FOREIGN INVESTMENT OR DEVELOPMENT? COMPARING CANADIAN AND BRAZILIAN APPROACHES TO INVESTMENT PROTECTION

INVESTIMENTO ESTRANGEIRO OU DESENVOLVIMENTO? COMPARANDO ABORDAGENS BRASILEIRAS E CANADENSES PARA A PROTEÇÃO DO INVESTIMENTO

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Abstract: This article compares Canada and Brazil's approaches to regulating foreign investment. Despite having a similar economic structure, the two countries have divergent approaches to the regulation of foreign direct investment that have been shaped by their long-term foreign policy patterns. While Canada has tended to promote a high level of protection for foreign investors, Brazil has preferred to defend its policy autonomy as part of a wider strategy of state-led industrialization. The article concludes by suggesting that recent growth and development by Brazil may lead to more convergence on the issue of regulating foreign investors.

Keywords: Brazil; Canada; foreign policy; policy autonomy; foreign investment; investment agreements; bilateral investment agreements.

Resumo: Este artigo compara as abordagens do Canadá e do Brasil na regulamentação do investimento estrangeiro. Apesar de terem uma estrutura econômica semelhante, os dois países têm percepções divergentes para a regulamentação do investimento estrangeiro direto, que foram moldadas por seus padrões de política externa de longo prazo. Enquanto o Canadá tende a promover um elevado nível de proteção dos investidores estrangeiros, o Brasil prefere defender a sua autonomia como parte de uma estratégia mais ampla do processo de industrialização liderado pelo estado. O artigo conclui sugerindo que o recente crescimento e desenvolvimento do Brasil pode levar a uma maior convergência na questão da

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regulação de investidores estrangeiros.

Palavras-chave: Brasil; Canadá; política externa; autonomia política; investimento estrangeiro; acordos de investimento; acordos bilaterais de investimento.

Canada and Brazil have been viewed by international relations scholars, particularly in Canada, as being like-minded countries (DOSMAN; FRANKEL, 2002; DYMOND; SORGER, 1997). Both countries have foreign policy traditions engaged with multilateralism; have pursued peaceful cooperation with neighbouring countries; and have had a special relationship with the regional superpower, the United States. Canada and Brazil have a similar economic structure, being highly competitive in commodity exports (particularly agriculture), and a limited number of high-tech sectors such as aerospace. But it is also apparent that deep divergences lie beneath these superficial similarities. As Haslam and Barreto (2009) argued, Canada's foreign policy tradition – at least until 2006 - was more ideological than interest-based, as well as reflecting a status quo approach to the current world order. In contrast, Brazil's foreign policy has been more pragmatic and instrumental, with a keen eye on Brazil's economic interests, as well as taking a revisionist approach to the world order constructed under American hegemony.

The approach of each country to the protection and promotion of foreign direct investment marks another deep foreign policy divergence. Using the framework developed by Haslam and Barreto (2009), it is clear that both norms and interests drive different approaches to the regulation of foreign direct investment (FDI). In this case, we will argue that key national interests are at stake resulting largely from the North-South divide. While "objective" economic interests are at play here, it should also be noted that "subjective" interpretations regarding the position of each country in the global order, also play an important role in determining each country's approach to regulating foreign direct investment. Consequently, this chapter will examine both countries' approaches to international investment agreements and the reasons for divergence.

The article is structured as follows. Firstly I will explain what investment agreements are and why they are important instruments of foreign policy. Secondly, the development of investment disciplines across the Americas in the last 30 years will be examined, and the strategies of Canada and Brazil, compared. Thirdly, the content of Canadian and Brazilian agreements will be compared. Finally, we will speculate as to whether the long-term trends that have caused divergence in FDI policy may be evolving in a way that suggests future policy concordance.

What are International Investment Agreements?

