past decade. Whilst “there were only a handful of internationally arbitrated investor-state disputes in the 1980s and early 1990s,” “by the end of 2007, 290 known international treaty-based arbitration cases had been initiated, involving at least seventy-three countries – fifteen developed countries, forty-four developing countries, and fourteen economies in transition.” The advantages of such dispute resolution provisions can be categorized under two umbrellas: micro and macro advantages.

i. Micro advantages: resolving the investor-state dispute

This is perhaps the most obvious advantage of a BIT investor-state dispute resolution clause. It helps both the investor and host state to resolve investment disputes effectively by recourse to a privately-sponsored dispute settlement system, such as arbitration. This is a major advantage for the investor because country. Instead, BITs can have positive spill-over effects. How important is the signaling effect, which benefits investors from all countries, compared to the commitment effect, which only relates to investors from BIT partner countries, is difficult to say.”).

61 Alvarez, supra note 49, at 41-42.
62 Tobin & Busch, supra note 28, at 3.
64 Jalicki & Medeiros, supra note 23, at 428.
65 Karl P. Sauvant & Lisa E. Sachs, BITs, DTTs, and FDI Flows, in Sauvant & Sachs, supra note 42, at xxxix.
67 See U.S. Model BIT, Arts. 23-36, available at http://www.state.gov/documents/organization/188371.pdf. On a conceptual level, the dispute resolution provision is a clear
he can seek redress without depending on local courts. Not surprisingly, investors often fear that local courts may not grant them “fair and equal treatment . . . when the opposing party is the State or a State entity.”

The “sword” of a BIT is thus the sword of justice; or to be more precise, one of (typically arbitral) adjudication. Indeed, when a government party to a BIT conducts itself in ways that adversely affects a foreign investor’s investment, that investor may initiate arbitral proceedings against the government to seek redress. For instance, the government conduct may involve the enactment of a law that redenominates local currency, the administrative revocation of a banking license, the breach of a government privatization contract, the failure to

element of how international law can be enforced at the supra-national level, and is thus a good – though by no means perfect – example of the change I had previously called for in a previous article, albeit in a different context, namely a change in perspective in the way that international law is administered. See Lucas Bento, Towards an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish, 29 BERKELEY J. INT’L L. 399, 453-54 (2011) (“The problem is not so much one of liberalism, however, but of perspective. International law has chronically suffered from its atypical nature: there is no central legislative, executive, or judicial mechanism. Enforcement is complex and often impossible . . . . Despite its potential, the development of international law remains at the mercy of the political interests of individual sovereign states. Naturally, the conflict of interests inherent in this development creates the right political environment in which international and domestic laws develop with a lesser degree of uniformity than they should. However, the creation of an international legal order that is competent per se, with its own institutions and legal capacity, capable of developing laws and interpreting them in its own right, subject only to the principle of complementarity, may be a real possibility . . .”).

W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 46 (1992) (noting that “[o]ne of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one or the other of the parties and to protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies, with mandatory calls at each successive cubicle to rehear all or part of the case”).

MOSES, supra note 66, at 230; Salacuse & Sullivan, supra note 42, at 118 (“Investor recourse to local courts for protection may prove to be of little value in the face of prejudice against foreigners or governmental interference in the judicial process”).

An investor will typically seek to resolve the dispute via negotiation first. If this fails, an investor picks an arbitral institution listed in the investment treaty and submits a Notice and Request for Arbitration.


provide police protection after forcible seizure of an investment, the termination of a participation contract in an oil field, or Bolivia’s nationalization of Petrobras’ gas plants in that country. The investor-state arbitration provision is thus revolutionary, as it provides a way of directly enforcing rights against harmful government conduct. Indeed, “[i]nvestment treaties are not simply revolutionary because of the substantive protections that they provide. The real innovation was the provision of procedural rights that gave investors a mechanism to enforce the substantive rights directly.”

Most BITs provide for disputes to be resolved via the International Centre for the Settlement of Investment Disputes (“ICSID”), which has also been characterized as “revolutionary.” Having registered 319 cases since its inception in 1965, “it has become clear that the creation of ICSID amounted to the boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment.”

Five features make ICSID stand out. First, foreign companies and individuals can directly bring a suit against their host state, thus bypassing the (now mostly historical) need to bring the matter before the investor’s home state, in the hope

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76 See supra note 31.
77 Compare this to the doctrine of vertical direct effect under EU Law. See generally, EUROPA, The Direct Effect of European Law, available at http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14547_en.htm (“Vertical direct effect is of consequence in relations between individuals and the State. This means that individuals can invoke a European provision in relation to the State.”).
78 Franck, supra note 52, at 343.
79 Id. at 344 (“While ad hoc arbitration under the UNCITRAL Rules has been utilized, the most common form of dispute resolution under investment treaties is to permit arbitration before the World Bank’s International Centre for the Settlement of Investment Disputes . . .”).
80 Jalicki & Medeiros, supra note 23, at 425 (“The ICSID Convention was designed to introduce a revolutionary new process in which states could attract greater investment by consenting to afford investors certain standards of treatment recognized by international law, and by agreeing in advance that investors could present claims for perceived violations directly before neutral international arbitrators, without the need for their own states’ espousal and protection.”).
81 DOLZER & SCHREUER, supra note 37, at 20.
that the latter would resolve the dispute via diplomatic channels. Second, state immunity is severely restricted and thus investors become greatly empowered to bring claims against governmental conduct on a relatively horizontal playing field. Third, international law can be applied to the relationship between the host state and the investor, and can thus maximize the neutrality of the proceedings. Fourth, the local remedies rule is excluded in principle, thus bolstering the efficiency of redress for the investor. Finally, ICSID awards are directly enforceable within the territories of all states party to ICSID, thus providing an immediate – and tangible – remedy to the aggrieved party. Not all BIT disputes are, however, referred to ICSID. Indeed, there are numerous other fora (both institutional and ad hoc) that provide international dispute resolution services.

Advantages of international arbitration are not merely the product of theoretical speculation, but have been confirmed by empirical analysis. Indeed, a 2005 empirical study found that parties choose international arbitration for two primary reasons, namely (i) the neutrality of the forum and (ii) the likelihood of being able to rely on the New York Convention to enforce an award. In other words, parties fundamentally value principles of natural and corrective justice, that is, the right to be heard before an impartial adjudicator (audi alteram partem and nemo judex in causa sua), and the right to enforce a judgment to correct the injustice perpetrated against the injured party. A 2008 study by PriceWaterhouseCoopers also found that international arbitration “remains companies’ preferred dispute resolution mechanism for cross-border disputes,” often considered “superior[] over transnational litigation.” ICSID’s success has in part been due to a pro-arbitration and pro-enforcement culture in signatory states of the New York Convention. As Professor Margaret Moses notes, “the New York Convention is considered to have a pro-enforcement bias, and most

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82 Though some BITs still contain a precondition that the investor is required to first try to resolve its dispute in the courts of the host country. See the Argentina-Netherlands BIT, which entered into force in 1994, cited in MOSES, supra note 66, at 241, n.52.

83 ICSID CONVENTION, Art. 54(1): “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”


courts will interpret the permissible grounds for nonenforcement quite narrowly, leading to the enforcement of the vast majority of awards." As is explored in more detail below, Brazilian courts have a solid track record in adhering to the New York Convention, but they could do more to explicitly refer to the Convention when reaching their decisions.

Other advantages to international arbitration have also been noted, such as the comfort of a party knowing that a decision is final and unlikely to be overturned. Although some grounds exist to challenge an award, the finality of arbitral awards can be an attractive advantage of arbitration from both an investor and state’s perspective.

ii. Macro advantages: promoting peaceful relations amongst nations

This is often an advantage that goes unnoticed, perhaps due to difficulties in verifying its underlying claims. It is, however, likely that the ratification of BITs, and the resulting availability of a civilized method of adjudicating disputes, can foster peaceful relations amongst nations. Indeed, “BITs not only offer protection in the event of disputes but also help to avoid them by providing a framework and level platform for a constructive dialogue between investors and host countries. Such exchanges may contribute to preventing the escalation of issues and the

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87 Moses, supra note 66, at 3.

88 See infra, Part A.3.b. Of course, ICSID’s enforcement mechanism does not depend on the New York Convention, but judicial policy that favors recognition of foreign arbitral awards indicates a predisposition for adhering to the ICSID Convention’s enforcement mechanism. See also LUCY REED, JAN PAULSSON, & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 179-80 (2004) (“A strength of the ICSID Convention is that it is even more favorable to recognition and enforcement of awards than the New York Convention. The ICSID Convention accepts no grounds whatsoever for national courts to refuse recognition and enforcement of ICSID tribunal awards. It requires, instead, that the national courts of Contracting States recognize and enforce monetary awards immediately, as if they were final judgments of the local courts themselves. The courts may not vacate ICSID awards, because they are a-national and subject to the ICSID treaty regime rather than to national law.”).

89 For a concise yet critical analysis of grounds to challenge an award, with particular emphasis on annulsments under the ICSID Convention, see Tai-Heng Cheng, The Role of Justice in Annulling Investor-State Arbitration Awards, 31 BERKELEY. J. INT’L L. (forthcoming) at 23 (noting that “unlike a domestic court decision, which is subject to appeal by a higher court, an ICSID award is not open to appeal. It is only subject to rectification, interpretation, revision or annulment, which are all different in nature from appeals.”). See also Tai-Heng Cheng & Lucas Bento, Practical Measures to Control Annulments in Investor-State Arbitration Awards, N. Y. L. J., Nov. 26, 2012.

90 GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 13 (2012); but see Cheng, supra note 89, at 51 (“Some investors may prefer to have a second chance to win their arbitration by annulling a prior award against them, rather than to lose their disputes with finality once an adverse award is rendered”).
outbreak of international disputes." Therefore, at the macro-level, the existence of treaties (with provisions for enforcement) may facilitate the resolution of conflicting tensions in a peaceful, rather than hostile, way. Peaceful relations may in turn foster greater trade amongst nations, and thus provide greater investment opportunities for investors.

c. BITs as a shield: protecting investments

A BIT would be incomplete if its procedural rights were unaccompanied by substantive rights. Indeed, prior to the time that BITs ever existed, the only protection available to foreign investors consisted of a substantive rule of customary international law called the Hull rule. This was a minimum standard of treatment rule which provided that “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore.” This rule, however, “can no longer be said to represent a binding international legal norm.” Nowadays, BITs provide substantive rights to investors against, inter alia, uncompensated expropriation, and discriminatory treatment. Indeed, “[o]ne of the primary functions of any BIT is to protect foreign investments against . . . interference with property rights by host country governmental authorities.”

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91 Alison Ross, Brazil Breaks Traditional Stance on BITs, 5(1) GLOBAL ARB. REV. (2010) (quoting Rafael Benke).
92 Arguably, though, it is unlikely that states consider this as a reason to ratify a BIT; see also generally MALCOLM N. SHAW, INTERNATIONAL LAW 111 (2011) (noting that arbitrations contribute to the “peaceful settlement of international disputes”).
93 On the relationship between trade and peace, see generally Patrick J. McDonald, Peace through Trade or Free Trade?, 48(4) J. CONFLICT RESOLUTION 547 (2004).
94 See also The Working Group, The International Law Association, German Branch, Sub-Committee on Investment Law, General Public International Law and International Investment Law – A Research Sketch on Selected Issues 8 (Dec. 2009) (“[I]nternational investment law also fulfills an ordering function for investment relations. The legal implementation of international investment law can itself be described as a global public good. Bilateral investment treaties and investor-state arbitration as an institutionalized form of an ‘investment law culture’ remain committed to the common aim of promoting international economic exchange and development through the rule of law.”).
95 Reproduced in 3 GREEN HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-59 (1942); see also Neumayer & Spess, supra note 44, at 1569.
97 Salacuse & Sullivan, supra note 42, at 129. Indeed, expropriation of property by governments has always remained a critical issue in the investment arena. For example, the United Nations identified 875 examples of governmental expropriation of foreign property in sixty-two countries during the period between 1960–1974. See Don L. Piper, New Directions in the Protection of American-Owned Property Abroad, 4 INT’L TRADE L. J. 315, 330 (1979).
Most BITs contain general standards of treatment for foreign investors, including “a) fair and equitable treatment; b) the provision of full protection and security; c) protection from unreasonable or discriminatory measures; d) treatment no less than that accorded by international law; e) requirement to respect obligations made to investors and investments; and f) national and/or most-favored-nation treatment.”

