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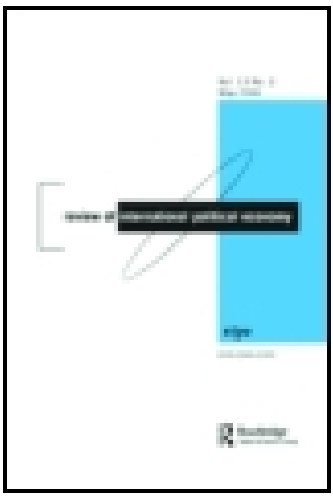

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# The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation

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# The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation[†]

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## ABSTRACT

This article examines Brazil's unique experience with bilateral investment treaties (BITs) – the country signed 14 of them in the 1990s, but none was ever ratified. The case is puzzling for a number of reasons. First, BITs were an initiative of the presidency, and the Brazilian political system is notorious for executive branch's high level of success at enacting legislation. Second, the record of treaty ratification is very high in the country; between 1988 and 2006, 98% of the treaties signed entered into force in less than 18 months. Finally, the Brazilian Congress approved various investor-friendly policies that required even higher voting thresholds in the same period that BITs were being negotiated. We use primary legislative data and interviews with policymakers and bureaucrats to argue that a concentrated but strong ideological opposition in the Congress certainly contributed to hinder BIT ratification, but an unresolved executive – which addressed most investor's demands through alternative channels – was the decisive factor in explaining non-ratification. Ultimately, our findings imply that scholars need to open the black box of the executive in order to better understand the determinants of treaty ratification.

## KEYWORDS

bilateral investment treaties; BITs; executive–legislative relations; Brazil; Brazilian Congress; Brazilian executive branch.

[†]We have presented previous versions of this article at the Global Leaders Fellowship Workshop, Oxford, UK, May 2010; ECPR, Reykjavik, August 2011; and at Chile Catholic University, Santiago, August 2011.

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The Brazilian unique experience with bilateral investment treaties (BITs) has puzzled analysts and policymakers alike. As many other emerging economies in the 1990s, Brazil signed numerous BITs in a relatively short period of time. Yet it is the only country in the world that, after signing, did not ratify a single one of these treaties.

The Brazilian case is perplexing for many reasons. First, it diverges from the behavior of most other emerging economies in the 1990s, which frequently ratified the treaties signed without much political debate (Poulsen and Aisbett, 2013). Second, it differs from Brazilian experience with respect to comparable legislation; in the same period that BITs were being negotiated, the legislature approved various investor-friendly policies that required even higher voting thresholds. Finally, the Brazilian political system is notorious for a very strong executive branch, historically very successful at passing legislation in general and at ratifying international treaties.

In order to explain Brazil's quandary of non-ratification, this paper traces the process that started with the signature of investment treaties in the early 1990s and ended with their withdrawal from the Brazilian Congress in 2002. We use multiple sources, including news, legislative documents and face-to-face interviews with politicians, diplomats, bureaucrats and members of the business community to argue that the failure of BIT ratification resulted from the interplay of an unresolved executive and a small but cohesive and well-coordinated opposition, to whom the topic was highly salient.

Following recent work on Brazilian foreign policy (Anastasia *et al*., 2012; Lima and Santos, 2001), our narrative acknowledges the important and frequently overlooked role played by the Brazilian Congress as a veto player in foreign policymaking. Nonetheless, we argue that the executive's refusal to use its 'toolbox' – pork barrel, patronage, among others – to overcome an opposition is the real puzzle to be explained. In the same period as BITs were being negotiated in the Brazilian Congress, these tools were successfully used to pass a number of other liberalizing policies that required higher vote thresholds and faced a far stronger opposition, such as the end of state monopolies, equal treatment for foreign business, and pension and civil service reforms, most of them approved in less than a year (Lemos, 2007; Souza, 1999).

We conclude that even though BITs were a pressing issue for Brazilian diplomats, they were never a priority for the 'hard' areas of the executive – the Finance Ministry, the Central Bank or the Office of the Presidency (Casa Civil), the one that oversees the presidency's political strategy. Such lack of resolve can be partly attributed to the absence of a constituency for BITs among important domestic and international economic groups; as a comparison, double-taxation treaties (DTTs) – a clear

priority for the business community – were promptly approved in the same period in which BITs remained blocked in the Congress.

As the BIT ratification lingered in the Congress, however, politicians and bureaucrats had the opportunity to update their beliefs about the costs and benefits of the treaties in light of three important developments: a successful privatization program, the failure of the Multilateral Agreement on Investment (MAI) and the financial crises of the late 1990s. These occurrences were the object of legislative debates about BITs and strengthened the perception that the treaties were neither a necessary nor a sufficient instrument for the attraction of foreign investment to the country.

The analysis advanced here speaks to broader literatures on international cooperation, by evidencing the importance of political parties and bureaucracies in foreign policymaking (Neumayer, 2008; Simmons, 2009). It also sheds light on the domestic politics of the global investment regime (Commission, 2010; Haslam, 2010; Salacuse, 2010; Van Harten, 2005), and on the study of policy diffusion (Elkins *et al*., 2006; Shipan and Volden, 2012; Weyland, 2007), as it reveals how the provision of information by a highly technical congressional bureaucracy managed to hinder diffusion by imitation and to promote learning based on other countries' experiences (Poulsen and Aisbett, 2013).

Ultimately, our findings highlight the diverging goals of diplomats and economic policymakers, and imply that, in order to better grasp the determinants of treaty ratification, scholarship needs to open the black box of the executive branch rather than treating it as a unitary actor.

The article is organized as follows. The next section introduces the Brazilian puzzle in the context of a broader literature on BITs. Section 2 places the Brazilian BIT program into historical and regional perspectives. Section 3 discusses the literature on Brazilian executive–legislative relations, and examines competing hypotheses for the failure of BIT ratification in the country. Section 4 traces the process of BITs negotiation and presents evidence in support of our explanation. We conclude by examining potential extensions of our findings to the study of the politics of BITs in other emerging democracies.

## 1. BIT RATIFICATION AND THE BRAZILIAN PUZZLE

The literature devoted to the study of bilateral investment treaties (BITs) as a mechanism for the governance of foreign direct investment (FDI) has expanded dramatically in the past decade, following the exponential growth in the number of these treaties ratified worldwide.

Until the late 1980s very few BITs had entered into force, and the annual rate of ratification remained quite low and stable. It was only



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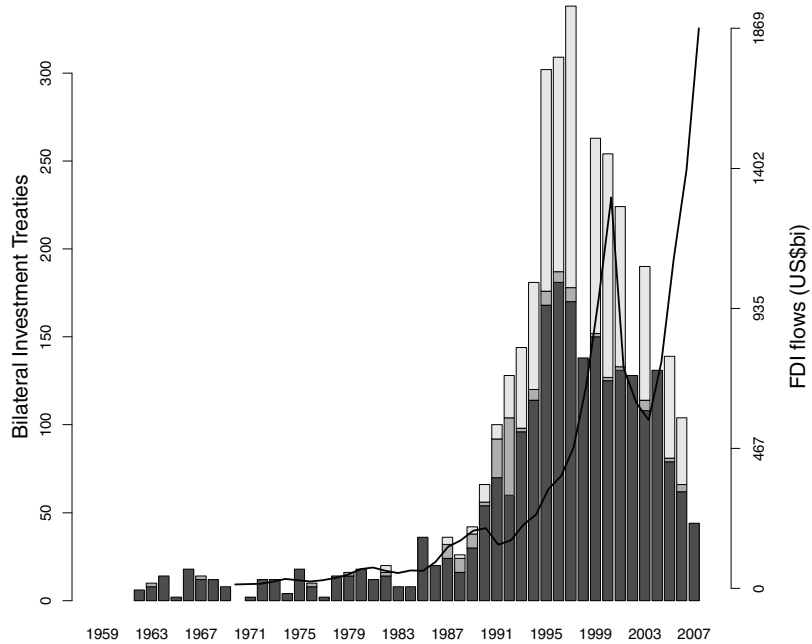


**Figure 1** Bilateral investment treaties and foreign direct investment.
*Note*: Bars represent the annual number of bilateral investment treaties enacted, and the line represents annual flows of foreign direct investment. Areas in black, gray and white within the bars represent BITs enacted between (1) developed and less developed countries, (2) developed countries and (3) less developed countries, respectively.
*Source*: UNCTAD.

during the 1990s that BITs took off, increasing tenfold in comparison with the previous decade (Figure 1).