The term "international investment agreements" (IIAs) is commonly used to refer to a diverse set of instruments. IIAs are treaties that govern the relationship between states and foreign firms based in the signatory countries. They lay out the obligations of host states towards foreign investors regarding the definition, admission, establishment, operation and withdrawal of foreign-owned companies, as well as specifying dispute settlement procedures, which usually grant investors recourse to binding international arbitration, should their treaty rights be violated by the host government. International Investment Agreements come in a number of forms. They can be stand-alone agreements between two countries (bilateral investment treaties –BITs); a single chapter in a larger free trade agreement (FTA), such as Chapter 11 of the North American Free Trade Agreement; or they can be integrated into regional or sub-regional common market schemes – like the Colonia Protocol (signed but not ratified) in Mercosul, and Decisions 24 and 291 of the Andean Pact. Some non-

-traditional agreements may be considered investment agreements if they effectively encourage FDI flows, such as the partial-preferential and sector-specific "economic complementarity agreements" (ACE) concluded in Latin America, or even the inter-state cooperation agreements signed within the Venezuelan solidarity grouping ALBA (Bolivarian Alternative for the Americas) bloc. It must be noted, however, that the ALBA agreements seek to promote state-to-state investment via state-owned enterprises and offer no extra protection to foreign investors beyond that already available under domestic law, and in this respect it is debatable whether they should be included under the rubric of international investment agreements.

There is a very large number of investment agreements signed between countries, both globally and in the Americas. The heyday for the negotiation of IIAs occurred in the mid-1990s, as many developing countries under the influence of the Washington Consensus embraced market-based solutions to their development problems – including the promotion of inward foreign direct investment. In the 2000s, and particularly since the Argentine crisis of 2002, there has been a notable decline in the enthusiasm shown for IIAs. The Argentine crisis revealed the costs associated with these agreements, when some 42 foreign investors brought compensation claims against the Argentine government for its economic policies in the wake of the devaluation of the peso. Ten years after the crisis, Argentina continues to expend significant financial and human resource efforts to counter these compensation claims from foreign investors at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and other arbitration venues recognized in its international investment agreements.

Nonetheless, in the 2000s, countries continue to sign investment agreements, although at a slower rate, and increasingly bundled with free trade agreements. Furthermore, since most of these treaties remain in effect for ten to fifteen years, and automatically renew for similar increments, unless repudiated by one of the signatory governments, almost all treaties ratified in the 1990s, remain in effect. At a global level, at least 2670 bilateral investment treaties had been signed by the end of 2008 (UNCTAD 2009, p. 2). In the Americas alone, a multilevel system of regional governance of foreign direct investment already exists that includes at least 633 signed bilateral investment treaties (with over 400 ratified), as well as numerous free trade and common market agreements in most of the major sub-regions: Andean Community; Central American Common Market; NAFTA; and Caricom[1].

There are so many overlapping investment treaties that it has been called a "spaghetti bowl", following Jadgish Bhagwati's famous metaphor for the world of trade agreements (ABUGATTAS, 2004; BHAGWATI, 1995). And like the original reference, the metaphor of the spaghetti bowl underlines the difficulty of knowing where one agreement begins and ends, as well as the impossibility of predicting the interaction effects between the many different treaties that overlap.

However, the literature on the consequence of international investment agreements on foreign direct investment inflows is inconclusive. Most early studies showed that international investment agreements, particularly bilateral investment agreements had little effect on FDI inflows, although the most recent studies do correlate a slight increase in foreign investment with these treaties (HALWARD-DRIEMIER, 2003; Neumayer and Spess, 2005; GALLAGHER; BIRCH, 2006; JACKEE, 2008). Furthermore, it is worth pointing to a number of typical characteristics of investment treaties: most are either North-South (between developed and developing countries) or South-South (between developing countries). There are very few between developed countries. Most researchers think this is because developed countries trust the rule of law in other developed countries and expect local legal systems to protect investments or provide for adequate compensation in case of expropriation of those investments. This same trust in the rule of law in rich host states, does not seem to apply when investors from developed countries invest in developing countries – and consequently, international investment agreements are expected to fill the supposed regulatory void.

When trying to explain why countries sign international investment agreements, normally, we distinguish between the interests of countries who export direct investment, and those who receive capital inflows from foreign companies. Countries who export direct investment, seek to use investment agreements to protect their companies from intervention by host country governments. For example, Canada might sign an investment agreement with Panama to protect Canadian companies from Panamanian policies that could excessively regulate, tax or expropriate that company. Countries who receive inflows of direct investment will sign investment agreements because they think that a promise to protect foreign investors will attract more companies to invest and set up operations than would have come without the extra protection. In this sense, investment agreements can be a signal to investors that a developing country is friendly and open for business (KERNER, 2009; UNCTAD, 2000, p. 1; UNCTAD, 2009, p. 2; VANDERVELDE, 1998, p. 632). This signaling effect was particularly relevant in the early 1990s, when many governments in Latin America chose to abandon statist import-substitution policies of the past in favour of more economically liberal recipes.