MNEs often favor such provisions as it provides additional comfort and confidence when investing abroad. Indeed, “absent some remedy, the investor is left insecure and may be less likely to invest as a result.” This insecurity stems from what has been termed as the “dynamic inconsistency problem.” This problem suggests that although a host country has an incentive to provide fair and equitable treatment to investors in order to attract FDI, once the investment is made, the host country has a greater incentive to renege on its promise and expropriate the investment (or the assets thereof). In this context, a BIT is a highly attractive tool to provide investors with procedural and substantive rights independent of the local legal system. As Salacuse and Sullivan note, “Without a BIT, international investors are forced to rely on host country law alone for protection, which entails a variety of risks to their investments. Host governments can easily change their own domestic law after a foreign investment is made, and host country officials may not always act fairly or impartially toward foreign investors and their enterprises.”

d. **BITs as a risk management tool**

Overall, BITs can act as a buffer to control investment risk for MNEs. BITs are therefore not only legal tools, but also corporate tools utilized in a larger risk management process.

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99 See Brazil-Netherlands BIT, Art. 3(1) (“Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full security and protection.”).

100 Salacuse & Sullivan, supra note 42, at 129. See Brazil-Netherlands BIT, Art. 3(2) (“More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favorable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favorable to the investor concerned.”). See also U.S. Model BIT, Art. 5(1), available at http://www.state.gov/documents/organization/188371.pdf.


102 Neumayer & Spess, supra note 44, at 1570.

103 Salacuse & Sullivan, supra note 42, at 118.
This focus on risk has already been recognized in the literature, where, for instance, it has been noted that “the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide for stability and predictability in the sense of an investment-friendly climate.” Or specifically, BITs “are designed to reduce the risk of state-led expropriation.”

This has particularly been so in Latin America, where legal stability has been crowned as a top priority for investors to protect them “against the periodic waves of anti-foreigner sentiment that have been a marked feature of [the region’s] history.” Indeed, the political risk stemming from the dynamic inconsistency problem examined earlier in this article can be minimized via the ratification of a BIT. While BITs are not perfect in attaining a complete “mastery of risk,” investors covered by a BIT arguably enjoy a “higher degree of protection from the political risks of governmental intervention than those that are not.” Put differently, “investment treaties promise that host governments will not subject investors and their investments to inappropriate risks.”

BITs are also highly regarded in the risk-management industry. For example, many providers of political-risk insurance, including the French and German governments, require a BIT before they will underwrite an investment. In a similar vein, the Multilateral Investment Guarantee Agency (“MIGA”) encourages nations to adopt BITs to minimize the risk of expropriation of its investments. Hence, there can be little doubt that a BIT can offer both a country and its investors (whether individual or corporate) a more sophisticated way to control risks inherent in the investment process.

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104 DOLZER & SCHREUER, supra note 37, at 22.
105 Kerner, supra note 101, at 76.
108 PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 1 (1998) (“The revolutionary idea that defines the boundary between modern times and the past is the mastery of risk: the notion that the future is more than a whim of the gods and that men and women are not passive before nature”).
109 Salacuse & Sullivan, supra note 42, at 133.
110 Franck, supra note 52, at 342
111 Tobin & Busch, supra note 28, at 4.
2. Disadvantages of BIT Ratification

The disadvantages of BITs are well documented, and this article does not seek to provide a comprehensive account. However, in the context of Brazil, disadvantages would stem from BIT obligations imposed on a national level, rather than difficulties associated with granting rights to Brazilian companies abroad. These national difficulties could, however, lead Brazil to avoid BITs altogether, thus affecting the potential rights of Brazilian companies investing abroad.

a. Sovereignty and regulatory issues

Given the importance of state sovereignty in international law, it is not surprising that an international binding instrument, such as a BIT, may be conceptualized as an infraction of a state’s political and legal supremacy. Indeed, Eric Neumayer and Laura Spess note that “the extent of interference with domestic regulatory sovereignty that developing countries succumb to in signing BITs is enormous.” In being empowered to challenge national provisions that violate a BIT clause, foreign investors can invoke the investor-state arbitration clause to effectively override a host country’s public policy regulations, which can be “as diverse as labor law, the organization of the judiciary, administrative principles, environmental law, health law, and, of course, rules governing property.” Thus, some argue that in ratifying BITs developing countries are “trading sovereignty for credibility.” In a similar vein, some suggest domestic law is displaced, and sometimes replaced, by international investment law because of the BIT in place. This “surrender of sovereignty” acts as a political restraint on the host country, and subordinates local laws and political flexibility to provisions contained in the BIT.

However, there is arguably no “surrender” of sovereignty, since the host state consensually entered into the treaty. Thus, the ratification of a BIT is an exercise of sovereignty rather than an example of subordination. Granted, host countries

112 MALCOLM N. SHAW, INTERNATIONAL LAW 6 (2011) (“While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognizing no one in authority over them”).
113 Neumayer & Spess, supra note 44, at 1571.
114 Often without having to exhaust domestic legal remedies.
115 DOLZER & SCHREUER, supra note 37, at 9-10.
117 Salacuse & Sullivan, supra note 42, at 113.
118 SORNARAJAH, supra note 38, at 178.
119 Id.
can be said to have made a concession or “trade-off”\textsuperscript{120} between the expectation of attracting greater FDI, or protecting its investors abroad, in exchange for a (consensual) interference in local political and legal processes. To this end, however, modern BITs are already “evincing a movement towards preserving regulatory space to interfere with foreign investment arrangements if public interests so dictate.”\textsuperscript{121} Indeed, Arnoldo Wald notes that BITs have evolved and “[t]he newer generation of treaties do a better job of reconciling investors’ rights with a country’s flexibility to govern.”\textsuperscript{122} For example, the new model BIT of the U.S. states that “each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.”\textsuperscript{123}

Nonetheless, some concerns as to the impact of BITs on local institutions exist, particularly in relation to the quality offered by these institutions, such as domestic courts.\textsuperscript{124} One commentator has argued that investment treaties have “subverted the evolution of robust rule of law institutions in the development world . . . [because] foreign investors rationally refrain from championing good and generalized rule of law reforms in the developing state, preferring instead to protect their interests by relying on the BIT rule of law enclave.”\textsuperscript{125} The counterargument to these assertions is that investment treaty arbitrations may “actually benefit the rule of law, or at a minimum, do not adversely affect a country’s adherence to the rule of law.”\textsuperscript{126} Indeed, domestic courts and investment treaty arbitration often engage in a symbiotic relationship, “complement[ing] domestic institutional reform.”\textsuperscript{127}

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\textsuperscript{120} See DOLZER & SCHREUER, supra note 37, at 23 (“In an investment treaty, the host state deliberately renounces an element of its sovereignty in return for a certain new opportunity: the chance to better attract new foreign investments, which it would not have acquired in the absence of a treaty”).
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\textsuperscript{121} SORNARAJAH, supra note 38, at 178.
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\textsuperscript{122} Quoted in Ross, supra note 26.
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\textsuperscript{126} Franck, supra note 52, at 366.
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\textsuperscript{127} Id. at 367 (noting that “[e]specially where investment treaties are used to signal the desire to engage in institutional reform and adhere to the rule of law, offering the opportunity to arbitrate investment claims might reasonably create a ‘race to the top’ to adjudicate disputes impartially and fairly, instead of a ‘race to the bottom’”).
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3. Brazil’s Pro-Arbitration Policy and Legal Challenges to BIT Ratification and Enforcement

Brazil’s potential ratification of BITs raises a number of legal issues. One of the most significant issues is whether the investor-State dispute resolution clause contained in a BIT can be enforced in and against Brazil. At first, at least from an OFDI perspective, this may not seem relevant as Brazilian investors will be bringing proceedings against a foreign state, and thus the question of whether or not the clause can be enforced in Brazil appears to be, at first sight, a non-issue. However, as BITs operate on a reciprocal basis, it is unlikely that a country will sign a BIT with Brazil if its own investors are unable to bring proceedings against Brazil. Thus, a signatory state will want to know whether arbitration can be brought against Brazil before an international arbitral tribunal, such as ICSID, and whether the arbitral award will be recognized by Brazilian courts. This ultimately depends on whether arbitration is recognized by the Brazilian legal system, as well as the status of foreign arbitral awards in Brazil.

a. Arbitration in Brazil

The first issue to consider is whether arbitral awards are enforceable under the Brazilian legal system. Arbitrations in Brazil are governed by the 1996 Brazilian Arbitration Act (“Arbitration Act”).128 Article 5, XXXV, of the Brazilian Constitution states that “[t]he Law shall not exclude any infringement or threat to a right from the consideration of the Judicial Power.”129 Courts have been influenced by this constitutional provision and have historically struggled with interpreting it with arbitration clauses under the Arbitration Act. Indeed, a number of – now obsolete – decisions have held arbitration clauses to be unconstitutional, or, in the alternative, to empower parties to have recourse to the courts at all times, thus undermining the attractiveness of arbitration.130 For example, one Brazilian court in 1997 held that “[a] simple arbitration clause is insufficient to start arbitration and does not prevent interested parties from referring the dispute to the court.”131 However, a number of cases have since

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130 See Adriana Noemi Pucci, Arbitration in Brazil, 60(1) DISPUTE RESOLUTION J. 82, 84 (2005) (noting that “between the Arbitration Act’s enactment in 1996 and the 2001 Supreme Federal Court’s decision upholding its constitutionality, the Brazilian courts reached contradictory decisions on the question of enforceability of pre-dispute arbitration agreements”).
131 Dec. 15, 1997, 2d Civil Jurisdiction Court, Sao Paulo, 1st Chamber. Appeal with review, No. 479.936; see also Feb. 24, 1999, Court of the Jurisdiction of Minas Gerais, 3d Chamber. Instrument Appeal. Sentence No. 0262252-4 (where Judge Edelson Fernandes said, “The simple existence of an arbitration clause is not an obstacle to access to the judicial courts”).
confirmed the constitutionality of the Arbitration Act. In *Banco Fontecidam S.A. v. Banco Banque Nationale de Paris-Brasil S.A.*, a São Paulo court held:

> It is noticeable that, different from the previous rules, the [Arbitration Act] brings a wider concept regarding the arbitral convention, since Article 3 of the Arbitration Act expressly mentions not only arbitration submission (compromisso) but also the arbitration clause, and either one of the above is sufficient to exclude the Judiciary’s power over the dispute, except in cases of nullity or annulment of the arbitral award.132

In the same vein, the court in *Celso Varga v. TRW Automotive South América S/A* confirmed the constitutionality of the Arbitration Act by noting that “the enforcement of that award . . . is valid, effective and does not violate Article 5 . . . of the [Brazilian] Constitution.”133 Since then, Brazilian courts have recognized arbitration not only as constitutional but also beneficial. Thus, in one case, the court held that arbitration is “a facility given to interested parties to settle their disputes more rapidly and with less bureaucratic obstacles, etc.”134 These advantages are particularly relevant in Brazil because, “although the [court] system is now well structured by Latin American standards, inefficiency does slow the judicial process, and this has contributed to a major backlog in cases.”135 Nowadays, arbitration is “the most widely used alternative mechanism to resolve disputes in Brazil.”136

Interestingly, Brazil’s experience with arbitration resembles that of the United States, where resistance to arbitration eventually gave way to its acceptance.137

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132 Apr. 16, 2011, Case No. 000.00.631007-9-40a, Vara Cível do Foro Central da Comarca de São Paulo (Civil Court), *per* Judge Cecília Pinheiro da Fonseca (emphasis added).