Whereas most of the work on BITs still revolves around their impact on FDI flows[1] and on the determinants of the government's decision to enter these treaties,[2] the recent literature has expanded to include topics such as the design of BIT clauses (Allee and Peinhardt, 2010; Blake, 2013), the backlash against these treaties (Allee and Peinhardt, 2011; Poulsen and Aisbett, 2013; Simmons, 2014) and BIT renegotiation (Haftel and Thompson, 2013).

Interestingly, however, even though without entering into force BITs cannot fulfill their intended role as legally binding instruments for the promotion and protection of foreign investment, and despite recent evidence that FDI flows seem to increase only as BITs are ratified (Egger and Merlo, 2012; Haftel, 2010), with few exceptions most work has either focused on treaty signature or treated signature and ratification interchangeably.[3] Moreover, despite the wide variation in the 'spell'[4] and rate



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of success of BIT ratification, our understanding of the factors that drive this process remains incipient.

In the first systematic study on the topic, Haftel and Thompson (2013) draw from research on domestic policymaking (Henisz, 2000; Keefer and Stasavage, 2002; Tsebelis, 2002) and on the effects of domestic institutions on international commitments (Lantis, 2009; Martin, 2000; Mayer, 1992; Milner, 1997; Putnam, 1988) to posit that the prospects of BIT ratification should decrease with the range of formal requirements and the level of political and legal constraints imposed on the executive, and increase with the executive capacity as well as with the transparency and predictability of political systems. Yet these factors can hardly account for the Brazilian case.

First, formal requirements for treaty ratification are not particularly strong in Brazil.[5] Consistent with that, the country displays a highly successful record of treaty ratification since re-democratization: 98% of the treaties entered into force between 1988 and 2006, and did it within less than 18 months from signature. In addition, and similar to other countries in South America in which BITs were promptly ratified, the Brazilian political system is frequently referred to as a 'hyper-presidentialism,' for the wide range of powers amassed by the presidency. If not the executive capacity or overly demanding requirements for treaty enactment, what factors could satisfactorily explain the puzzle of non-ratification?

## 2. FROM NATIONALIZATIONS TO INVESTMENT PROMOTION: THE BRAZILIAN U-TURN

To understand the puzzle of non-ratification of BITs in Brazil, it is essential to place the case in the context of liberalizing reforms carried out in South America in the 1990s. The region illustrates, probably better than any other, the overwhelming change in governments' strategy towards FDI occurred in the developing world in that period.

South American countries were historically among the most reactive to the liberalization and protection of FDI (Grunwald, 1971). They were strongly influenced by the Calvo Doctrine,[6] which determined that foreigners should receive the same treatment as domestic investors and be subject to national regulation and courts (Baker, 1999). As a result, no country in the region signed the International Court on the Settlement of Investment Disputes (ICSID) Convention by the time of its establishment in 1965, and Brazil has not signed it to the day.

The antagonism against foreign investors in the late 1960s was such that the then Deputy US Coordinator of the Alliance for Progress, William D. Rogers, pointed Peru's expropriation of the International Petroleum company in 1968 as the most important single event in the USA–Latin American relations in a decade. In his words:



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> In no area of the world have the disputes about U.S. investment been so numerous. Nor in any area of the world—China, Russia, and Iran under Mossadegh included—has the threat of nationalization loomed over such a wide array of US properties, or US business investment been so important to the broader issues of international relations. (Rogers, 1971: 247)

Yet less than three decades later, all major South American economies had joined the ICSID and rushed to conclude BITs (Figure 2), aimed at protecting the assets of multinational companies abroad and establishing an international consensus with respect to foreign investors' rights. Brazil was not different; even though it never signed the convention, it entered into numerous BIT negotiations in the 1990s.

The Brazilian approach to investment protection began to change under Fernando Collor de Mello, the first president popularly elected after two decades of military rule (1964–1985). In that period, Brazil joined the Multilateral Investment Guarantee Agency Convention

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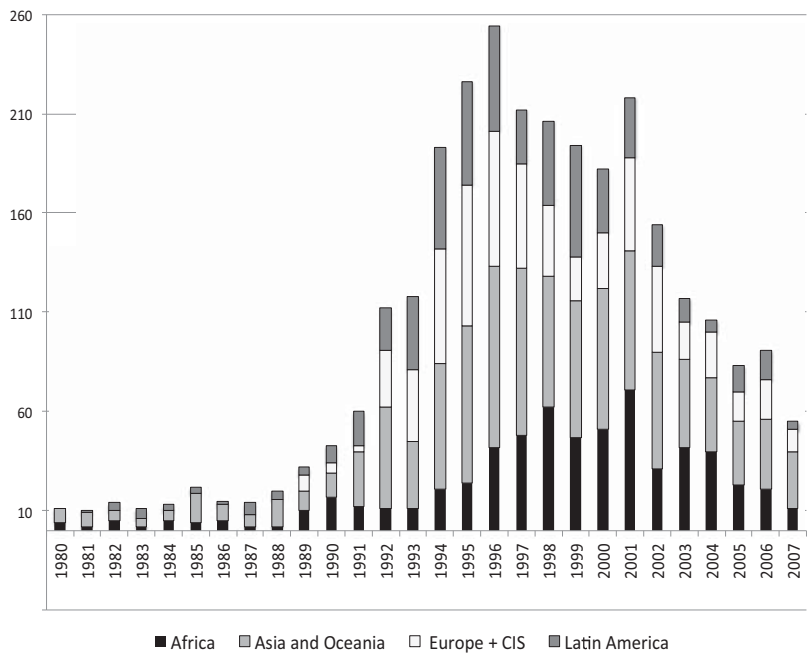


**Figure 2** Bilateral investment treaties by region.
*Note*: BITs signed.
*Source*: UNCTAD 2009.

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(MIGA), started an Inter-ministerial Working Group (IWG) to frame a BIT model and created an agency to stimulate foreign investment.[7]

BIT negotiations involving Brazil were mostly initiated by home countries' governments.[8] The treaties were offered sometimes as a means for attracting investment, in others presented as a prerequisite for it, since some international agencies like the MIGA demand BITs in order to insure foreign investment. The German government, for example, remarked that credit was more expensive without a BIT.[9] Multinational corporations (MNCs) already established in the country also lobbied for policies like the liberalization of cross-border capital transfers and national treatment, which were included in the BITs proposed.

On the Brazilian side, there was a declared purpose of 'signaling to the international financial community a receptive attitude towards foreign investment.' BITs were sponsored as a 'relevant factor to attract foreign investment (...),' and official guarantees to foreign investment were internalized as 'more and more valuable to investor's final decision.'[10]

The rhetoric about the importance of offering protection to investment was strengthened in the context of a privatization program, one of Collor de Mello's main priorities; the success of the program required that the government found potential buyers for nationalized firms beyond national borders, and BITs were claimed to reduce the costs of doing business in Brazil by curbing political and regulatory risks.[11] In an effort to conform to international standards, the first very restrictive, anti-foreign investment model of a Brazilian BIT was progressively readapted to more 'realistic parameters, towards a model as close as possible to the recommendations of OECD.'