Salacuse and Sullivan have described the "grand bargain" that underlies most investment agreements. In effect, developing countries sign on to higher levels of investment protection than they might normally desire (and by implication, accept restrictions on their ability to regulate foreign investment) in exchange for the promise of increased FDI inflows

(SALACUSE; SULLIVAN, 2005, p. 77), or in the case of FTAs, secure market access (SHADLEN, 2005, p. 764-767). This bargain makes sense where there is a reasonable expectation of increases in FDI and trade flows, as is often the case in North-South agreements. For example, several authors seeking to explain the logic behind the willingness of Central America and the Dominican Republic to sign on to an FTA (including an investment protection chapter) with the United States, invoke this argument (SANCHEZ-ANCOCHEA, 2008, p. 173; TUSSIE, 2008, p. 246).

However, a major concern of the development literature on international investment agreements is that the price paid by developing country signatories, particularly in free-trade agreements with investment chapters, is too high in terms of the loss of governmental policy autonomy (PETERSON, 2005; VAN HARTEN, 2008; ABUGATTAS, 2008). Policy autonomy, or "flexibility for development" is a term that emerged from UNCTAD studies of the impact of trade and investment agreements. UNCTAD argued that particular formulations of investment disciplines common to international investment agreements dramatically reduced the ability of host governments to pursue certain kind of development policies, particularly imposing the performance requirements used in the 1970s and 80s to force firms to integrate into local economies (UNCTAD, 2000b).

This critique on policy autonomy coincided with a growing concern over the effects of the investment chapter of the North American Free Trade Agreement (NAFTA) - Chapter 11. Analysts at the International Institute for Sustainable Development (IISD) in Canada, pointed to the case evidence that was emerging out of the binding international investment arbitration associated with the NAFTA, as heralding a serious limitation on the ability of host governments to make policy in the public interest (COSBEY, et al., 2004; PETERSON, 2004). A number of emblematic cases in the early 2000s seemed to suggest that firms could demand compensation for a wide range of government policies that impacted their profits, regardless of the public interest at stake. This raised two important problems: one was that governments had to pay compensation (and legal costs) to firms negatively affected by government regulation; and secondly, there was a fear of a "regulatory chill" in public health and environmental regulation. It was suggested, that governments might fail to regulate serious environmental problems out of fear of being sued. But more generally, it was argued that the enhanced protection of investor rights, represented by Chapter 11 and other international investment agreements, might prevent governments from taking major decisions in the public and developmental interest, such as moving from a privately-operated to a public and universal national health system, out of concerns that the reaction of private investors could raise the cost of such a development initiative.

In this respect, international investment agreements have generated a lot of controversy related to the fear that, by permitting investors to seek compensation from interventionist governments, they may restrict the policy autonomy of developing countries. The number of international investment agreements signed during the 1990s suggests, nonetheless, that many Latin American governments were willing to accept such limitations in exchange for increased foreign direct investment inflows or more secure market access in the case of FTAs.

Canada, Brazil and the Development of Investment Disciplines in the Americas

If we look at how investment agreements have developed in the Americas over the last thirty years, a pattern emerges. As I indicated, it is possible, by reading the text of these agreements to distinguish between those offering higher levels and lower levels of protection. In other work, I have calculated this difference for all the free trade and investment agreements signed and ratified in the Americas, and mapped that information (HASLAM, 2010a). By mapping the level of investment protection resulting from international investment agreements across the hemisphere, it is apparent that the Americas exhibit an economic geography of three distinct investment spaces. There is a high-protection economic space that stretches across the NAFTA partners and through Central America and the Dominican Republic to the eastern borders of Colombia and Chile. There is a medium-protection space that includes much of the rest of South America, excluding Brazil. Finally, there is a low-protection space that includes Brazil, the Guyanas and the majority of the Caribbean countries. As is apparent from this categorization, Canada and Brazil belong to the most different spaces, respectively the high protection, and low protection spaces – as defined by the texts of international investment agreements.