135 *Brazil Oil & Gas Report*, BUSINESS MONITOR INT’L 34, 34 (Q2, 2011).

136 Gabriel Alves Da Costa et al., *Brazil, in Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil* 78 (Association of Corporate Counsel, 2012).

Despite the difference between arbitration clauses in commercial agreements and their counterpart in international investments agreements, Brazil’s judicial trend has firmly shifted to pro-arbitration, and this development is a positive factor in crafting a policy that favors BIT ratification.138

It is worth noting that the current Brazilian Arbitration Act is under review by the Brazilian Senate. On August 29, 2012, the Brazilian Senate authorized the creation of a special commission to draft a revision of the Arbitration Act. The initiative is to be welcomed, as it seeks to ensure that the legislation is capable of meeting the expectations and practical developments of a growing trend toward arbitration in Brazil.139 Although it is impossible to ascertain what the new draft will look like, commentators have suggested that it could address the following issues: provisions to distinguish between domestic and international arbitrations; regulation of arbitrators’ duties; and the availability of provisional measures.140

These potential reforms underscore Brazil’s pro-arbitration policy. Judicial policy and practice also strongly supports this trend. Most recently, the Superior Tribunal de Justiça (“STJ”) (Brazil’s highest court for non-constitutional issues) held that the Arbitration Act applied retroactively, thus expanding the reach of the Act.141 Consequently, arbitration clauses contained in contracts that pre-date the
Act are now subject to it. The decision is significant from a practical point of view, since there existed a long-standing debate about the applicability of the Act to clauses that pre-dated it. Indeed, before the Act was enacted, arbitration clauses were treated as conditional promises to submit a dispute via arbitration, where disputes could only be arbitrated if parties agreed to it after such disputes arose. Now, however, “an arbitration clause is a sufficient element to give arbitrators competence to settle disputes” and “all arbitration clauses, even those contained in contracts entered into prior to the enactment of the Brazilian Arbitration Act, will have . . . binding effect.”142 Brazilian courts have also helped clarify “vague” aspects of the Arbitration Act, such as an arbitral tribunal’s exclusive jurisdiction to rule on interim measures.143

b. Does Brazilian law recognize foreign arbitral awards?

Brazilian law recognizes foreign arbitral awards. Although the status of arbitration was once unclear under Brazilian law, it is now firmly recognized by the Arbitration Act as well as other legislation.144 Before the Arbitration Act, the recognition of foreign awards was subjected to a procedure of homologation by the Brazilian Supreme Federal Court (the Supreme Court for constitutional issues in Brazil) pursuant to Article 102, paragraph I(h) of the Brazilian Constitution (now revoked),145 the Brazilian Civil Procedure Code and an Internal Regulation of the Supreme Federal Court. After the Arbitration Act was enacted, however, Brazil ratified three international conventions (the Panama, Montevideo and New York Conventions).146 Subsequently, an award issued by a foreign arbitral tribunal, after a recognition procedure before the STJ, became equivalent to an enforceable judicial document, producing the same effect as a judgment given by

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143 Itarumã Participações S.A. v Participações em Complexos Bioenergéticos S.A. – PCBIOS, Resp No. 1,297,974-RJ (holding that national courts may not generally interfere with disputes subject to the jurisdiction of an arbitral tribunal); see Felipe Sperandio, Brazilian Court Clarifies Jurisdiction for Interim Measures, KLUWER ARBITRATION BLOG, (Oct. 26, 2012), available at http://kluwerarbitrationblog.com/blog/2012/10/26/brazilian-court-clarifies-jurisdiction-for-interim-measures (noting that “[t]he guarantee that, in due course, the tribunal shall have exclusive jurisdiction to rule on interim measures removes the concerns some may have had of the local courts favoring Brazilian parties”).

144 See the Brazilian Commercial Code which allows partners to solve disputes through arbitration (BRAZILIAN COMMERCIAL CODE, Art. 100, ¶3); see generally Gabriel Alves Da Costa, Brazil, in LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION IN COLOMBIA, MEXICO, PANAMA, AND BRAZIL (Association of Corporate Counsel, 2012)(providing a succinct overview of alternative dispute resolution in Brazil, including arbitration law).


146 See Decree 4311, July 23, 2002.
the Brazilian judiciary, without needing homologation by the Supreme Federal Court. The Arbitration Act also streamlined the recognition process of foreign awards by removing the double *exequatur* obstacle in the Brazilian legal system. In deciding on whether or not to recognize a foreign arbitral award, the STJ does not analyze its merit. It only examines the formal requirements specified in the Arbitration Act (Article 38 and 39), the New York Convention (Articles IV and V) and an STJ resolution. This resolution provides the internal rules on the recognition procedure for both foreign arbitral awards and judgments. According to Article IV of the New York Convention, for a foreign arbitral award to be recognized and enforced, the requesting party must present the duly authenticated original award or a duly certified copy thereof and the original agreement of the parties to submit the dispute to arbitration. Article V of the New York Convention establishes that recognition and enforcement of an arbitral award may be refused for a number of reasons, including if the agreement containing the arbitration clause is invalid or if the recognition or enforcement of the award would be contrary to the public policy of that country. These are incorporated in Articles 38 and 39 of the Arbitration Act, which includes the following circumstances:

(i) The parties to the arbitration agreement were incapacitated;
(ii) The arbitration agreement was invalid under the laws to which the parties submitted themselves or, in the absence of a governing law, under the law of the country where the arbitration award was issued;
(iii) No proper notice was given to the party against which the award is being invoked regarding the appointment of the arbitrator or the arbitration procedure, or that party was not afforded due process of law and thus was unable to present his case;
(iv) The arbitral award was issued beyond the scope set forth in the arbitration agreement, and the excessive portion of the award could not be separated from the matters submitted to arbitration;

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149 A double *exequatur* judgment recognizes and declares enforceable a foreign judgment.
151 STJ Resolution No. 9 of May 4, 2005, Diário da Justiça, p. 154 Seção I, Art. 4 (Braz.).
152 These provisions are reproduced in the Brazilian Arbitration Act (Art. 37, I and II).
154 Id. Art. V(2)(b).
(v) The arbitration award has not yet become binding on the parties; has been rendered null and void; or has been stayed or suspended by the courts of the country in which the award was made.\(^{155}\)

Since the jurisdiction over recognition of foreign judgments was transferred to the STJ, that court has confirmed on a number of occasions that it is impossible to reopen discussion of the merits of an arbitral dispute.\(^{156}\)

Finally, there is the question of actual enforcement of the award once it has been recognized. A recognized award has the status of an enforceable judicial instrument (the same as a domestic judicial award),\(^{157}\) and follows the ordinary procedural rules of enforcement. This makes proceedings fairly straightforward. According to Article 109 (X) of the Brazilian Constitution, federal courts have jurisdiction to enforce a recognized foreign arbitral award. Therefore, as long as the rules of the New York Convention, the Arbitration Act and the STJ resolution are satisfied, the foreign arbitral award will be recognized and enforced in Brazil.

Recognition by the STJ provides a “one-shot procedure” without the need to crawl up the courts to reach a final result.\(^{158}\) Given that the STJ’s hearings are held in public, the system has been described as an “international model.”\(^{159}\) Despite these commendable developments, some practitioners have criticized the STJ for not explicitly basing its reasoning on international agreements. For example, Albert Jan van den Berg, a leading Dutch arbitrator, praised the STJ for its recognition and enforcement of international awards, but recommended that judges refer more explicitly to the New York Convention in their opinions.\(^{160}\) The point has also been noted by Brazilian scholars and practitioners.\(^{161}\) The STJ’s recognition and enforcement decisions rarely mention the New York Convention, leading some scholars to note that reference to the New York Convention is

\(^{155}\) Beneti & Marques, supra note 34.

\(^{156}\) See, e.g., Contested Foreign Decision 560/EX, per Judge Gilson Dipp, Special Court of the Superior Tribunal of Justice, Oct. 18, 2006.

\(^{157}\) Brazilian Arbitration Act, Art. 34.


\(^{159}\) Id.

\(^{160}\) Id.

\(^{161}\) See e.g., Beneti & Marques, supra note 34 (“It is worth emphasizing that, although [the Brazilian arbitration] system brought about by the Brazilian Arbitration Law is fully in line with Article V of the New York Convention, the reference by STJ to said legal text . . . is minimal”); Leonardo Campos de Melo, Recognition of Foreign Arbitral Awards in Brazil, 24 AM. REV. INT’L ARB. 113, 160 (“The STJ has not fully embraced all provisions of the New York Convention and, consequently, has not been paying attention to the great repertoire of precedents available from courts around the globe. In order for Brazil to draw alongside countries in which the arbitration practice is highly developed, the STJ urgently needs to fully adopt the provisions of the New York Convention.”).
“minimal.” Rather, the STJ takes a nationalistic approach in reaching enforcement decisions, primarily relying on Articles 34 to 40 of the Arbitration Act. This trend is intriguing because Article 34 of the Arbitration Act provides that foreign arbitral awards shall be recognized and enforced “pursuant to international treaties effective in the national legal system,” taking priority over domestic law. Thus, van den Berg argues that scant reliance by Brazilian courts on the Convention may “create uncertainty and impede enforcement of awards in the future.” Although the effect of this practice is not inconsistent with the substance of the New York Convention, it “raises doubts about the extent to which Brazilian courts are undertaking a universal approach to the interpretation of the transnational standards governing recognition of foreign awards in the country.” However, in September 2012, the STJ made explicit reference to the New York Convention when it dismissed claims that were duplicative of a previous foreign arbitral award. This may therefore indicate the STJ is responding to international and domestic criticism, as it seeks to raise the visibility of the New York Convention in its decisions.

c. Constitutionality issues surrounding ICSID awards in Brazil

Although the analysis above shows how foreign arbitral awards are fully recognized and enforceable in Brazil, this relates to arbitral awards between two private parties, and says nothing about an arbitral award rendered against the

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162 Beneti & Marques, supra note 34. See also Andre de Albuquerque Calvacanti Abbud, Fifty Years in Five? The Brazilian Approach to the New York Convention, in INTERPRETATION OF LAW IN THE GLOBAL WORLD: FROM PARTICULARISM TO A UNIVERSAL APPROACH 279, 279 (J. Jemielniak & P. Miklaszewicz eds., 2010) (noting that “[d]espite Brazil’s adoption of the New York Convention in 2002, national judges have not yet embraced it, applying instead the 1996 Arbitration Act when adjudicating enforcement claims of foreign arbitral awards”).

163 The New York Convention was incorporated in Brazilian Law by virtue of Decree 4,311 of 2002.

164 Ross, supra note 158.

165 See Calvacanti Abbud, supra note 162, at 300 (“The precedents issued so far [by the STJ] show that the basic features of the Convention seem to have been embraced by the Court”).

166 Id. at 279.

Brazilian State. The issue is significant in the context of BITs, because dispute resolution clauses in BITs typically give investors the option to arbitrate the dispute against a State under ICSID auspices.\footnote{See for instance the Brazil-Finland BIT (1995), Art. 9 (2)(a).} Unless the ICSID Additional Facility Rules are used,\footnote{See infra IV.A.} a State will normally ratify the ICSID Convention in order to enable its investors to refer disputes to ICSID.