Along with foreign governments and multinationals, the most influential Brazilian newspapers also explicitly campaigned on the necessity of a new, more favorable and aggressive approach towards foreign investment. News in the early 1990s often urged the government to move fast to attract investors, in response to the competition entailed by the transition to capitalism of former communist countries and China. Argentina's privatization process was also extensively covered, and pointed as another reason why Brazil should adopt market-friendly policies that enabled the country to join the competition for foreign investment. Argentina not only signed the ICSID Convention in 1991, but also advanced an encompassing BIT program that culminated in the signature of 59 treaties between 1990 and 2011, 54 of them ratified within 2.5 years (Table 1).

As of 1990 many countries had formally proposed bilateral treaties to Brazil, and by 1993 11 negotiations had already started.[12] Six years later, the government had signed 14 of these treaties (Table 2), but after a decade none of them had been enacted when they were finally removed from the legislative agenda in 2002. Meanwhile, Brazil's neighbors

**Table 1** BITs in South America and Mexico

| Country | Signed | Ratified | Spell (years) |
|---|---|---|---|
| Argentina | 59 | 54 | 2.5 |
| Chile | 52 | 39 | 3.1 |
| Peru | 31 | 29 | 1.2 |
| Ecuador | 28 | 24 | 2.0 |
| Uruguay | 28 | 27 | 3.6 |
| Venezuela | 27 | 24 | 2.1 |
| Paraguay | 24 | 21 | 2.8 |
| Mexico | 23 | 19 | 1.6 |
| Bolivia | 22 | 19 | 3.5 |
| Brazil | 14 | 0 | |
| Colombia | 8 | 2 | 3.1 |

*Source*: UNCTAD.

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ratified 85% of the BITs signed, with an average spell of 2.5 years and no country taking longer than 3.6 years on average (Table 1).

In order to understand the failure of BIT ratification in Brazil, it is necessary to take a closer look into the executive–legislative relations that prevail in the country. The next section reviews this literature and examines alternative hypotheses for the failure of the presidency to ratify BITs.

## 3. BRAZILIAN 'HYPER-PRESIDENTIALISM' AND POTENTIAL EXPLANATIONS FOR THE PUZZLE OF NON-RATIFICATION

There is a wide consensus that the Brazilian presidency is one of the most powerful in the world (Shugart and Carey, 1992). More than 85% of the

**Table 2** Brazilian BITs

| Signature | Country |
|---|---|
| 1994 | Portugal, Chile, UK and Ireland, Switzerland |
| 1995 | Denmark, Finland, France, Germany, Italy, Venezuela, South Korea[a] |
| 1997 | Cuba |
| 1998 | Netherlands |
| 1999 | Belgium |

*Note*: [a]Even though the UNCTAD database includes a BIT signed between South Korea and Brazil, different from all other cases, we found no register of this BIT in the Brazilian Congress. The only international agreement available in the records refers to technical cooperation.
*Source*: UNCTAD.

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legislation adopted in Brazil since 1985 originated in the executive branch (Figueiredo and Limongi, 1999), and more than 75% of it was issued through 'provisional measures,' or decrees, with a rate of rejection as low as 8% (Pereira *et al.*, 2008).

On top of that, parties lack programmatic consistency and the open-list proportional representation system adopted in the country leads to extreme fragmentation and prone-to-crises minority governments (Ames, 2001; Lucas and Samuels, 2010; Mainwaring, 1999; Pereira *et al.*, 2008; Samuels, 2002). Since democratization in 1985, no winning presidential party has convened more than 20% of the seats in the lower house (Amorim Neto, 2006); one-third of lower house members in the country change party in a given four-years Congress (Melo, 2004), and ideology explains little of legislative behavior, with declining effects over time (Zucco, 2009).

This institutional schema, in which strong presidents coexist with fragmented assemblies (that is to say, with severe coordination problems), has been claimed to conspire against stability and governability, and to promote a rather individualistic and parochial system.

Yet competing views argue that cooperation between both branches is possible through the distributions of cabinet positions, a highly partisan behavior that evolves from structured, centralized rules and distributive pork (Amorim Neto, 2006; Figueiredo and Limongi, 1999; Pereira *et al.*, 2008; Raile *et al.*, 2010). The approval of fiscal, administrative and social security reforms that required supermajorities of 60% in both houses is evidence of such cooperation.

These authors recognize that while presidents are strong, the Congress imposes itself as a veto player – no major proposal goes unchanged, and some are rejected by the legislature (Ames, 2001). Decrees are used as agenda-setters, rather than usurpations, and a large share of them are actually amended to incorporate the Congress' preferences (Negretto, 2004). Of course, this only happens through continued negotiation and eventual stalemate.

Coalition management has proved necessary and is in fact at the core of the system, and different governments have played it for about two decades now. Coalitions have been functional and durable in Brazil, as long as the 'executive toolbox' has worked.[13] Notwithstanding, they can also be oversized and ideologically heterogeneous (Amorim Neto, 2006), and generate abnormalities as excessive pork, patronage and even corruption (Ames, 2001; Pereira *et al.*, 2008; Samuels, 2002; Zucco, 2009).

Both perspectives share, nonetheless, the consensus that presidents are the epicenter of the political system in Brazil, and do have almost a monopoly upon the resources important for the advancement of legislators' careers, which are constantly used to guarantee majorities. Because these majorities are not completely safe, presidential

anticipation, recurrent bargaining and government sharing are intrinsic parts of the system. As Kingstone (2000) has put it, it is a science of 'muddling through gridlock.'

Authors have described the functioning of Latin American assemblies as a 'bilateral veto game.' In this game, presidents move first, by proposing a policy. Next, the legislature accepts, amends or rejects it. In case there is change or rejection, presidents 'bargain, take unilateral action or seek to undermine assembly's ability to veto proposals' (Cox and Morgenstern, 2001: 173).[14]

In the particular case of international treaties, the presidency has the Constitutional prerogative of negotiating them, and the Constitution requires a simple majority in the two houses for treaties to enter into force. According to Hathaway's (2008) classification, these requirements are not particularly restrictive in the context of South America. They are the same as those observed in Argentina, Bolivia and Chile, countries that ratified treaties with high rates of success and in a relatively short period of time. It follows that the Brazilian failure to ratify can hardly be attributed to Constitutional requirements for treaty ratification (Haftel and Thompson, 2013).

Once a treaty is signed, it is sent to the Congress, which can either accept or reject it by issuing a decree. Differently from other legislation, however, there is no presidential veto power, meaning that presidents have no instrument to override the Congress' preference in this case. Consequently, they can either bargain by trying to convince opponents, or distribute pork and patronage (or threaten to cut them) with the same goal; they cannot, however, impose or bypass the Congress in this matter as they can in other policy areas.

The fact that there is no presidential veto power over treaties suggests that, in this particular area, the Brazilian Congress might have stronger clout to impose its views and preferences over the executive. Constraints on executive power are, thus, another potential explanation for the quandary of non-ratification (Alexandre, 2008; Haftel and Thompson, 2013).

This hypothesis, however, is hardly compatible with the historical success of Brazilian presidents to ratify the country's international treaties. Since the promulgation of the Brazilian Constitution in October 1988, only 3 out of the 812 treaties sent to the Congress until 2006 were rejected, and 12 others were withdrawn by the president – less than 2% of the total (Diniz and Ribeiro, 2008). Moreover, 75% of these treaties were approved within three years of being presented to the Congress, a spell comparable to the 2.5 years that BITs have taken on average to enter into force in South America.

The presidential success in ratifying foreign policy in Brazil since the 1988 Constitution is such that scholars – and even politicians – have frequently considered the Congress irrelevant or a mere 'rubber stamper'



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on these matters.[15] The challenge, thus, is to explain why such distinct pattern emerges in the case of BITs.