If we look at the high-protection treaties, we see that they are based on the NAFTA model agreed between Canada, Mexico and the United States – and more fundamentally derived from US investment treaty practice. The high-protection economic space also includes treaties concluded by the United States, Canada and Mexico, Central America, the Dominican Republic, Chile, and in a limited number of treaties, Colombia. The most significant elements of these treaties that confer higher levels of protection are found in the *admission and establishment* clauses. For example, US and Canadian treaties grant national treatment (NT - treatment no less favourable than that granted to domestic firms), and most-favoured nation (MFN - treatment no less favourable than the standard granted to a third countries), status to foreign investors at what is known as *the pre-establishment phase*. This creates a "right of establishment" for foreign investors (by virtue of the treaty, foreign investors have the right to invest), which prevents governments from bargaining with or screening foreign investors prior to allowing them to set up in that country. Bargaining and screening have been used historically to ensure that only foreign direct investment that is good for the economic development of the country gets in. It should be noted that treaties that confer pre-establishment NT and MFN also usually include a lengthy appendix of excluded sectors. In the case of US and Canadian treaties with other parties, the list of exemptions for the developed country tends to be longer than that of the developing country partner (in other words the rich country defines a larger space for policy autonomy excluded from the protection offered by the treaty)!

Canadian treaties also typically follow the US model in restricting the performance requirements that may be imposed on foreign investors – often going beyond the current trade-distorting restrictions defined by the World Trade Organization. Again, performance requirements have been a tool for governments that want to channel FDI to meet some kinds of developmental goals – such as local employment; productive links to local firms; and the transfer of technology. There is of course, a debate on the effectiveness of performance requirements, with some authors claiming that they rarely improve developmental outcomes (MORAN, 2001). Nonetheless, high-protection investment agreements restrict the use of performance requirements in a comprehensive way.

Yet, we must also recognize that these high-protection treaties have backed down from the historic highs in investment protection of the 1990s. Although most of the concerns expressed by UNCTAD and the International Institute for Sustainable Development regarding policy autonomy have been focused on safeguarding the autonomy of developing countries, in fact concern over the impact of NAFTA's Chapter 11 on the policy autonomy of the United States and Canada, caused *those* countries to take the first steps toward restricting the ability of foreign investors to pursue host governments for compensation. In July 2001, the NAFTA Commission, an intergovernmental panel charged with overseeing the implementation of the trade agreement ruled on the interpretation of the "fair and equitable treatment" clause in Chapter 11, an important clause for several investor-state arbitration cases, in order to restrict its application. Shortly thereafter, the US congress in the Bipartisan Trade Promotion Authority Act (2002) further restricted the ability of investors to sue governments, and established important principles of transparency, and in general, greater state oversight prior to arriving at arbitration (GANTZ, 2003-2004, p. 767). These new rules were incorporated into subsequent US treaties, and copied by Canadian policymakers.

A number of factors explain Canada's commitment to high-protection treaties:

(1) a commitment to free trading by Canadian policymaking elites;

(2) a desire to protect Canadian investments abroad, as Canada has become a net capital exporter;

(3) a defensive act to counter the US policy of trade and investment promotion.

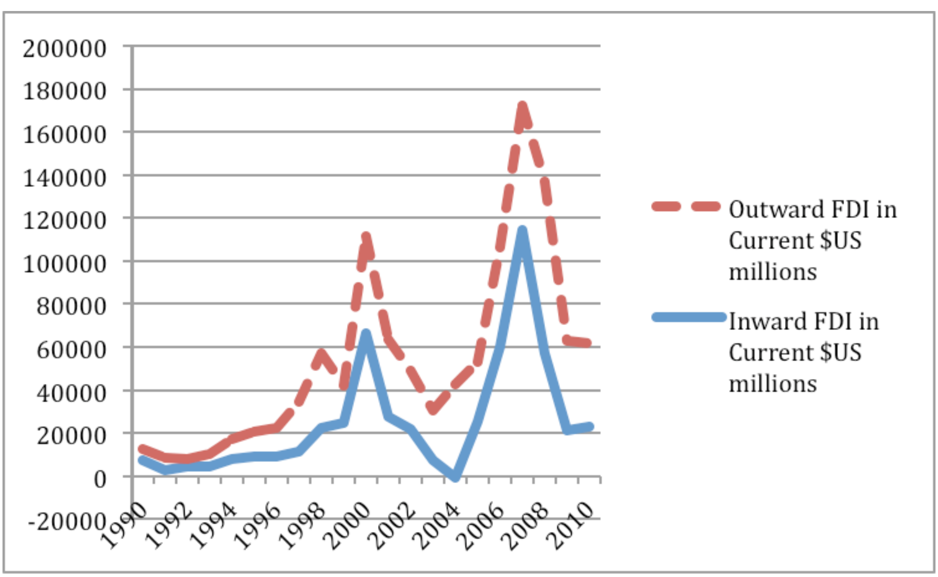
Canada has long been a trading nation, and as a result, the Canadian state has long been committed to freer (although not free) trade. In this respect, part of the Canadian focus on high-protection trade and investment treaties may be related to this normative or ideological part of the equation. However, it is more important to underline the two other explanations, based on the national interest.