However, Brazil’s ratification of the ICSID Convention presents an interesting constitutional puzzle. Article 54 (1) of the ICSID Convention provides that an arbitral award issued by ICSID is a “final judgment.”\footnote{See ICSID Convention, Art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state”).} Contrast this with Article 5 of the Brazilian Constitution which states that “[t]he Law shall not exclude any infringement or threat to a right from the consideration of the Judicial Power.” At first glance, one could argue that Article 54 of the ICSID Convention and Article 5 of the Brazilian Constitution are incompatible. In other words, one could argue that it would be impossible to give final direct effect to an arbitral award (read judgment) because of the primacy of the Brazilian Judiciary’s power to review any case under Article 5 of the Brazilian Constitution. Article 5 would, in effect, dilute the effect of Article 54 of the ICSID Convention and seemingly subject the latter to the possibility of perpetual review. However, upon closer analysis, such an argument is unfounded. This is because Article 5 of the Brazilian Constitution grants access to justice (i.e. the “Judicial Power”) to the individual – qua citizen – as a holder of his constitutional rights,\footnote{By entering an arbitration agreement, the citizen effectively waives his Article 5 rights.} but it does not extend this treatment to the State.\footnote{See Jan Kleinheisterkamp, O Brasil e as disputas com investidores estrangeiros, in COMERCIO INTERNACIONAL E DESENVOLVIMENTO: UMA PERSPECTIVA BRASILEIRA 156, 178 (Monica Teresa Costa Sousa Cherem & Roberto Di Sena, Jr. eds, 2004) (“ Também os argumentos do terceiro item não convencem, pois de art. 5º, inc. XXXV, da CF garante o acesso à justiça ao indivíduo como titular de direitos constitucionais, não ao Estado”) (author’s translation: “The argument that Art. 5 of the Constitution is incompatible with arbitration is meritless because Art. 5 grants access to justice to the individual, not the State”).} The Brazilian State is therefore unable to benefit from Article 5 in this context as Article 5 does not equip the State with any rights per se. This means that Article 5 would not impede a foreign investor from enforcing an ICSID award against the Brazilian State (assuming, of course, that Brazil ratified the ICSID Convention).\footnote{Subject to the analysis supra Part II. 3}
d. **Arbitral proceedings against the Brazilian State**

A boiling question that seems to excite lawyers and investors is whether the Brazilian State can participate in arbitral proceedings at all. As Pucci notes, “arbitration involving the State or a State-owned or controlled company is the subject of much discussion in Brazil.”\(^{174}\) Indeed, although Brazilian law favors arbitration between private parties, it has adopted a restrictive approach to arbitration against the State. This reluctance stems from two constitutional principles.

First, Article 37 of the Brazilian Constitution provides that the disposition of public assets and rights is always subject to prior legislative authorization, also known as the *principle of legality*.\(^{175}\) This means that for arbitration proceedings against the State to take place, there must be legislation authorizing the referral to arbitration.\(^{176}\) If Brazil were to ratify the ICSID Convention, however, this is likely to become a non-issue, as domestic legislation would provide the legal competence for arbitration against the State in the context of a BIT.

Second, the State can agree to arbitrate only with respect to available assets.\(^{177}\) According to Article 1 of the Arbitration Act, persons capable of contract will be able to arbitrate in order to resolve disputes relating to freely available and transferable assets.\(^{178}\) In *Companhia Estadual de Energia Elétrica (CEE) v. AES Sul Distribuidora Gaúcha de Energia e Outros*, a court in Porto Alegre (Brazil)...

\(^{174}\) Pucci, *supra* note 130, at 86.

\(^{175}\) Brazilian Constitution, Art. 37, available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm (“A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade”) (author’s translation: The public administration of any direct and indirect Powers of the Union, of the States, of the Federal District, and of the Municipal areas, is subject to the principle of legality”).

\(^{176}\) See generally MARIA SYLVIA ZANELLA DI PIETRO, *DIREITO ADMINISTRATIVO* (2003).

\(^{177}\) Pucci, *supra* note 130, at 86-87.

\(^{178}\) Brazilian Arbitration Act, Law 9.307/96. Art.1 (“As pessoas capazes de contratar poderão valer-se da arbitragem para dirimir litígios relativos a direitos patrimoniais disponíveis”)(translation: “Persons capable of entering into contracts will be able to avail themselves of arbitration in order to resolve disputes relating to freely transferable property rights.”). See Pucci, *supra* note 130, at 86-7.

\(^{179}\) Companhia Estadual de Energia Elétrica (CEE) v. AES Sul Distribuidora Gaúcha de Energia e Outros, Recurso Especial 606.345 proveniente do Estado do Rio Grande do Sul (RESP 606.345-RS)(upholding the lower court’s opinion, which held that “A CEEE é empresa prestadora de serviço público essencial, consistente na produção e distribuição de energia elétrica, sociedade de economia mista do Estado do Rio Grande do Sul. Como tal, não pode, sem a competente autorização do legislativo estadual, abrir mão do devido processo legal para dirimir eventuais conflitos concernentes ao serviço público por ela prestado”) (author’s translation: “The [state-owned entity] is an entity that provides an essential public service, namely the production and distribution of electricity . . . Thus, it cannot, without competent legislative authorization from the state, subject itself to conflicts/disputes regarding the services it provides to the public.”); see also Luciano...
held that an ICC arbitration should be suspended because it involved public-related matters, namely the distribution of electric power. The court reasoned that the matter could not be arbitrable, as matters related to the public do not involve “freely available assets” within the meaning of Article 1 of the Arbitration Act.\textsuperscript{180} Another case held that a government-controlled entity could not be subject to arbitration without express legislative authorization.\textsuperscript{181} Other cases have upheld arbitration proceedings between state-controlled entities and private parties because “disputes related to the distribution of gas . . . do not involve the public interest, since it is an economic activity governed by the rules of private, not public law.”\textsuperscript{182} To this end, the Brazilian legal system is already replete with industry-centric legislation that authorizes state-controlled entities to arbitrate disputes.\textsuperscript{183} These, however, are only useful to bring proceedings against extensions of the State, i.e. government-controlled entities.\textsuperscript{184} What is needed, however, is legislation authorizing the use of arbitration against the State itself arising from disputes covered by a BIT.\textsuperscript{185}


\textsuperscript{180} Brazilian Arbitration Act, Law 9.307/96. Art.1, supra note 178.

\textsuperscript{181} Companhia Paranaense de Energia (Copel) v. UEG Araucária Ltda., R.B.A. N.3, 170 e ss. Mar. 15, 2004; \textit{but see} Ross, supra note 24 (noting that the decision was overruled by a provincial Brazilian Court of Appeal).

\textsuperscript{182} \textit{See} Companhia Paranaense de Gás v. Consórcio Carioca-Passarelli, R.B.A., No.4, 162 e ss.; \textit{see} Pucci, supra note 130, at 86-87.

\textsuperscript{183} \textit{See} the Brazilian1995 Public Service Permission and Concession Act, Act 8.987/1995; the 1997 Telecommunications Act Act 9.472/1997; the 1997 Petroleum Act Act 9.478/1997; the 2001 Water and Land Transport Act Act 10.233/2001; \textit{see also} the 2004 Public-Private Partnership Act (PPP Act) which provides that contracts between public or state-owned entities and private companies can arbitrate disputes via an arbitration clause. In most cases, however, the arbitration must be conducted in Portuguese and in Brazil.

\textsuperscript{184} Jalicki & Medeiros, supra note 23, at 438 (“[W]ithout an investment treaty providing for investor-state arbitration, a foreign investor in Brazil will be limited to raising contractual claims against the party with whom its contract was concluded, with no possibility of recourse against the state for non-contractual (e.g. regulatory) infringements of investor rights”).

\textsuperscript{185} Brazil’s ratification of the ICSID Convention is likely to include language to this effect. For example, Brazil’s ratification of the Multilateral Investment Guarantee Agency enabled MIGA to bring ad hoc arbitral proceedings against Brazil, thus satisfying the principle of legality. \textit{See} Kleinheisterkamp, supra note 172 at 185; \textit{see also} Article 18(a) of the Multilateral Investment Guarantee Agency Convention (“Upon paying or agreeing to pay compensation to a holder of a guarantee, the Agency shall be subrogated to such rights or claims related to the guaranteed investment as the holder of a guarantee may have had against the host country and other obligors.”); Chapter IX (“Settlement of Disputes”) and Annex II (setting out dispute settlement procedures, such as negotiation,
III. TOWARD A (NEW) BRAZILIAN OFDI POLICY

Part II considered the institutional and legal reasons for Brazil to join the BIT Club. This Part considers whether the ratification of BITs would make sense for Brazil at this point in time. In other words, do macroeconomic conditions and business trends in Brazil, justify the ratification of BITs? The answer, as this Part argues, is that both Brazilian FDI and internationalization trends would favor and justify BIT ratification. Indeed, as more Brazilian companies expand their operations abroad, and as higher levels of Brazilian OFDI are being recorded, the need for adequate mechanisms to protect Brazilian investors abroad becomes all the more important.

A. Brazilian FDI and Internationalization Trends

This section will introduce the reader to some basic elements of FDI and internationalization, in order to better grasp how BIT ratification can protect the internationalization of Brazilian organizations as well as Brazilian OFDI.

1. A Primer on FDI and Internationalization

Though often used interchangeably, FDI and internationalization are two separate processes that occupy separate trenches of the investment literature. In a nutshell, FDI usually involves the long-term186 and international187 allocation of assets for the purposes of controlling and significantly influencing the development of a venture. On the other hand, internationalization is the process by which an organization expands abroad.

FDI is a type of Foreign Investment (“FI”), which may or may not be the product of a firm’s internationalization strategy. The objective of the FDI investor is to obtain a significant ownership interest and thus substantial control in the management of a venture.188 The IMF defines control to reflect voting power of conciliation and arbitration), available at http://www.miga.org/documents/miga_convention_november_2010.pdf.

186 DOLZER & SCHREUER, supra note 37, at 3 (noting that “[w]hereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country”).

187 See Deborah L. Spar, National Policies and Domestic Politics, in THE OXFORD HANDBOOK OF INTERNATIONAL BUSINESS 205 (A.M. Rugman ed., 2d ed. 2009) (defining FDI as an aggregate amount of capital and technology across international frontiers or a transfer of resources from one place to another).

more than 50%, while a significant level of influence consists of voting power between 10% and 50%.\(^{189}\) FDI investments differ from portfolio investments, as the former typically involve long-term relationships between investors and the host markets, thus rendering the investment project relatively irreversible from the investor’s perspective. FDI is typically conducted in two ways: (a) via acquisition, when an enterprise acquires a foreign entity; or (b) via a “greenfield investment,”\(^{190}\) when an enterprise establishes a new subsidiary abroad.\(^{191}\) These are equity modes of entering a foreign market, and differ from non-equity entry modes such as exporting, licensing and employing agents in the foreign market.

The concept of internationalization is broader than FDI as it describes the “expanding process of corporate involvement in international transactions.”\(^{192}\) Internationalization is thus a form of FI, though not necessarily FDI.\(^{193}\) For example, internationalization includes both equity (e.g. greenfield investments) and non-equity modes of international expansion (e.g. exports). According to John H. Dunning – a founding father of internationalization studies – there are four types of motives for a company to internationalize: resource-seeking, market-seeking, efficiency-seeking and strategic-asset-seeking.\(^{194}\) A resource-seeking investment is typically made to enable a firm to access resources at lower costs abroad or not available at home. A market-seeking investment involves the firm economy makes an investment that gives control or a significant degree of influence on the management of an enterprise that is resident in another economy”).

\(^{189}\) Id. at ¶ 6.12.


\(^{191}\) Mohamed Amal, Henrique Raboch & Bruno Thiago Tomio, Strategies and Determinants of Foreign Direct Investment (FDI) from Developing Countries: Case Study of Latin America, 10 LATIN AMERICAN BUS. REV. 73, 75 (2009); for a brief overview of the relative advantages and disadvantages of choosing the acquisition versus the greenfield approach, see John H. Dunning & Sarianna M. Lundan, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 286-87 (2d ed. 2008) (noting that “[t]firms may also favor the speed of M&As over greenfield investment because they want to pre-empt their competitors, to prevent them from entering a particular market, or to avoid the (perceived) unfavorable consequences of nor being active in that market, or not having access to specific resources. . . . Another reason why a firm might choose an acquisition over a greenfield investment is to overcome organisational inertia following a period of organic growth”).