Another hypothesis for the failure of BIT ratification resides in the content of these particular treaties. They might have been more controversial than others sent by the presidency for congressional approval. As already noted, economic liberalization, especially in the case of foreign investment, has been a historically divisive topic in Brazilian economic policymaking. According to this hypothesis, opposition in the Congress should be particularly strong and cohesive in the particular case of BITs, imposing a barrier to executive preferences on the matter.

Yet, again, this does not seem to be the case. First, most opposition came from the then relatively small share of Workers' Party's (PT's) legislators, plus a handful of dissatisfied government allies, as we show in detail in the next section. Moreover, in the same period that BITs were being debated, other related legislations were widely approved in a relatively short period of time, despite the same opposition. This was the case of DTTs, for example, which also involved liberalization of FDI.

Even the clause on international arbitration, which would move conflict resolution from national to international courts, and which was highly debated for its explicit contradiction with the Calvo doctrine and the Brazilian Constitution cannot be blamed for the stalemate. In this same period that BITs were in negotiation, Brazil was making major advances in regulating international arbitration in the realm of trade. It approved the 'Marco Maciel law' in 1996, which regulates arbitration both at the domestic and at the international levels, conciliating the domestic laws and internalizing practices set by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the 'New York' Convention (1958), ratified in 2002. Two other related agreements were also ratified in the decade: the Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1997) – 'Montevideo Convention' – and the Inter-American Convention on International Commercial Arbitration – 'Panama Convention.' All of these initiatives suggest that the explanation for the failure of BIT ratification can hardly be blamed on their conflict with the Doctrine.

Likewise, concurrent with BITs, the Brazilian Congress approved many economic liberalizing reforms far more contentious than the treaties, some of which required Constitutional changes with super-majorities and multiple rounds of voting. The end of state monopolies, equal treatment to foreign business, and pension and civil service reforms are examples of highly contentious policies approved in less than a year (Lemos, 2007; Souza, 1999).

When resistance was organized against the breach of monopolies, for example, such as the five-months strike of oil workers in 1996, the president went as far as to send army troops to resume production while



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negotiating with the Congress (Goertzel, 1999: 132–4). In view of these events, it is hard to make the case that the sole – and by no means massive – opposition in the Congress was the determinant to the failure of BIT enactment.

In the next section, we present evidence from interviews, legislative documents and the media to argue that the failure of BIT enactment in Brazil was not a result of strict rules for approval, of limited executive powers or even of the particular content of the liberalizing initiatives included in the treaties. Rather, the main factor to explain the quandary of non-ratification was an unresolved executive, which was never fully committed with the treaties in the first place, and became less and less so as their costs and benefits became clearer over time.

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## 4. THE POLITICS OF TREATY RATIFICATION IN BRAZIL

In Brazil, the legitimate authority to negotiate and celebrate treaties and agreements is the presidency, through a delegation to the Foreign Affairs Ministry, often joined by other ministries or agencies. Once signed, the Minister of Foreign Affairs sends the original treaty text to the Office of the Presidency (Casa Civil). The president will then send both the treaty and its justification with a formal presidential message to the Chamber of Deputies (CD), where the legislative process begins. As the system is bicameral, once approved in the CD it will follow to the Senate.

After approval in the Senate, a legislative decree is issued, and the president herself[16] issues a 'ratification' decree that incorporates the treaty into the national law system. It is only then that the treaty is considered to enter into force. The presidency is, thus, the 'clearing house' in the law-making process initiated by the executive branch, with enormous gatekeeping powers.

Although legal scholars tend to consider that the Congress cannot amend a treaty ( Cachapus de Medeiros, 1995; Diniz, 2009; Mazzuoli, 2001; MRE, 2008; Rezek, 1973), the Congress members have actually claimed their rights to raise reservations to the text submitted to them. After an extensive debate, it has been concluded[17] that the Congress could amend the original text only to express agreement or disagreement, being able to approve the bill with reservations.[18] Still, as the legislative process of BIT ratification is described in section 4.1, it becomes clear that congressmen frequently attempted to amend the treaties. In our view, these initiatives function as an additional tool in the hands of the opposition to stall the process of ratification, since it was never clear what would happen in case these amended treaties were actually approved.

Internal statutes (regimentos) set up the rules for the legislative process, a serpentine process that does not favor celerity. As Figure 3 shows, the Foreign Affairs and National Defense Committee is the first

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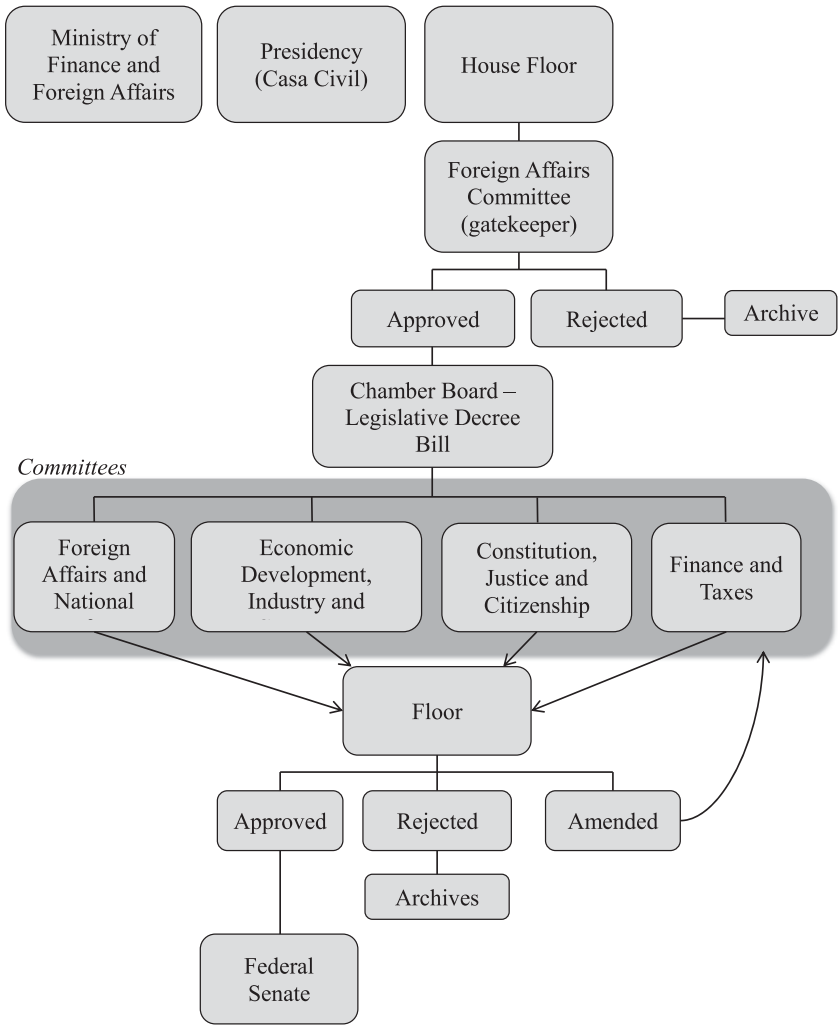


**Figure 3** Legislative process of treaties in the Brazilian chamber of deputies. *Source*: Authors, based on the Chamber of Deputies Statutory Rules, 1989.

gatekeeper; a floor voting follows, and then the bill is sent back for further analyses under the committees the Speaker had assigned it to.

At the committee stage, the respective chairmen have full discretion to choose the rapporteur. The only rule regarding who will report the bill is that their distribution should follow party proportionality, yet chairmen frequently privilege their own party's policy stance. Deadlines set by rules are seldom respected; once approved in the committees, reports are voted in the floor under a non-nominal voting of simple majority.[19]

If amendments are proposed at the floor stage, bills go back to committees for further debate and then return to the floor. If approved, the bill follows straight to the Foreign Affairs and National Defense Committee in the Senate and is then voted on the floor. Once approved in the Senate floor, it is promulgated and published. Only then can the president issue a decree ratifying the treaty.