Canada has tended to see closer trade integration as a defensive strategy against the United States. Canada has been dependent on the US market to sell the vast majority of its goods and services, and the great fear of Canadian exporters has been arbitrary trade-restricting measures applied by the United States against Canadian goods (much like the US anti-dumping duties applied against Brazilian steel some years ago). The original Canada-US Free Trade Agreement (1988) was a success for Canada, not so much because of freer trade between the two countries (it was mostly free prior to the agreement), but because it tied the US into a set of dispute--settlement procedures that were supposed to prevent it from acting arbitrarily against Canadian exporters. This is also why the Canada-US Free Trade Agreement (and NAFTA afterwards) is a very long, very legalistic document – it is supposed to leave no room for the United States to use its superior economic size to threaten Canada through extra-legal means (i.e., political bullying) (BELANGER, 2007).

This defensive approach to trade was in fact, a similar logic to that which drove Canada's participation in NAFTA. Canada decided to negotiate with Mexico and the United States together because it feared that the United States, after having concluded a free-trade agreement with Canada in 1988 would then conclude a separated deal with Mexico, from which Canada would be excluded. In that scenario, only US firms would have access to low-cost Mexican labour, making Canadian companies uncompetitive. So NAFTA was supposed to limit US economic advantages from the deal with Mexico by embedding it in a three-way economic partnership while Canada hoped to continue its privileged bilateral political relationship with Washington.

Canada's trade and investment policy in the Americas has also often been part of a defensive strategy against US policies in the region. Canada was a major supporter of the US promoted Free Trade Area of the Americas (FTAA) from the time of its launch, following the Miami Summit of the Americas in 1994, until its demise at the Miami ministerial of 2003. Although Canadian policymaking elites undoubtedly favoured freer trade, Canada also saw a hemispheric agreement as a good way to prevent its worst-case scenario – a series of bilateral deals between the US and the other countries of the Americas. This hub-and-spoke scenario, envisaged the United States at the centre of all major bilateral trading relationships in the hemisphere, while the Latin American and Caribbean economies, as well as Canada, continued to confront major trade barriers in trading with each other. Canada's enthusiastic participation in the Free Trade Area of the Americas was therefore part of its broader strategy to ensure that a hemispheric deal trumped a series of limited bilateral accords. Ultimately, this strategy failed, as the United States faced significant opposition from Brazil and a number of other countries, and abandoned the regional approach for the logic of bilateral "competitive liberalization" after 2003. Indeed, the countries with which Canada has negotiated FTAs in the post-2003 period have (in general) also negotiated bilateral deals with the United States, and have integrated themselves into that high-protection economic space for foreign investors described earlier in this chapter. In this respect, Canada continues to integrate itself into the same geographic space, but minimizes the trade diverting effects of the bilateral deals with the United States.