\(^{193}\) But note Amal et al., supra note 191, at 74 (“FDI is ranked among the internationalization mechanisms often deployed by corporations, paving the way for their competitive entry into the global economy, with international investments aimed mainly at holding operating control over companies abroad . . . ”).

\(^{194}\) These types will become relevant in our discussion of Brazilian companies’ motivations for internationalizing their operations.
“following the customer” and thus venturing abroad to further develop the market in which it currently operates. Strategic asset-seeking investments involve the acquisition of new firm-specific advantages (e.g. technological competencies) rather than exploiting internal existing assets. Finally, efficiency-seeking investments are made to exploit comparative advantages in the firm’s production chain in order to reduce costs and maximize efficiency.  

Dunning’s paradigm helps us better understand Brazilian FDI and internationalization trends. Indeed, Brazilian internationalization has been primarily driven by market-seeking and resource-seeking motives. In other words, Brazilian firms have been seeking to (i) penetrate existing markets abroad and/or (ii) gain access to resources unavailable (or commercially unattractive) at home. As this article will show, this is significant because market-seeking and resource-seeking investments are typically difficult to liquidate and involve high sunk costs, thus requiring superior methods of protection.  

2. Brazil FDI Trends  

a. Generally  

Brazil’s economic pendulum has swung in multiple directions over the past three decades. Fortunately, globalization has brought a healthy rhythm back into Brazil’s economy. The fruits of economic liberalization are now starting to become visible. Most notably, in 2008, Standard & Poor’s gave a vote of confidence to the country’s economic policies when it elevated Brazil’s sovereign debt to Investment Grade.  

However, for a considerable period of time, Brazil was a loyal adherent to protectionism. Indeed, from the early 1950s up until the 1980s, the Brazilian economy was heavily grounded on import-substitution industrialization (“ISI”) policies. The goal of ISI policies was to develop “a domestic production capacity for as many formerly imported manufactured products as possible.” In other words, instead of importing a good, Brazil would seek to make it locally, thus fostering a competition-free environment for local businesses to develop. Consequently, during this period, Brazilian companies felt insulated by the State’s protectionist ISI policies, and profit and revenue became their

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196 Geri Smith, Brazil Goes Investment Grade, BLOOMBERG BUSINESSWEEK, May 1, 2008, available at http://www.businessweek.com/bwdaily/dnflash/content/may2008/db2008051_933251.htm.  
197 BAER, supra note 31, at 180.  
198 These types of state interventions in developing countries were symptomatic of the post World War II period. See Salacuse & Sullivan, supra note 42, at 133 (“Beginning in the post–World War II period, virtually all developing countries rejected the liberal economic model and believed that their governments had the primary responsibility for bringing about national economic development. As a result, their systems were characterized by: (1) state planning and public ordering of their economies and societies; (2) reliance on state enterprises as economic actors; (3) restriction and regulation of the
only concern. Propelled by the sheer force of globalization, it was only in the 1990s that Brazilian companies explored international opportunities on a wider scale. In many ways, Brazilian companies realized that in order to survive, they had to remain competitive both at home and abroad.

Interestingly, this ISI policy paradoxically helped catapult the country’s companies into foreign markets by enabling the development of a strong domestic industrial base well prepared for export activities. In turn, the intensification and diversification of exports created a favorable environment for Brazilian companies to internationalize. From this perspective, in orchestrating economic policies, the Brazilian State has played a significant role in the internationalization of Brazilian companies, albeit only inadvertently.

Yet the State has failed in so many fundamental ways to actively encourage, support and protect OFDI. Though Brazilian companies now rank amongst the largest in the world, “such performance seems to be below its potential of a large and growing economy.” It can be argued that such underperformance is partially due to the State’s reluctance to develop a coherent OFDI policy that promotes and protects Brazilian investments abroad.

private sector; and (4) governmental limitation and control of international economic transactions, especially foreign investment that their governments had the primary responsibility for bringing about national economic development . . . . By the mid-1980s . . . [d]eveloping countries increasingly privatized their state enterprises, engaged in deregulation, and opened their economies.”).

199 See generally, BAER, supra note 31.

200 Leonardo Martinez-Diaz & Lael Brainard, Brazil: The “B” Belongs in the BRICS, in Martinez-Diaz & Brainard, supra note 4, at 6 (noting that “[a]lthough Brazil’s past state-led development policies to promote self-sufficiency were costly and counterproductive in many ways, the legacy of some of these policies is now paradoxically providing a strong foundation for the country’s current generation of outward-looking political and business leaders as they pursue its global competitiveness . . . . Brazilian [companies] have been able to translate this [ISI] policy into competitive advantages in global markets now that the country’s policy orientation has turned outward and global demand has shifted favorably.”).

201 See Amann, supra note 5, at 196 (noting that “[t]he pursuit of ISI led to a structural transformation, resulting in a full-fledged economy. In its wake, ISI created enterprises and saw the formation of the large domestic economic groups that feature so prominently among the Brazilian multinationals of today.”).

202 This was partially engineered by the State abolishing export taxes, simplifying administrative procedures for exporters, and introducing “a program of export tax incentives and of subsidized credits to exporters.” See BAER, supra note 31, at 181.

203 See Amann, supra note 5, at 196 (noting that “public policy remains a highly significant factor in explaining the growth and internationalization of Brazilian enterprises”).

204 Flavia Pereira De Carvalho et al., supra note 25.
b. **IFDI trends in Brazil**

Brazil boasts a number of highly attractive industries, including oil and gas, biofuels, infrastructure, semiconductors and aerospace. Consequently, FDI in Brazil has increased dramatically in the past decade, up six times from the 1980 levels in real terms. A number of factors are responsible for this positive trend, including “market size and economic growth rate,” macroeconomic stability, privatization, as well as changes in the legal status of foreign capital.

The 2000s definitely marked Brazil’s ascendency up the FDI ladder. In the periods between 2000 and 2009 Brazilian FDI inflows averaged $24 billion per year. Structural reforms and changes in legislation made “Brazil’s FDI regime . . . progressively more investor-friendly.” Though the reality of “Custo

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205 See Brainard & Martinez-Diaz, supra note 200, at 4 (noting that “if its recently discovered offshore oil and gas fields meet expectations, [Brazil] will become one of the world’s largest producers of hydrocarbon fuels”).

206 Brazil derives 46 percent of its energy from renewable sources, compared with a world average of 13 percent and an OECD average of just 6 percent. See Brainard & Martinez-Diaz, supra note 5, at 8.

207 See Brazil Means Business, 18(5) LATIN TRADE, SEPT. 2010, at 69, 72 (noting also other attractive industries such as venture capital, medical and hospital equipment, information technology, automotive and tourism).

208 Porzecanski & Galagher, supra note 43, at 218.

209 Id. at 229; but see Regis Bonelli, A Note on Foreign Direct Investment and Industrial Competitiveness in Brazil, 27(3) OXFORD DEVELOPMENT STUDIES 305, 306 (1999) (“[I]t is recognized that developing countries’ domestic policies play a somewhat passive role in attracting foreign capital. ‘Getting the fundamentals right’ and ‘adopting market friendly’ policies in domestic markets are necessary, but not sufficient, conditions for attracting FDI. Access to the flows is largely determined by events occurring elsewhere in the world economy . . . .”); see also generally Denise Gregory & Maria Fatima Berardinelli Arraes de Oliveira, O Desenvolvimento De Ambiente Favorável No Brasil Para A De Investimento Estrangeiro Direto, Câmara Dos Deputados, COMISSÃO DE RELAÇÕES EXTERIORES E DE DEFESA NACIONAL, available at http://www2.camara.gov.br/atividade-legislativa/comissoes/comissoes-permanentes/credn/documentos/publicacao/Artigo%20LED%20010705.pdf/view (setting out a comprehensive list of FDI determinants) (in Portuguese, translation on file with author).


Brazil" (a derogatory term denoting the cost of doing business in Brazil) has been fading in recent years, it has not been completely eliminated. As one researcher put it, investment legislation in Brazil is “still somewhat more restrictive . . . and burdensome . . . than in several countries in the OECD area.”

**c. OFDI trends in Brazil**

Brazilian OFDI has increased considerably in the past decade. In 1970, the year in which UNCTAD began collecting FDI data, Brazil OFDI was a meager $14 million. In 2006, however, FDI outflows surpassed inward flows for the first time in Brazil’s history and in 2008, Brazilian OFDI recorded $20.5 billion. Although the figure was a negative $10 billion in 2009, it soon jumped to $11.5 billion in 2010 “largely due to nearly five-fold increase of the equity capital component of Brazil’s outward investments.” Overall, the average annual growth rate of Brazilian OFDI between 1994 (when a new currency, the “Real,” was adopted) to 2008 was 25.35%.

Brazil’s OFDI boom is part of a larger trend unfolding in emerging economies. As a leading reference text put it, “[t]he global environment for OFDI is changing rapidly.” Indeed, FDI outflows from developing economies

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213 Bonelli, *supra* note 209, at 308 (noting that “the (extra) cost of doing business in Brazil, sometimes known as “Brazil-cost” (custo Brasil, or Brazil-specific transaction costs), is clearly recognized as very high due to the inefficiency of infrastructure and services as well as from harmful effects arising from the existing tax system”).

214 De Mello, *supra* note 212, at 8.


218 Beginning value was $690 million in 1994 and the ending value was $20.457 billion in 2008, see UNCTAD Stat, *Direct Investments Abroad: Brazil” Inward and outward foreign direct investment flows, annual 1970-2009*, available at http://unctadstat.unctad.org/TableViewer/tableView.aspx.

219 See AFRONSO FLEURY & MARIA TEREZA LEME FLEURY, *BRAZILIAN MULTINATIONALS: COMPETENCIES FOR INTERNATIONALIZATION* 2 (2011) (noting that “the internationalization of Brazilian corporations is part of a large process whereby multinationals from emerging economies began to play an increasingly important role in the global economy”).


accounted for 28% of total world FDI outflows in 2010, up from 15% in 2007.\textsuperscript{222} Most of these outward investment flows were directed toward other developing and transition economies.\textsuperscript{223} This trend is likely to intensify as there is evidence indicating that BRIC (Brazil, Russia, India, China) nations are becoming increasingly interdependent economically.\textsuperscript{224} Furthermore, BRIC countries have been a driving force in the rise of OFDI flows from developing countries.\textsuperscript{225}

In the case of Brazil, from 2003 onwards, trade “negotiations with other developing countries became increasingly relevant to Brazil’s strategy.”\textsuperscript{226} The bulk of the investment has come from a handful of organizations such as Petrobras (Energy), Vale (Mining), Gerdau (Steel) and Braskem (Petrochemical). These are primarily natural resource companies\textsuperscript{227} seeking to expand their international reach in order to capitalize on locational-specific advantages and ownership specific advantages. Indeed, “Brazil . . . has shown a preference for the natural resource sector.”\textsuperscript{228} Moreover, “[i]n terms of strategies for international investment, Brazilian FDI in productive ventures has been predominantly market seeking or resource seeking, rather than efficiency seeking.”\textsuperscript{229}