### 4.1 The legislative process of BIT ratification

Portugal, Chile, Switzerland and UK/Ireland treaties were negotiated under Collor de Mello, signed under his successor Franco in 1994, and sent to the Congress in early 1995 by Cardoso.[20] Considering that there was no sign of opposition and that 67% of all international treaties and agreements approved between 1988 and 2006 took less than 24 months (Diniz, 2009), the length of time it took the government to initiate the process is, in itself, evidence of the lack of interest on the part of the executive.

In the first committee that examined the treaties, the government enjoyed agenda-setting power and the pro-government rapporteur promoted a favorable view; BITs were expected not only to make Brazil more competitive vis-à-vis Asian countries, but also to facilitate economic cooperation.[21] An approval without restrictions seemed the most likely outcome at this level and if any trouble arose, the government could have used procedural instruments like the Constitutional urgency to push the bill forward.

Notwithstanding, opposition emerged both from within the ruling coalition itself and from leftist opposition parties, focused on four main points: (a) the scope of investment concept within the BITs, claimed to favor speculative capital; (b) international arbitration, which would allow firms to unilaterally 'exit' national courts, undermining the long-accepted Calvo Doctrine; (c) 'most favored nation clause,' which would bar Brazil from negotiating special conditions with other developing countries; and (d) the conflict between a new framework for expropriation compensation and Constitutional rules on the matter.[22]

After much debate, the committee unanimously approved the four BITs with the sole interpretative clause on the payment of expropriations framework. In three merit committees, action sped up, with reports signaling the need to suppress 'archaic and rigid xenophobic attitudes, typical of Third World countries' in favor of pragmatism. The PT's proposal of a governmental approval for a firm's decision to 'exit' the national judicial system for an international arbitration was ignored.

Surprisingly, in the last committee (Finance and Taxes), the rapporteur, a *member of the governing coalition*, recommended the elimination of the clause on international arbitration and a 15-years grace period of



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protection after denunciation for the Switzerland BIT. He further contended that free-transfer clauses worked against the need to control cross-border capital flows in a crisis scenario.

This concluded the 'first phase' of the BIT legislative process in Brazil, in which a 'packaged' journey of the first four treaties (Chile, Portugal, UK and Ireland, and Italy) was met with increasing controversy in several committees (see Figure 4).

The second phase begins with changes that disfigured the bills at the floor level, forcing them back for a second consideration at the committee level at a time when opposition had gained control over agenda-setting powers in important instances. In this phase, three concurrent events took place: (a) the presidency sent the second batch of bills and faced a concerted and polarized response against the original text of these new treaties, which got stuck; (b) the first batch of bills faced strong and concerted opposition in the committees and floor; and (c) a third batch of eight signed BITs were never sent to the Congress.

Stalling maneuvers employed by the PT forced the treaty's discussions to be rescheduled up to 12 times, and two other years elapsed before competing versions of the treaties finally made it to the floor. One version included an 'interpretative clause' (i.e. amendment) on expropriations in the four treaties, while the second one also eliminated international arbitration for the Switzerland BIT only.

The cost of trying a vote in the floor rose significantly for the executive, as the more restrictive option would imply re-starting negotiations with Switzerland – and explaining why the government managed to approve other three treaties unchanged and failed on this one.

Furthermore, when the UK/Ireland BIT was finally tabled in the floor, in 1999, the Worker's Party mobilized other small left and center-left parties and proposed a broad amendment introducing three key changes to the original text, including some changes already rejected at the committee level: elimination of free transfers; introduction of government approval to the investor's appeal to international arbitration; and guarantee of policy space to the Congress, based on an article of the Constitution that determines the Congress will regulate investments. This proposal was a systematization of all the previously rejected changes to the text in the committees for the past four years.

The original BITs traveled back to the committees, where the changes proposed in the floor were to be voted. At this point, however, four years had passed and the Workers' Party had gained control over one of the key committees: Economic Development, Industry and Trade. In the previous phase, the ruling coalition dominated the committees, which were chaired by business-friendly coalition members. Now, under PT leadership, floor changes were rapidly approved.[23]



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| | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|
| **Portugal** | Signed, sent to House | Sent to 1st committee | Become Legislative decrees* | Sent and approved in 2nd, 3rd and 4th committees; Sent to the floor Tabled for the 1st time | |
| **Chile** | Signed, sent to House | Sent to 1st committee | | | |
| **UK & Ireland** | Signed | Sent to House, sent to 1st committee | | Sent and approved in 2nd and 3rd committees; Sent to the Floor Tabled for the 1st time | |
| **Switzerland** | Signed | Sent to House, sent to 1st committee | Becomes a Legislative Decree*; Sent and approved in 2nd, 3rd and 4th committees | Sent to the Floor; Tabled for the 1st time | |
| **France** | | Signed | | Sent to House, sent to 1st committee | |
| **Germany** | | Signed | | | Sent to House; Sent to 1st committee |

1st committee: Foreign Affairs and National Defense (FAND)
2nd committee: Economic Development, Industry and Commerce
3rd committee: Constitution, Justice and Citizenship
4th committee: Finance and Taxes

* Aproved at FAND committee

| | 1999 | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|
| **Portugal** | Resent to committees due to floor amendment | | | President withdraws | |
| **Chile** | | | Back to floor | | |
| **UK&Ireland** | | Back to Floor | | | |
| **Switzerland** | | | Back to floor | | |
| **France** | | Becomes a Legislative Decree*; Sent and approved in 2nd and 3rd committees | Sent to Floor; Tabled for 1st time | Resent to committees due to floor amendments; President withdraws | Back to Floor |
| **Germany** | | Becomes a Legislative Decree* Sent and approved in 2nd, 3rd and 4th committees | Sent to Floor; Tabled for 1st time | President withdraws | |

1st committee: Foreign Affairs and National Defense (FAND)
2nd committee: Economic Development, Industry and Commerce
3rd committee: Constitution, Justice and Citizenship
4th committee: Finance and Taxes

* Aproved at FAND committee

**Figure 4** BITs timeline.
*Source*: Federal Senate database, 2013 (http://www.senado.gov.br/senado/prodasen/).

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The PT's position was that 'there is no coincidence between capital-exporters' and capital-importers' interests, and the purpose of the treaties is to protect only the export side from 'hostile' or 'damaging' laws in the host country. If there were a coincidence, there would be no need for the BITs.'

In the view of the rapporteur, national regulation was about disciplining foreign investment, and BITs were about restricting the states' scope to effectively regulate capital flows. Moreover, it was argued that free transfers would limit the government's capacity to respond to speculative attacks which, in light of the late-1990s crises, started to seem very important. Within three weeks, in April 1999, this committee produced reports on the four original BITs – Chile, UK and Ireland, Italy and Switzerland, approving the floor changes with unanimous voting.

At this point, the government finally submitted a second batch of BITs (again after a two-year delay), but the anti-BIT mood had now extended to the committees controlled by the ruling coalition as well. While the government managed to approve the France BIT unchanged in spite of the full Workers' Party fire at the Foreign Affairs Committee, the opposition version won in the second committee. In the third and last committee, the rapporteur – a coalition member – proposed a favorable draft that was never tabled by the chairman (the decision to table is discretionary to the president of the committee); two years later, during the 2002 presidential campaign in which the PT had very good winning prospects, he altered his own report and sided with the opposition. This bill was never tabled, and was later withdrawn.

The Germany BIT provoked polarization as well. The government rapporteur firmly defended that 'the treaties do not contradict Constitutional principles, the legal framework and national sovereignty,' drawing from the Itamaraty – the Brazilian foreign service – and academic sources, and addressed criticisms one by one.[24] His view won one year later, but was soon rejected at the other committees. The Germany BIT never made it to the floor.