Fig. 1. Canadian Foreign Direct Investment Flows, 1990-2010



Source: UNCTAD STAT, "Inward and Outward Foreign Direct Investment Flows, annual, 1970-2011". Available from http://unctadstat.unctad.org/TableViewer/tableView.aspx

Since the mid-1990s, Canada has also become a net global exporter of direct investment (see Fig. 1.) and a major exporter of capital and expertise towards Latin America. Canadian outward FDI has grown dramatically since the 1990s. The stock of outward foreign direct investment was around 5-10% of Gross Domestic Product up until 1980, but grew to reach 30-35% after the mid-1990s (ECLAC, 2008, p. 141). In terms of foreign direct investment, Canada holds a huge investment surplus with the Latin American region. In 2006, Latin America was a destination for 20% of Canadian FDI, but inward FDI from Latin America accounted for just 3.4% of the total (ECLAC, 2008, p. 144). In many countries of the region, Canadian firms account for close to 50% of new investment in the mining sector (ECLAC, 2008). This sector has always been a nationalist lightening rod – and has been prone to cycles of nationalization by host governments. Indeed, the classic literature on nationalization and political risk written in the 1970s, was principally concerned with natural resource industries (see Moran 1974). The risk of nationalization in extractive industries should also be apparent to Brazilians who faced a threatened nationalization of *Petrobras* facilities in Bolivia by the government of Evo Morales in 2006. Indeed, extractive industries across the region faced increased pressure from governments in the 2000s, as they attempted to capture more of the rent associated with record commodity prices (HASLAM, 2010b). But Canadian mining firms are also embroiled in a number of high-profile conflicts with local communities, such as the Pasqua Lama project on the Argentina-Chile border. Such conflicts, especially when they become internationalized through the participation of transnational activist networks, are likely to lead to nationalization or suspension of mineral exploitation rights (see Rousseau and Meloche, 2002). In this context, Canada, as it has become a capital exporter in the Americas, has become increasingly committed to high-protection investment agreements. In this respect, a number of Canada's more recent attempts to negotiate free trade agreements (with investment chapters) – such as recent negotiations with Colombia, Peru and Panama – can be seen as efforts to establish investment agreements to protect Canadian investments, particularly in mining. In other words, Canada has an objective and material economic interest in protecting its firms abroad through high-protection investment treaties and free-trade agreements with investment chapters.

In addition to the high-protection zone for investment discussed above, there are also medium and low-protection zones. In general we find that most Latin American countries prefer signing investment protection treaties between themselves that offer a lower level of protection for foreign investors. Typically, these treaties limit national treatment to the post-establishment phase, which is an important way for governments to retain more discretion in screening foreign investment for appropriateness and developmental impact, and imposing certain kinds of performance requirements prior to admitting entry. Unlike the high-protection treaties already discussed, the medium protection treaties do not limit the use of performance requirements. Furthermore, treaties signed among Latin American countries are also more likely to permit restrictions on financial transfers in the case of balance of payments disequilibria. In this respect, it is evident that the medium-protection treaties protect a greater amount of policy autonomy for governments.

Although, most Latin American countries have signed and ratified a large number of medium-protection treaties, Brazil, together with the Guyanas and most of the Caribbean nations remains in a low investment protection zone. To clarify, I am referring to the international treaty obligations assumed by these countries, not their domestic statutes that govern and regulate foreign investors, nor their investment climate. Brazil is one of the few countries in the hemisphere that has not ratified any international investment treaties. Under the government of Luiz Inacio “Lula” da

Silva, the government of Brazil rejected the idea of signing up to investment disciplines that went beyond the current set of rules negotiated at the World Trade Organization – known as TRIMs (Trade-related Investment Measures). This approach was principally justified in terms of Brazil's concerns over safeguarding its policy autonomy.

Brazil's position on investment, namely that "it must enjoy the flexibility to opt out of commitments which go beyond existing WTO disciplines in areas like foreign investment, services, intellectual property rights (IPR) protection, and government procurement" (INVEST-SD, 14/11/030) has been explicitly made by foreign minister Celso Amorin in terms of Brazil's developmental needs (VIGEVANI; PASSINI, 2004, p. 2-3). For example, Antonio Rubens Barbosa, former Brazilian ambassador to the US, stated: "Brazil has a clear interest in preventing hemispheric disciplines on topics such as investment, intellectual property, government procurement, and services from curtailing its ability to formulate and implement public policies that are in its national interest" (BARBOSA, 2003-4, p. 1021).

However, it should be noted that Brazil did, in the mid-1990s pursue a policy of signing investment agreements – although none of these agreements were subsequently ratified. In the 1994-1997 period, Brazil signed thirteen bilateral investment treaties, as well as an investment protocol to govern intra-Mercosul foreign direct investment flows, called the Colonia Protocol (1994). The thirteen countries that Brazil signed BITs with were: Chile (1994); Portugal (1994); United Kingdom (1994); Switzerland (1994) Denmark (1995); Finland (1995); France (1995); Germany (1995); Italy (1995); Korea (1995); Netherlands (1995); Venezuela (1995); and Cuba (1997). In this respect, the rejection of investment agreements should properly be understood as a policy of the Lula administration, rather than a long-standing principle of Brazilian foreign policy.