Having recovered from recent global financial turbulence, Brazilian companies have adopted an aggressive strategy in acquiring foreign firms. The country’s net cross-border M&As amounted to $7.8 billion in 2010, a striking growth rate of 210% from 2009.\textsuperscript{230} Although the figure was the highest in Latin America & the Caribbean in 2010, Brazil’s net cross-border M&A activity was the lowest amongst BRIC nations. Brazil also lags behind other South American

\begin{itemize}
\item \textsuperscript{223} See id. at 2 (“A feature of the increased importance of developing and transition economies as investors is that a lion’s share of their investments (70 per cent) are directed towards other developing and transition economies compared with developing countries where the share of these economies is only 50 per cent”); see also UNCTAD, \textit{World Investment Report 2012}, supra note 12, at 5 (noting that “65 per cent of FDI projects by value (comprising cross-border M&As and greenfield investments) from the BRIC countries . . . were invested in developing and transition economies . . . ”).
\item \textsuperscript{224} Bric Nations Become Increasingly Interdependent, BBC NEWS, April 14, 2011, available at http://www.bbc.co.uk/news/mobile/business-13046521; see also generally Salacuse & Sullivan, supra note 42, at 118 (noting that “the number of BITs involving two developing countries has been increasing steadily”).
\item \textsuperscript{225} Sauvant, et al., supra note 48, at 9.
\item \textsuperscript{226} Da Motta Veiga, supra note 62, at 121.
\item \textsuperscript{227} See also Amann, supra note 5, at 193 (noting that sectoral specialization of Brazilian largest multinationals tend to be connected to natural-resource-based activities, particularly oil and gas, and mining and steel).
\item \textsuperscript{228} Sauvant, et al., supra note 48, at 10.
\item \textsuperscript{229} Schneider, supra note 10, at 177.
\end{itemize}
countries with respect to the rate of growth of investments abroad. Indeed, while OFDI stocks doubled in Brazil in 2005 when compared to 1990, other countries in the region, such as Argentina, witnessed their FDI stocks quadruple (i.e. Argentina), or even grow 23 fold in the case of Chile. Thus, although Brazil’s OFDI dynamism has been remarkable in recent years, its low comparative rate of growth with other nations in the region highlights a major deficiency in government policy towards OFDI.

d. Internationalization trends

The internationalization of Brazilian firms can be analyzed under macro and micro lenses. At the macro level, the internationalization process of Brazilian firms forms part of a larger trend of MNEs from developing countries “going global.” Notably, “[t]he overall number of MNEs from developing countries has been rising in line with total OFDI flows: in 2008, UNCTAD counted over 21,000 MNEs from developing countries and nearly 2,000 from transition economies.” Generally, MNEs seek a number of intertwined advantages such low cost but productive labor, technological assets, reliable infrastructure and stable environments.

The internationalization of Brazilian firms is a relatively recent development. Many Brazilian manufacturing businesses started investing abroad in the past 25 years, as a way to secure markets, overcome trade barriers, and mainly to support export activities. A recent study suggests that Brazilian firms nowadays decide to internationalize to create new markets due to domestic market saturation, in reaction to global competition and to exploit intangible assets. Other exogenous factors such as advances in transport, communication and information technology can also influence a company to venture overseas.

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231 Flavia Pereira De Carvalho et al., supra note 25.
235 Lima & de Barros, supra note 25.
236 Flavia Pereira De Carvalho et al., supra note 25 at 409.
237 FLEURY & FLEURY, supra note 219, at 206.
238 Karl P. Sauvant, The rise of TNCs from Emerging Markets: The Issues, in Sauvant & Ince, supra note 221, at 7 (noting that the strategies of firms from emerging markets are increasingly driven by a combination of three factors, namely, the worldwide liberalization of the FDI regime, advances in communication, IT and transport, and competition among firms).
Arguably, a weaker U.S. dollar and stronger Real is empowering many Brazilian companies to invest abroad.239

At the micro level, private sector firms are mostly responsible for current internationalization trends, though state-owned enterprises also play a significant role in terms of OFDI volume. For example, the partially state-owned Petrobras operates in 16 countries.240 The internationalization strategy of Petrobras, as with many oil companies, has been to leverage its technological competencies to seek resources in other parts of the world (i.e. “resource seeking” in Dunning’s paradigm). The 1997 Brazilian Law No. 9.478 deprived Petrobras of its monopoly in the exploration and production sector of Brazil’s oil industry, thus pressuring the company to seek further opportunities abroad.241

An example of market-seeking internationalization is Embraer’s (an aircraft manufacturer) significant investment in China. “The decision to invest in China represents, according to the Dunning schema, a classic market-seeking initiative.”242 In 2011, Brazil agreed a $1.25 billion deal with China for the sale of Brazilian made aircraft.243 Vale also maintains a strong international presence, and the company’s recent diversification into oil and gas will undoubtedly expand the company’s already significant international reach.244

The internationalization trend of Brazilian firms has focused primarily on market-seeking and resource-seeking motives. However, Brazilian companies decide to internationalize for other reasons too, namely to defend their competitive position, to reduce dependence on domestic markets, to gain access to better infrastructure,245 and to obtain more attractive fiscal incentives.246 Although some

239 See O Globo, “É um bom momento para investir”, Entrevista com Karl Sauvant, 22/11/2010 at p.21 (on file with author) (“Com o dólar fraco, diz [Karl Sauvant], é um bom momento para se investir lá fora”; author translation: “The time is right to invest abroad given the current weakness of the U.S. Dollar”).

240 Lima & de Barros, supra note 25.


242 Edmund Amann, supra note 5, at 207.


245 But note that Brazilian infrastructure is improving thanks to public-private partnerships (PPPs). See Brazil Oil & Gas Report, BUSINESS MONITOR INTERNATIONAL, Qs 2011, at 35 (noting that “[d]evelopment in infrastructure is being driven by public-private partnerships (PPPs) . . . .” and stating the benefits of recent legislation encouraging PPPs).
firms may face challenges when internationalizing, it is clear that the maturing trend to internationalize will not be hampered anytime soon. To the contrary: this author argues that the current Brazilian economic boom coupled with the unfolding process of globalization will further fuel the international appetite of Brazilian MNEs.

3. Developing Brazil’s New Bit Policy

Although Brazil signed 14 BITs in the early 1990s, it has never ratified them. Furthermore, it never ratified the ICSID Convention. Brazil’s decision not to join the “BIT Club” is a double-edged sword as it gives it the political freedom to do whatever it wants nationally – and thus retain its political and regulatory sovereignty intact – at the cost of, however, hurting its investors abroad. Ironically, Brazil is effectively applying the Calvo Doctrine to Brazilian interests abroad by subjecting its investors to the local remedies of host states. In order to reverse this trend, Brazil should consider ratifying BITs in order to empower Brazilian investors with greater procedural and substantive protections as well as provide them with a better method to control investment risk abroad. The fundamental rationale of this proposed policy is to “promote and protect” Brazilian investments abroad.

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246 Lima & de Barros, supra note 25; see also Paolo Resende, Andrea de Almeida & Jase Ramsey, Transnationalization of Brazilian Companies: Lessons from the Top 20 Multinationals, in Sauvant et al., supra note 2 (noting the factors that mainly drive the internationalization process of Brazilian MNEs from the executive managements’ point of view better market access, the potential to increase sales internationally, as well as the utilization of economies of scale.).

247 See Sauvant et al., supra note 48, at 15 (noting that “[p]erhaps the single most important challenge that emerging market MNEs face relates to their human resources . . . . [because] internationalizing often at an early stage in their development, they have had less time to develop such skills and capacities”).

248 De Carvalho et al., supra note 25 at 410 (observing an increasingly stronger attempt of Brazilian firms to invest in foreign markets).

249 See DOLZER & SCHREUER, supra note 37, at 12 (“[T]he Calvo doctrine is based on the view that foreigners must assert their rights before domestic courts and that they have no right of diplomatic protection by their home state or access to international tribunals”); Comment, A Courageous Course For Latin America: Urging the Ratification of the ICSID, 5 Hous. J. Int’l L. 157, 161 (1982-1983) (noting that the basic premise of the Calvo Doctrine is that foreign investors waive any “foreign legal redress prior to any business agreements” in the host state, and thus submit themselves only to local remedies).

250 Brazil is not alone in lacking an OFDI policy. Indeed, “[m]ost emerging market governments restrict outward FDI and, in any event, often have no clear policy in this area (contrasting sharply with inward FDI where virtually all countries have an enabling framework in place and investment promotion agencies seeking to attract investment”). See Emerson de Almeida et al., supra note 2.
a. Using BITs as a tool to promote OFDI

As has been noted earlier, the literature has extensively examined the merits of BITs in attracting FDI. The converse has also been explored, and some argue that “international investment agreements (IIAs) [such as BITs] are a part of a set of policy instruments affecting companies’ decisions to invest [abroad].”251 Both perspectives are arguably different sides of the same coin, as investment flows are considered as IFDI from the host country (or capital-importing)’s point of view, and OFDI from that of the capital-exporting country.

Brazil’s success in attracting considerable IFDI flows has nothing to do with the existence (or more accurately, the absence) of BITs.252 Perhaps the local environment is sufficiently adequate in meeting foreign investors’ expectations. Indeed, Jonathan Hamilton, an international arbitration lawyer based in Washington, DC, who frequently represents Brazilian multinationals, observed that “when a nation is as blessed with resources as Brazil, it doesn’t always need to offer the same inducements to foreigners. Unlike some smaller Latin American countries, the country doesn’t fear that it may lose out to a neighbour if it doesn’t offer treaty protections.”253 In the same vein, some argue that “[d]espite the lack of an investment policy and tax incentives to promote OFDI, Brazil has emerged as Latin America’s main source of FDI [and thus a main OFDI actor], as more and more Brazilian companies have expanded abroad.”254 Some may thus contend that devising a policy advocating the ratification of BITs to promote OFDI may be just as futile as doing so to promote IFDI. But Brazil’s increased success abroad ought to be accompanied by appropriate structured safeguards. Brazil’s inaction in this area leaves Brazilian OFDI at the mercy of foreign legal systems, which may not always act in the best interests of Brazilian investors.

252 But see Jalicki & Medeiros, supra note 23, at 424 (“Brazil’s isolation from other Latin American countries, and from all other South American countries in particular, is inconsistent with the priority it otherwise places on FDI as a means of furthering economic development. In order for Brazil not only to sustain but also to increase the amount of FDI attracted to the country each year, it should reconsider offering greater incentives and guarantees to foreign investors, in the form of international standards of treatment for investment and confirmed access to investment arbitration.”); there has also been some external political pressure to ratify a BIT with the U.S., see Efraim Chalamish, The Return of Investment Policy – The U.S. Is Back in the Game, THE HUFFINGTON POST, May 3, 2012, available at http://www.huffingtonpost.com/efraim-chalamish/investment-policy_b_1475649.html (Earlier in 2012, U.S. Secretary of State, Hillary Clinton, “announced in Brazil the need to conclude a bilateral investment treaty and a double taxation treaty, which is a reflection of the $75 billion of trade between the nations and $15.5 billion Brazilian investment in the U.S. last year”).
254 De Abreu Campanario et al., supra note 251, at 7.
To say the Brazilian government is completely silent on the issue of supporting OFDI would be inaccurate, if not unfair. Indeed, the **Banco Nacional de Desenvolvimento Economico e Social** (“BNDES”), also known as the “Brazilian Development Bank,” has acknowledged that “[s]upporting competitive Brazilian companies in the international market is a primary objective of the Brazilian government.”255 As such, BNDES operates a line of credit to promote investments by Brazilian MNEs.256 The line of credit offers interest rates lower than the market average, and is available to a number of activities, including M&As, export support and the acquisition of equipment.257

Although the BNDES has sought to fulfil some of the policy functions of promoting OFDI, it “lacks the legal and operational structure to do so.”258 The BNDES is first and foremost a bank, and is thus only involved in the financing stage of some international projects. Indeed, “public policies do not promote Brazilian MNEs’ OFDI, except for the financial support of BNDES to some ‘national champions.’”259 Thus, these projects are typically organized by already large MNEs, and arguably fail to support a number of other ventures that are comparatively smaller (but by no means small) in size. Hence a structured policy that actively promotes – and not just supports – OFDI is required.