By January 2000, the first set of BIT bills was facing a second committee round, completely changed by opposition, while newer ones faced no compromise at the first committee round. At the end of that year, the failure was clear with competing versions of the treaties having to be reconciled on the floor. The risk of having a modified text that would send the diplomats back to the negotiation table at the international level – at a point when some countries had already ratified theirs – was simply too high.

For the following two years, not much action happened besides some tabling attempts. In December 2002, two weeks before the end of his term, Fernando Henrique Cardoso withdrew all the six bills from the Brazilian Congress, following the recommendation of a second IWG set up



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to debate the alternative facing the government. The other eight BITs signed were never even sent to the Congress, as a result of the gridlock.

To summarize the drawn-out process, the eight-year legislative history of the BITs in the Brazilian House represents a gridlock marked by ideological and formal disputes, as well as procedural battles. The process was centered in very few actors – Itamaraty, Casa Civil, rapporteurs and committee chairmen, and was played against the backdrop of coalitional politics.

The PT offered fierce opposition to BITs, and expressed divergence at all stages. Earlier accounts of the process (Alexandre, 2008) and many narratives have 'blamed' the PT for blocking the treaties. Although it was certainly a driving force behind the gridlock – even though it controlled less than 10% of the seats and had only a handful of fully participating members – a careful reading of proceedings shows that the desertion of allies was also key to the government failure.

It finally became clear that letting the bills die in the Congress would be better for the government than suffering a real formal defeat or even returning to the negotiation table, as the partner countries had already ratified the agreements. The process stopped for about two years and ended with the withdrawal of the propositions, two weeks before the end of Cardoso's presidential mandate.

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### 4.2 Our argument: small cohesive opposition vs. unresolved executive

The process traced above reveals how a very powerful Brazilian executive proved completely unable of ratifying a single BIT, after a legislative process that lasted almost a decade and ended with the withdrawal of the few treaties that made it to the Congress.

This failure was not a matter of executive capacity; other treaties were approved in the same period, and comparably contentious bills were passed requiring even higher thresholds than BITs. It was also not the result of an opaque or unstable process; rules of the game were clear and did not change either compared to other periods when international treaties were ratified with little congressional resistance or over the period during which BITs were being negotiated.

Rather, the Brazilian quandary of non-ratification resulted from the interplay of a small but cohesive and well-coordinated opposition, to whom the topic was highly salient, with an unresolved executive, as we argue below.[25]

*A small but cohesive opposition*. The Worker's Party was the major opposition BITs faced in the Brazilian Congress. The party held a consistent and cohesive anti-liberalization and anti-globalization position, at that

time driven by well-known ideological views. On programmatic terms, the PT opposed every aspect of the treaties, and all congressmen in the party voted consistently against their approval in every opportunity.

Besides voting cohesively, the PT was favored by a wide array of minority prerogatives afforded by the Constitution and the Congress' by-laws – such as control of committees, amendment powers and deferring strategies – which boosted its capacity to influence the process.

Finally, economic nationalism was certainly not limited to the PT. The notion of a 'national project' had been pervasive among Brazilian leading elites and key to the country's insertion in the world since at least the early-twentieth century. The country had always taken a 'defensive stance' with respect to international economic affairs and consistently favored a 'cautious integration' (Almeida, 2007: 60 (see http://www.scielo.br/scielo.php?script=sci_isoref&pid=S0034-73292007000200005&lng=en&tlng=ptAlmeida)).

This explains why some members of the ruling coalition joined the PT in the opposition to BITs, and to a framework to dealing with investment seen as 'coming from the North.' Caveats were successfully framed as legal issues and not as blunt political opposition, and therefore appealed to a broader audience.

The PT's cohesiveness, congressional rules that favored minorities, and the support it gathered from members from the ruling coalition itself made it possible for a party with less than 10% of seats to influence the content of BITs and make their passage harder. As we have repeatedly stressed, however, the PT's behavior was not particularly directed to BITs, and *similar strategies were observed in the voting of other liberalizing measures in the same period, without the same success*.

What was unusual in the case of BITs was the executive's decision to not use its 'toolbox' to force approval, in the same way it did in other cases, to which we turn now.

*Executive's lack of resolve*. It is important to stress that BITs comprised one initiative among many others designed to attract foreign investment in the 1990s. They were part of a policy bundle advanced by a number of different actors in the executive, in the context of an encompassing liberalization project. This highlights an important aspect that is frequently overlooked in the literature on treaty ratification – the executive is not a single, unitary actor, and understanding how BITs were sponsored *within* the executive branch is key to explaining their negotiation process.

We have no elements here to argue that BITs were a case of executive turf,[26] yet we can affirm that whereas BITs were a pressing issue for diplomats – as all treaties and agreements are since they embody the costs of time and resources allocated to negotiation and signing, we find no evidence that they were a priority for the 'hard' areas of the Cardoso



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government: the Finance Ministry, the Central Bank or the Office of the Presidency.

This is clear throughout the process of BIT negotiation; the persuasion phase was handled by few diplomats in the Itamaraty alone through meetings and exchange of notes, with no involvement of the Office of the Presidency, or of any other key government representatives and party leaders. A successful track record of treaty ratification in the Congress certainly increased the confidence, among diplomats, that no barriers should arise in the case of BITs.

As the treaties were blocked, however, it would be expected that a resolved executive that considered them a priority would use the instruments at hand to push for their approval. Persuasion, agenda powers and pork were exhaustively used to successfully promote social security and public sector reforms – a deficit-reduction package, the fiscal responsibility law and civil service reform, but this effort never happened in the case of BITs.

As the chairman of the Constitutional Committee in the Chamber at the time reminded, members were very busy with the Constitutional amendments and the tough resistance faced not only from other legislators, but also from various societal segments, such as trade unions and businesses concerned with the loss of privileges. In this context, BITs 'were not really a priority.'[27]

In our view, there are many domestic and international factors that potentially account for the lack of priority BITs received in the Brazilian executive. From the start, as a policy bearing potentially diffuse benefits, there was never a clear constituency pushing for the treaties' ratification. Potential beneficiaries – governors who would receive increased investments in their states, or MNCs already operating in the country and that would have more protection and access to cheaper loans abroad – were never involved in direct negotiations. For these players, DDTs were the real priority – 'this is what we look for,' remarked a representative of the industry federation in Rio de Janeiro.[28] Not surprisingly, 24 DDTs were ratified without opposition or changes.

As the congressional resistance delayed the process, legislative debates brought to light the implications of three major developments, prompting politicians from all sides to update their beliefs: the failure of the negotiations of the MAI, the success of the Brazilian privatization program and the late-1990s financial crises.

The MAI negotiations were launched by OECD governments in May 1995, with the goal of designing a freestanding international treaty, with investment protection and with effective dispute settlement procedures. Negotiations went through 1998, and their failure strengthened the opposition against BIT ratification in Brazil. The position of countries like France, which insisted on protecting the government's capacity to control



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capital flows, strengthened the same arguments in the Brazilian Congress.[29]

The concern with the government's capacity to control capital flows is also revealed in reference to the financial crises occurred throughout the world in the second half of the 1990s. Reports made direct reference to crises, and referred to the experiences of Mexico and Russia to question both the risks associated with the treaties and their real importance for the attraction of FDI. 'If there is one lesson from these sad episodes [the Mexican, East Asian, Russian crises], is that the free market does not solve by itself the instability generated by the intense movement of speculative capitals at the international level.' Opponents argued that BITs would tie the hands of the government in the event of a speculative attack.

Finally, it is important to note that the end of inflation and the launching of an encompassing privatization program triggered a dramatic increase of FDI inflows to Brazil (Figure 5), which grew faster than most of the region, regardless of the fact that not a single BIT was ever ratified.

The risks associated with BITs revealed by the failed negotiations of the MAI and the late-1990s crises, on top of the perception that Brazil did not need these treaties to attract FDI, strengthened the consensus that benefits of BITs did not justify their costs.

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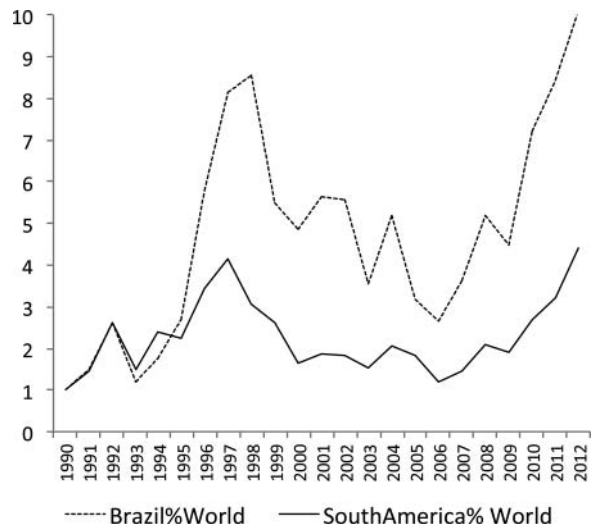


**Figure 5** Foreign direct investment inflows to Brazil and South America.
*Note*: Index of the share of world FDI inflows directed to Brazil and South America; reference year is 1990.
*Source*: UNCTAD.

Yet whereas the executive failed to ratify BITs, it succeeded in advancing most of the policies long demanded by foreign investors through alternative channels.[30] Liberalizing reforms in the Brazilian Constitution and infra-legal regulations have addressed two important features of the BITs: equal treatment to foreign companies and free transfers of capital.

In early 1995, President Cardoso proposed the end of state monopolies on mineral resources, energy exploitation, telecommunications, and oil and gas, at the same time revoking an article of the Constitution that granted special treatment to national companies. The combination of these reforms meant foreign participation in all these activities and the same legal treatment.

Reforms were approved within a period of six to nine months, surprisingly short considering they demanded a supermajority of 60% in two rounds in the two houses, and that the government party had less than 20% of the seats (Lemos, 2007; Souza, 1999).[31]

The free-remittances topic was addressed through norms and resolutions issued by the National Monetary Council (CMN).[32] These policies date back from at least 1990, have been deepened in the mid-1990s, and are still being furthered. For many years, foreign capital inflows to Brazil had to be approved by the Central Bank through article certificates. Since 1996, the system has changed to what is an only informational electronic control of inflows and outflows, with no need for repatriation authorizations. Profit remittances became income tax free since 1996, and Brazil signed treaties to avoid double taxation with a number of countries, among other measures demanded by investors (Silva, 2009).

The only clauses left out were the most favored nation and international arbitration. With respect to the first, it can be argued that national treatment at least equalizes the legal framework in which multinationals from different countries operate.

It can be said that most items on the liberalizing agenda of the 1990s were implemented through other means, rendering BITs even less relevant. Ultimately, the use of international arbitration for investment conflict resolution was the single clause included in BITs that was never addressed.

## 5. CONCLUSION

The negotiation of BITs in Brazil poses a puzzle to scholars and policymakers alike. In view of the nationalism that historically pervaded Brazilian governments and elites, the rush to sign BITs in the 1990s marks a radical shift from previous strategies toward FDI. Once these treaties were signed, however, there were reasons to expect that a very strong executive would be able to promptly enact them in the Congress, which never happened. Brazil signed 14 BITs in a relatively short period of time, but never ratified any of them.



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This article used multiple sources, including news, extensive legislative documents, and face-to-face interviews with politicians, diplomats, bureaucrats and members of the business community, in order to trace the process of BIT negotiation in Brazil and explain the quandary of non-ratification.

We argued that non-ratification was the result of the interplay of a small but cohesive opposition for which investment regulation was a salient theme and an unresolved executive. The first part of the argument reinforces the role of the legislature as a veto point, and challenges the scholarship that grants congresses in Latin America a very weak role by showing that the Brazilian Congress can play a central part in foreign policymaking. Yet, in our view, considering the characteristics and practices of the Brazilian political system, the behavior of the executive was the real puzzle to be explained.

This behavior cannot be understood without stressing the fact that BITs were only one initiative in a bundle of policies designed to liberalize the Brazilian economy. These initiatives were advanced concurrently, and by different groups within the executive, from the early 1990s on.

In this context, even though BITs were a priority for the Ministry of Foreign Affairs, there is no signal they were relevant for the 'hard' areas of the government – the Finance Ministry, the Central Bank and the Chief of Staff of the Office of the Presidency (Casa Civil). The absence of a clear domestic constituency, compared to DTTs, for example, explains part of this irrelevance.

Still, the successful track record of treaty ratification certainly suggested that BITs should enter into force without major efforts on the part of the executive. When the treaties were blocked in the Congress by a 'hawkish' opposition, however, rather than using patronage, pork and other instruments at hand, the 'hard' areas of the executive chose to focus on their priorities rather than making real efforts to push BITs forward.

The lack of resolve of the presidency, revealed since the beginning of BIT negotiations, was later reinforced by changes in the international scenario and by the debates occurred in the Congress, which increasingly alluded to the lessons learned from the failure of the negotiations of the MAI, the financial crises of the late 1990s and success of the privatization program in the absence of any BIT. All these events contributed to update politicians' (among them those in the executive) beliefs about the costs and benefits of these treaties, and strengthened the perception that BITs were neither necessary nor sufficient for FDI attraction.

We also noted that, even though the government failed to enact BITs, it advanced many important features of the treaties like the national treatment of MNCs and free cross-border transfers through other channels like central bank regulation, sometimes bypassing the Congress in order



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to respond to investors' demands. Yet other important clauses such as the use of international arbitration for the resolution of investment disputes never passed, and Brazil remains the single Latin American country that never signed the ICSID Convention.[33]

These findings have interesting implications that can be potentially extended to the study of investment protection in other emerging economies. First, they suggest that BIT signature does not imply that the treaties are actually a priority to governments. As it has been recently noted, treaties were often signed without much debate, and neither negotiators nor stakeholders seemed to correctly evaluate their consequences (Poulsen and Aisbett, 2013). In that sense, the Brazilian Congress played a decisive role of preventing diffusion by imitation of a policy that would soon reveal highly constraining to countries' policymaking (Simmons, 2014).

Comparative studies in countries like Argentina, where the executive was also very powerful but the need to attract investment was more pressing – arguably less attractive to foreign investors than Brazil, the country launched the most aggressive privatization program in the region – could potentially reveal how the executive responds to opposition when BITs are broadly seen as a priority.

A study of Chile, in addition, could help identify how BITs fare in a context where they are not bundled in a larger program of economic liberalization. Chile liberalized its economy in the 1970s, under military rule, and signed most of its BITs in the 1990s.

Finally, an analysis of BITs in contrast with DTTs in Brazil should shed light on the important role played by domestic constituencies in the process of treaty ratification. We are convinced that the DTT's priority for domestic firms contributes to explain their expedite approval in the same period when BITs remained blocked in the Congress. If correct, this finding has important implications for the prospects of BIT ratification in the next few years, since 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.

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## DISCLOSURE STATEMENT

No potential conflict of interest was reported by the authors.