Adopting such a policy will not be without challenges. One of the greatest challenges will be political, namely political costs faced by the government, or what Karl Sauvant calls costs associated with managing the “public reaction” to promoting OFDI. Indeed, some national interest groups may be critical of the government’s support for OFDI and may argue that what the country actually needs is greater focus on issues and economic development at home.

But far from a political cost, promoting OFDI may be a political opportunity for economic development. Indeed, OFDI can support the domestic economy by helping the competitiveness of the industrial base at home, given that MNEs have greater access to location assets, or “the range of resources that are needed for the production process.”261 Furthermore, there is empirical evidence supporting the

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258 *Id*. at 8.

259 *Id*. at 8-9.


261 *Id*. at 280.
proposition that “outward FDI strengthens rather than damages home economies.”

Brazil currently has “no explicit agenda to strengthen the role of IIAs as an investment instrument to encourage FDI (outward and inward).” As “th[e] internationalization [of Brazilian firms] is just beginning,” and will likely grow, it is time to consider devising a policy that focuses on promoting and encouraging outward investment. Thus, the interventionist and ad hoc role of government agencies must be complemented (or better, replaced) by a national structured policy promoting Brazilian outward investment centred around IIAs (such as BITs).

A new policy will not be crafted overnight. But the government must accelerate the mechanics by which a new policy can emerge so that domestic firms are no longer left at a disadvantage abroad. Developing a policy framework equipped with BITs will send a clear signal to the domestic investment community that the country is taking investing abroad seriously. It will provide the “bite” in the “bark” of policy talk. It may raise national awareness of international investment opportunities, as the business press is likely to publicize BIT negotiations and ratifications, and prompt investors to explore investment ideas in signatory states. As noted above, it will provide added comfort to investors, particularly those previously hesitant to invest abroad. A new policy framework will also assist policy makers, diplomats and government negotiators to further expand commercial opportunities for Brazilian investors on a macro-level.

Brazil and Chile have recently been discussing the development of a BIT.

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262 See Giorgio Barba Navaretti & Anna M. Falzoni, Home country effects of foreign direct investment, in MULTINATIONAL FIRMS IN THE WORLD ECONOMY 218 (Giorgio B. Navaretti & Anthony J. Venables eds., 2004).
263 De Abreu Campanario, supra note 251, at 8.
264 Lima & de Barros, supra note 25.
265 Amann, supra note 5, at 196 (noting that “the Brazilian government does not maintain a policy set explicitly designed to encourage domestic enterprises to invest overseas. Instead, it is possible to argue that particular interventions implicitly assist Brazilian enterprises in their attempt to expand operations internationally, such as the important role of the Banco Nacional de Desenvolvimento Economico e Social (BNDES) in supporting internationalization via the financing of the country’s exports.”)(internal citations omitted).
266 Indeed, the OFDI policy is likely to have many goals. Another important objective is the ratification of double taxation treaties. See Lima & de Barros, supra note 25; see also Receita Federal, Double Taxation Conventions, http://www.receita.fazenda.gov.br/Principal/Ingles/Acordo/DuplaTributDefault.htm (listing 29 double taxation treaties signed by Brazil with other countries).
267 See Sauvant, Maschek & McAllister, supra note 48, at 17.
268 In this context, see the institutionalist argument that international agreements can be designed to alter future state behavior. See generally ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Kenneth W. Abbott, & Duncan Snidal, Hard and Soft Law in International Governance, 54 (3) INT’L ORG. 421 (2000).
between the two countries. To this end, Brazil ought to develop a Model BIT as soon as is practicable to transparently set the terms of negotiations to come. This will also help resolve any stakeholder conflicts at the domestic level before negotiations commence on the international plane.

Given Brazil’s increasing economic standing in the international sphere, this author argues that Brazil will be able to leverage this power to negotiate BITs that are favorable to its national interests. Whereas in the past emerging markets were desperately hungry for developed countries’ capital, this trend is now coming to an end, and in some cases, reversing. It is therefore unlikely that Brazil will negotiate a BIT that is incompatible with the country’s political and economic goals.

**b. Using BITs to protect OFDI**

As noted above, the internationalization of Brazilian business has occurred primarily because of market-seeking and resource-seeking motives. As Brazilian MNEs are likely to expand abroad to further those motives, signing a BIT will minimize their investment risk and provide comfort in the knowledge that substantive rights and procedures are available in the event a dispute arises.

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270 See Balance of economic power will shift dramatically over the next 50 years, says OECD, OECD NEWSROOM, Nov. 9, 2012 available at http://www.oecd.org/newsroom/balanceofeconomicpowerwillshiftdramaticallyoverthenext50yearssoecd.htm (noting that “[f]ast-ageing economic heavyweights, such as Japan and the euro area, will gradually lose ground on the global GDP table to countries with a younger population, like Indonesia and Brazil”); World in 2050: The BRICs and beyond: prospects, challenges and opportunities, PwC Economics Jan. 2013, at 2, available at http://www.pwc.com/en_GX/gx/world-2050/assets/pwc-world-in-2050-report-january-2013.pdf (noting that Brazil will be the 4th largest economy by 2050).

271 See Ross, supra note 91 (noting that “[u]nlike the negotiators in the 1990s, those drawing up the Chile-Brazil treaty have the benefit of several new generation Model BITs from which to take inspiration, as well as a body of investment treaty jurisprudence that has evolved over the last decade . . . . Thus they can choose the substantive provisions that best serve their interests and guard against their concerns, with full awareness of how those provisions are likely to be interpreted by tribunals”); see also Interview with Pedro Alberto Costa Braga de Oliveira supra note 138, at 9 (“The treaties would need to be so-called next generation treaties. In other words, they must be crafted to allow for sufficient governmental policy space, so that what has happened in Argentina, for example, doesn’t happen in Brazil”).

272 De Abreu Campanario et al., supra note 251, at 6.

273 This may, of course, provide further impetus for more Brazilian investors to invest abroad.
To that end, Brazilian investors need the shield to protect their investments abroad. Recently, delegates at a conference on Brazilian arbitration “agreed that Brazil could increase protection for companies investing abroad by signing the ICSID Convention – to gain membership of ICSID – and building a network of bilateral investment treaties with countries in which it invests.” This view is likely to become a trend amongst emerging markets, as they become greater participants in the OFDI arena. Indeed, emerging markets have been increasingly concluding BITs amongst themselves, and “this is, in and by itself, a sign that governments of emerging markets see the need to protect and promote the outward investment of their firms in a bilateral context.”

A number of incidents support the argument that Brazilian companies need greater protections abroad. This article has already noted the Petrobras-Bolivia incident, where Bolivia effectively nationalized Petrobras’ gas plants in that country. In 2008, Odebrecht, a Brazilian engineering and construction company, was forced to withdraw its operations from Ecuador. “[T]he Ecuadorian government decided to issue executive decrees that ordered the militarization of Odebrecht camps and offices, the termination of all of its agreements in the Ecuadorian Government and the revocation of Odebrecht executive officers’ and employees’ visas.” In the process, the Ecuadorian military seized over $800 million of Oderbrecht’s assets. Ironically, Ecuador started arbitral proceedings against Odebrecht for breach of contract, and the parties have since settled the dispute. Odebrecht has also been reported to face difficulties in Angola, when

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275 Ross, supra note 25.

276 Sauvant, supra note 238, at 11.


the government halted payments to foreign construction companies after a drop in oil prices affected a vital channel for governmental revenue. These events led Odebrecht to vocalize its dissatisfaction with Brazil’s OFDI policy, noting in particular the country’s lack of a BIT system in place. In October 2012, an ICSID arbitration panel determined that Ecuador breached the U.S.-Ecuador BIT and awarded the claimant, Occidental Petroleum Corporation, over $1.7 billion in damages. This illustrates what type of damages Brazilian investors may be missing out on.

Brazilian companies also need the sword. When Ecuador seized Odebrecht’s assets in 2008, and when Bolivia expropriated Petrobras’ plant in 2006, there were no direct means of redress against the host states. They became subject to political and diplomatic processes which were slow and provided no guarantee for compensation. For instance, Odebrecht is still owed over $1 billion. If a BIT were in place between Brazil and Ecuador, it is likely that Odebrecht would have invoked the investor-State arbitration clause, and initiated arbitral proceedings against Ecuador with a view to, inter alia, being justly compensated for the expropriation of its assets. To this end, Brazil ought to consider ratifying the ICSID Convention to grant domestic investors access to ICSID’s dispute resolution system. Brazil should capitalize on its increasingly pro-arbitration climate to galvanize political support for the ratification of the ICSID Convention.

Finally, Brazilian companies need a way to buffer the risks inherent in investing abroad. Odebrecht’s story demonstrates the significant risks faced by large Brazilian MNEs abroad. The consequences are far-reaching as they can affect the overall competitiveness of an organization and, in the worse-case

\[281\] See Ross, supra note 91.

\[282\] See id. (“Adriano Jucá, general counsel of Odebrecht’s engineering and construction arm, says: “Odebrecht has various ways to protect its interests, and if Brazil had a bilateral investment treaty, it would further support its options in international fora.”); see also Samantha Pearson, Vale doubles cost of potash project, FINANCIAL TIMES, Mar. 18, 2013 (reporting that in March 2013, Vale suspended its potash mining operations in Argentina after failing to secure an advance on tax credits from the Argentinian government to offset the mine's higher costs.).

\[283\] Cheng & Bento, supra note 75.

\[284\] Especialistas em arbitragem defendem que Brasil ratifique Convenção de Washington, AMCHAM (American Chamber of Commerce in Brazil) 2 Nov., 2010, available at http://exame.abril.com.br/noticia/chile-brasil-discutem-acordo-investimentos-589805/imprimir (“Os maiores especialistas em arbitragem – meio de resolução de controvérsias alternativo ao Poder Judiciário – defendem que o País intensifique as discussões no caminho de ratificar o Acordo Multilateral de Proteção de Investimentos no âmbito da Convenção de Washington. Eles dizem que o momento é importante para se avançar nessa questão, uma vez que as empresas nacionais passaram a ampliar sua atuação além das fronteiras.”) (author translation: “The biggest arbitration experts argue that Brazil ought to speed up discussions with a view to ratifying the ICSID Convention. The experts say that the moment is ripe for furthering these discussions because an increasing number of [Brazilian] companies are expanding abroad”).
scenario, an entire domestic industry. These incidents are thus “a wake-up call for the Government of Brazil to emulate best practices of other countries, in the interest of the international competitiveness of the country’s firms.”\(^{285}\) As risk is always a moving target, it is important to erect adequate mechanisms to manage, control and minimize it. Brazilian OFDI is inherently a risky business given its resource-seeking and market-seeking motives. Indeed, the sunk costs of resource exploration, such as those in the oil and gas or mining industries, are significantly high and illiquid. In other words, a company cannot simply “pack-it-all-up” and leave when something goes wrong. Also, a host country may increase FDI protectionist measures if an MNE makes an acquisition in a “strategic sector” of the host country’s economy. This, in turn, amplifies the need for OFDI protections for the MNE, without which its investment may become susceptible to nationalistic treatment, and receive less than fair compensation for its losses.\(^{286}\)

IV. ALTERNATIVES TO THE BIT REGIME FOR BRAZILIAN INVESTORS

This article has argued for Brazil’s ratification of BITs to protect outward investment. The article would be incomplete, however, without an evaluation of alternative methods to protect Brazilian investments abroad. These alternatives include: treaty shopping (or “treaty planning”), domestic legal protections, other alternatives (i.e. MERCOSUR and ICSID Additional Facility) and customary international law. For the reasons that follow, BITs remain one of the best options to protect Brazilian investments abroad.