## NOTES

1. See Egger and Pfaffermayr (2004), Neumayer and Spess (2005), Yackee (2008), Sauvant and Sachs (2009), Desbordes and Vicard (2009), Kerner (2009), Aisbett (2009), Halward-Driemeier (2009), Büthe and Milner (2009), Salacuse and Sullivan (2009), Haftel (2010), Poulsen (2010), Tobin and Rose-Ackerman (2011), Egger and Merlo (2012) and Kerner and Lawrence (2014).
2. For example, Guzman (1998), Vandevelde (1998), Gallagher and Birch (2006), Elkins *et al.* (2006), Swenson (2009), Bergstrand and Egger (2013), Schneider and Urpelainen (2013) and Jandhyala *et al.* (2011).
3. See Haftel (2010) for an extensive review of this literature.
4. We borrow this term from Haftel and Thompson (2013).
5. See Hathaway (2008) for a comparison of the formal requirements for treaty ratification in Brazil. They are the same South American countries, where 86% of BITs signed were ratified, and within an average of 2.5 years.
6. 'The Doctrine was advanced by the Argentine diplomat and legal scholar Carlos Calvo, in his *International Law of Europe and America in Theory and Practice* (1868). It affirmed that rules governing the jurisdiction of a country over aliens and the collection of indemnities should apply equally to all nations, regardless of size. It further stated that foreigners who held property in Latin American states and who had claims against the governments of such states should apply to the courts within such nations for redressal instead of seeking diplomatic intervention. Moreover, according to the doctrine, nations were not entitled to use armed force to collect debts owed them by other nations. A Calvo clause in a contract between the government of a Latin American state and an alien stipulates that the latter agrees unconditionally to the adjudication within the state concerned of any dispute between the contracting parties' (source: Britannica, on-line academic edition).
7. Jornal do Brasil, 4/1/1994.
8. This was documented in Gilaberte (1995), and reported in interviews conducted with Brazilian negotiators at Itamaraty in December 2010, and with a senior official involved in the American BIT program in April 2011. We find no reason to believe the Brazilian experience differs, in that sense, from that of other Latin American countries (see Mortimore and Stanley, 2006, for the Argentine case), or that this was consequential to explain different patterns of BIT ratification.
9. Rittner, D. (2002) 'País deve derrubar acordos externos', *Valor Econômico*, December 2010.
10. All quotes from written justification notes (Exposição de Motivos), accompanying the Portugal, Chile, UK and Ireland, and Switzerland Treaties (January 1995), p. 1, which use basically the same wording. Celso Amorim was the Foreign Affairs Minister, and Ciro Gomes the Finance Minister for Portugal, Chile, UK and Ireland, and Switzerland. Luiz Felipe Lampreia and Pedro Malan were the respective ministers for France and Germany treaties.
11. The use of BITs as a means to reduce investment risk was revealed in interviews with diplomats who participated in the process (Gilaberte, 1995, interviews conducted by the authors, December 2010).

12. Ministers of Finance and Foreign Affairs, Presidential message to Brazil–Chile BIT, 21 December 1994.
13. Figueiredo and Limongi (1999) argue that presidential plus party leaders powers enhance cooperation, Alston and Mueller (2006) reinforce the use of pork, Amorim Neto (2006) calls attention to cabinet sharing, and Zucco and Lauderdale (2010) reinforce government–opposition lines.
14. Bargaining means either concessions on policy or granting pork and patronage to get the necessary votes, unilateral action means the use of decrees or other discretionary powers, and undermining the assemblies means the attempt to win electorally more acquiescent majorities or control the assembly members' career paths.
15. Only recently there has been some recognition of legislative empowerment over such policies (Anastasia *et al*., 2012; Lima and Santos, 2001).
16. We use her/him interchangeably.
17. CCJC Report in response to the Question number 7, 1993.
18. This has been a controversial issue: Would it necessarily lead diplomats back to the international level to renegotiate on the interpretation clauses or not? Some say it does oblige, some it does not (Fontanive, 1997). The fact is that since 1988 around 7% of the treaties were approved with some reservation clause (Diniz and Ribeiro, 2008).
19. Individual votes on this matter are not typically recorded. Theoretically, a treaty is ratified as long as there are more yea than nay votes. The Supreme Court has ruled that even if all abstain and there is only one yea vote, the bill is approved.
20. All three presidents (Franco less than others) shared a favorable view of foreign investment, and were committed with the liberalization of the Brazilian economy. We have no reasons to believe that the fact that BITs were negotiated, signed and sent to Congress under different presidents mattered for the ratification process. Cardoso, more than any other, should have profited from the signature/ratification of these treaties, since he was the president under which the majority of state companies were privatized.
21. In his view, BITs would open 'great perspectives of economic cooperation that go beyond the rigidity of preconceived and watertight concepts of the past about the inexorability of international capital flow trends, of the "obvious fate" of some countries as solely capital importers, instead of participating (as Brazil had, recently) more creatively and competitively of the great financial fluxes (. . .).' Chile report at CREDN, p. 63286, DCN.
22. Some BITs set up 'prompt payment in freely convertible currency' for expropriations, but the Brazilian Constitution allows municipal governments to pay expropriations with 10-years debt, and rural expropriations with 20-years agrarian debt bonds (FC 182-184). According to some interpretations brought to the table, that means the treaties would override the Constitution, leading to international disputes that the Supreme Court might not homologate, and setting different treatments to national and foreign enterprises.
23. Membership, as well as chairmanship to committees, changes every year in the Chamber (every two years in the Senate) – there is no such thing as the seniority system. Differently from the US committee system, the Brazilian legislature is not organized along 'winner takes it all' lines. The distribution of chairmanship is proportional to party size in the organization, so even opposition parties can chair committees. Size matters and larger parties control more important committees, but small parties can form caucuses (blocos) and compete for committee control. In a highly fragmented environment, the



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proportional distribution is a way to coordinate among members and at the same time decrease conflicts around goods that will favor electoral connection. As a result, when BITs returned, there were different members and chairmen for the same committees.

24. On the matter of FDI versus financial capital differentiation, he affirmed that incentives such as taxation over investments or quarantine, to be decided by each government, should be the norm, and BITs should not touch the issue. On transfers, he stressed the preponderance of national laws. On expropriations, he refused the need of interpretative clauses, as the Constitution would always prevail. The rapporteur stressed how treaties were 'important tools to foment trade, technology transfer and are today indispensable for improving and growing of the economies that will inevitably insert in the globalization process.'
25. By 'resolve,' here, we mean the willingness of the executive – policymakers, ministers and the president himself – to exhaust all instruments at hand to approve a certain policy, be it persuasion, threats, management of the coalition (through cabinet reshuffle to reward/punish), budget allocations or patronage.
26. Executive turf occurs as conflictive preferences within the executive cause a paralysis and let the bills travel in Congress without much pressure, not because the executive did not want them to be approved, but because different actors would push for different options.
27. Interview conducted by the authors: April 2011.
28. Interview conducted by the authors: April 2011
29. We thank Alexandre Sarquis for this comment.
30. These could be seen in the 'Blue Book', handed in 1992 by a group of 14 MNCs to the Minister of Finance – a set of demands related to national treatment, liberalization and lower taxation of capital transfers (source: 'Multinacionais querem divulgar novo tratamento ao capital estrangeiro', *Gazeta Mercantil*, March 1992).
31. The Brazilian Constitution still restrains foreign participation in many areas, such as nuclear ores, postal services, aerospacial navigation, health services, rural land, news and broadcasting.
32. As it is understood, it is a delegation from Law 4,595, 1964. The Council is responsible for the regulation of the financial system, and regulates on credit, exchange and monetary issues. Its composition has changed over time, and today comprises the Minister of Finance, the Minister of Management, Budget and Planning and the president of the Central Bank.
33. This is consistent with Allee and Peinhardt (2010) findings that countries heavily constrained by their dependence on global economy are those most likely to consent to ICSID clauses. It is possible that the high attractiveness of the Brazilian economy, ranked the fifth in A.T. Kearney's FDI confidence index in 2014, grants the government leverage to refuse signing the convention.

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