A. Treaty Shopping, Treaty Planning or “Corporate Engineering”\(^{287}\)

As Brazil has no BIT in place, Brazilian MNEs often structure their investments in ways that enable them to benefit from the protections of a BIT in another jurisdiction. In 2010, for instance, Petrobras received compensation over Ecuador’s nationalization of some of its assets in the oil industry by using a Petrobras subsidiary located in Argentina, which was covered by the Ecuador-


\(^{286}\) See Sauvant et al., supra note 48, at 19-20 (“The rise of outward investment from emerging markets presents its own set of challenges for host country policies, the greatest of which is increasing FDI protectionism, particularly in the case of emerging markets MNEs making acquisitions in developed countries. That the firms being acquired may be deemed to be part of a ‘strategic sector,’ thereby raising concerns over national security, and the acquiring firm is a state-owned enterprise or a sovereign wealth fund, only amplifies host country concerns.”).

\(^{287}\) Jalicki & Medeiros, supra note 23, at 442 (“[I]t remains to be seen how ICSID tribunals in the long term will approach this type of ‘corporate engineering’, intended to extend to a country’s investors the protection of third country BITs . . . when the investor’s own home state has no equivalent BIT of its own”).
Thus, a company may establish investment vehicles in particular jurisdictions covered by BITs so as to minimize risk and invoke protections when disputes arise. In other words, these “paper” companies are said to “sit” in a jurisdiction to benefit from BIT coverage. Not all companies, however, have the legal expertise nor the resources to structure international ventures in this way. Nor are they completely protected in doing so as the State in which the paper company sits may amend the definition of “investor” in the relevant BIT to exclude treaty shoppers from coverage.

Also, ICSID case law is split as to whether treaty-shopping in this way is acceptable. For example, in *Aguas del Tunari, S.A. v. Republic of Bolivia* the majority of the tribunal decided that the “entities relied upon for ownership of the Claimant were not corporate shells set up for the purpose of obtaining ICSID jurisdiction.” In the same vein the tribunal in *Mobil v. Venezuela* considered...
whether Exxon Mobil had engaged in treaty abuse by structuring its investments in Venezuela (in the form of subsidiaries) through a holding company incorporated in the Netherlands.\textsuperscript{295} The tribunal held that no such abuse had taken place. It concluded:

the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.\textsuperscript{296}

In Phoenix v. Czech Republic, however, the tribunal was unsympathetic to treaty-shopping as the paper company was created after the dispute arose and carried out no activities except to file the claim.\textsuperscript{297} A creative lawyer may wonder whether a company can assign an ICSID claim to a sister company sitting in a jurisdiction that is covered by a BIT. The established consensus is that it cannot.\textsuperscript{298}

In any event, “[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.”\textsuperscript{299} Suffice it to say that treaty-shopping is a risky and sometimes expensive strategy which does not afford the certainty provided by a direct BIT with the country in which Brazilian investments are situated.

B. Reliance on Domestic Laws and Courts

Brazilian investments abroad cover a wide geographic reach, from the Americas to Africa and Asia. As Brazil increases investment in developing countries,\textsuperscript{300} it is essential that it provide its investors with necessary supra-

\textsuperscript{295} Arguably, Exxon was seeking to benefit from the Netherlands-Venezuelan BIT.

\textsuperscript{296} \textit{Mobil}, supra note 291, at 204 (emphasis added); \textit{but see} the tribunal’s decision with regard to pre-existing disputes at 205 (“With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute...an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs”) (internal citations and quotation marks omitted).

\textsuperscript{297} \textit{See} Ross, \textit{supra} note 24.

\textsuperscript{298} \textit{See} Mihaly International Corporation v. Sri Lanka, (ICSID Case No. ARB/00/2), Award, Mar. 15, 2002, at 24 (“[N]o one could transfer a better title than what he really has. Thus, if Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)’s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected vis-à-vis ICSID by its assignment to Mihaly (USA). To allow such an assignment to operate in favor of Mihaly (Canada) would defeat the object and purpose of the ICSID Convention . . . ”).

\textsuperscript{299} \textit{Mobil}, \textit{supra} note 291 at 177.

\textsuperscript{300} \textit{See}, e.g., Teo Kermeliotis, Brazil Competes with China, India to Invest in Africa, CNN, Jun. 7, 2012, \textit{available at} http://edition.cnn.com/2012/06/07/business/brazil-africa-
national safeguards, given that many legal systems in those countries are slow, corrupt or inefficient. This presents considerable uncertainties and risks to an investor, who may face significant legal obstacles in pursuing local remedies. Indeed, litigation before domestic courts of the host State “may be inconvenient or outright impossible because of State immunity, act-of-State or non-justiciability.” However, such risks can be mitigated by “choosing ICSID arbitration which does not contain any [of the aforementioned] limitations.”

Relying on local laws also adds additional legal costs to Brazilian MNEs as they need to obtain legal advice from domestic firms to resolve local disputes. On the other hand, the BIT regime provides the flexibility of retaining a number of international (or even domestic) firms that specialize in international investment law and investor-State arbitration, which is arguably more uniform and accessible than the often complex local laws and procedure of a particular jurisdiction.

C. Other Alternatives: Diplomacy, MERCOSUR and Additional Facility Rules

A number of additional alternatives exist whereby a private Brazilian investor may seek redress for a wrong committed against its property. It could, for instance, petition the Brazilian government to mediate a resolution to the dispute via diplomatic channels. This method, however, is expensive, slow and uncertain. In many cases, it is also dependent on the political connections the investor has with the government. As such, “diplomatic protection . . . implies that investors are wholly dependent upon the willingness of their home States to ‘espouse’ their claims.”

If the investment was destined to a contracting party of the MERCOSUR, the investor may notify the Brazilian government to take action under the state-
state dispute resolution system, which may include ad hoc arbitral proceedings. However, the state-state system has been characterized as “primitive in relation to other dispute settlement arrangements” and there is no “opportunity to oblige states to enforce awards other than through compensatory measures.” The MERCOSUR system is thus inadequate for a private investor seeking redress. Indeed, the “state-state [system] . . . means that disgruntled investors in either country must rely on their government to bring a claim on their behalf – a system that does not differ greatly from looking to the government for diplomatic protection.”

Brazilian investors can also bring arbitral proceedings against the host state under ICSID’s Additional Facility Rules. These rules enable a non-ICSID party to bring arbitral or conciliatory proceedings against an ICSID-signatory State. At first glance, these Facility Rules may seem a backdoor entry to the ICSID Convention. This assumption, however, is misplaced. One of the main advantages of the ICSID Convention is contained in Article 54 which provides for the direct recognition and enforceability of ICSID awards in domestic courts. Article 54 does not apply to the Additional Facility Rules and as such is a major blow to an investor’s goal in enforcing an award obtained under the Additional Facility Rules. Furthermore, the use of the Additional Facility Rules is subject to the specific consent of the ICSID Secretary-General, which may further prolong the resolution of the dispute.

D. Customary International Law

Can an investor rely on customary international law to seek redress for harmful government conduct? If so, what are these rules, and how can an investor enforce them?

Scholars have for a long time debated whether BITs “constitute or form customary international law with respect to foreign investment.” Some argue

movement of goods, services, and factors of production between state parties; the establishment of a common external tariff; and the adoption of common trade policies vis-à-vis third states or groups of states”).

Note that there is also a private-party claims system. However, “[t]he overall system to entertain private-party claims depends upon political decisions of the Member States directly concerned.” See Vinuesa, supra note 305, at 429.

Id. at 428.

Id.

See Ross, supra note 91.


See ADDITIONAL FACILITY RULES, Art. 4(1) (“[t]he parties may apply for such approval . . . by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them”).

Salacuse & Sullivan, supra note 42, at 156.
“the investment treaty regime is affecting general public international law such that, for example, even states that are not parties to the 3000 or so (mostly bilateral) investment treaties may now be subject to some of the international investment rules emerging in that regime.”

Others disagree and argue that “despite their prevalence, BITs are lex specialis, and have effect only between the parties to the BIT.”

In any event, it is unlikely that a Brazilian investor will be able to enforce these customary international investment rules (if they exist, and whatever they are) in domestic courts in the absence of some other domestic provision. Customary international rules may only provide minimum standards whereas modern treaties, such as BITs, “go much beyond this minimum standard in the scope of obligations a host state owes towards a foreign investor.”

Given the uncertainty of customary international law, Brazil should consider relying on BITs rather than piecemeal customary international laws incapable of being identified, let alone enforced, by Brazilian investors abroad.

V. CONCLUSION

The increasing internationalization of Brazilian companies has resulted in a marked growth of Brazilian OFDI. Tellingly, some have commented that “[a] little Brazilian global empire might be hatching.” That may be the case, but one should not wish for the egg to crack before the chick is ready to be hatched. Accordingly, this article has argued that Brazil should ratify BITs to promote and protect Brazilian investments abroad. Brazilian companies have already suffered from the lack of BITs in this respect. The inability to refer disputes as of right to arbitration by virtue of a BIT puts Brazilian investors at a serious disadvantage.

Alternative methods of protection, such as forum shopping, diplomatic protection, customary international law and domestic remedies are inadequate to


314 Salacuse & Sullivan, supra note 42, at 156; see Bernard Kishoiyian, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law, 14 NW. J. INT’L L. & BUS. 327, 329 (1994); See also SORNARAJAH, supra note 38, at 175-76.

315 Also, the investor would face the obstacles identified above in relying on domestic courts to seek redress, see supra Part IV. B.

316 DOLZER & SCHREUER, supra note 37, at 8.


318 Jalicki & Medeiros, supra note 23, at 441 (noting that BITs can be a “powerful tool to protect [international Brazilian] companies from potential harm attributable to the actions of authorities in other states”).
protect investors in the highly competitive and uncertain commercial world. The
Brazilian government maintains some programs, mainly through the BNDES, to
financially support OFDI. However, the issue now is no longer how to merely
support OFDI, but arguably how to enhance it, promote it and, ultimately, protect
it. The latter is particularly important since Brazilian investors have shown an
appetite for investing for resource-seeking and market-seeking purposes, which
involve projects with significantly high sunk costs. To this end, the benefits of
arbitrating a dispute, as opposed to subjecting investors to unpredictable and
sometimes biased local court systems, enhances the protection of investments,
minimizes investment risk, and promotes global order.

Much has been written on the dichotomy of “capital-exporting” (read
“developed”) countries and capital-importing (read “developing”) countries.319
Brazil, once deemed a member of the latter, has now arguably become a
prominent capital-exporting country.320 The tables have thus turned.
Accordingly, it is now time for Brazil to set in motion policy changes to reflect
this paradigmatic shift, and equip its national investors with adequate protections
abroad.321 A BIT, with its procedural and substantive rights, such as the right to
arbitrate a dispute, is an ideal candidate to meet this need.

319 See Investment Treaties, International Institute for Sustainable Development,
investment framework consists today of a web of roughly 3000 investment treaties,
including bilateral investment treaties between two states, regional agreements, and
investment protection provisions in their free trade agreements. A key driver of these
instruments has historically been the desire of developed, capital-exporting states to
ensure that their nationals are financially and legally protected when investing in
developing, capital-importing states. Consequently, the majority of investment treaties are
between developed countries and developing countries or economies in transition, though
this is slowly changing.”) (emphasis added).

320 Ross, supra note 24 (“The decade in which Brazil has become a force in
arbitration coincides with its transition from being a capital importer to a capital
exporter”); see also Jalicki & Medeiros, supra note 24, at 441 (“Another important factor
that Brazil should take into account in considering its position towards investment
protection agreements and investor-state arbitration is the increasing role played by
Brazilian companies as exporters of foreign direct investment . . . Brazilian companies are
increasingly investing abroad.”).

321 See Interview with Pedro Alberto Costa Braga de Oliveira, supra note 138, at 8
(noting that “the worst consequence of failing to sign the ICSID Convention and not
ratifying BITs is that Brazilian companies are unprotected”).