When we look at the content of the Brazilian agreements, we also find that they promoted a high degree of liberalization, and did not express undue concern over developmental policy autonomy. For example, in the preamble to the treaties – the usual location for spelling out principles that should guide the interpretation of the treaty, such as concerns related to economic development and policy autonomy – none of the available texts (Chile, Cuba, Korea, Venezuela, and the Colonia Protocol) make any reference to these issues. The bilateral investment treaties (excepting the Mercosul instrument), only permit post-establishment National Treatment (NT) and Most-Favoured Nation (MFN) Treatment, and limit these key clauses by the powerful disclaimer "subject to national legislation". As noted above, we normally accept that pre-establishment NT and MFN grants a higher standard of protection for investors by granting a right of admission and establishment, than the post-establishment text. Post-establishment, in theory, allows governments to retain significant control over FDI as part of the decision to grant entry into the country. For example, the government may establish a number of performance requirements that seek to maximize the developmental contribution of FDI.

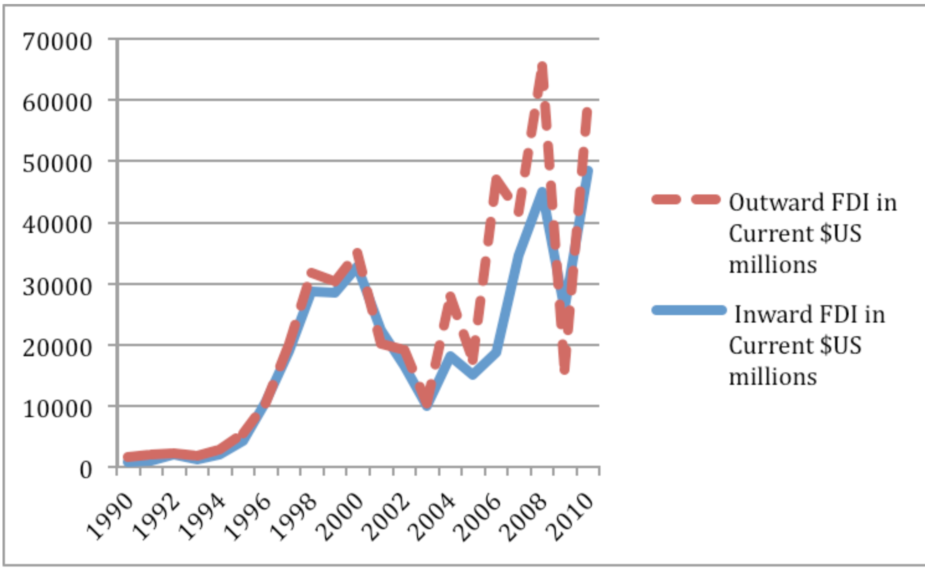
Once foreign investment was admitted, Brazilian treaties would offer relatively high standards of treatment that correspond to international norms, usually including "fair and equitable treatment" and "full protection and security". The Brazil-Cuba treaty waters down this standard slightly with a reference to "as provided by domestic foreign investment law". Clauses regulating financial transfers out of the country, the taking of property (direct and indirect expropriation), and compensation for expropriation correspond to the highest international standards (again, excepting the treaty with Cuba). On the crucial issue of permitting foreign investors to seek compensation from host governments for policies that negatively affect the firm, the signed Brazilian treaties, permit recourse to binding international arbitration via the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), ICSID Additional Facility (for non-signatories to the ICSID treaty), and ad hoc arbitration under UNICTRAL (United Nations Commission of International Trade Law) rules.

The Brazilian treaties also differ from the high-protection treaties signed by Canada, on the issue of performance standards. Performance standards are not mentioned or limited in the text, suggesting that governments are attempting to maintain some policy flexibility in this area. In this respect, the Brazilian treaties signed between 1994-1997 generally correspond with the majority of intra-Latin American treaties signed at that time that are broadly liberal, but which only permit post-establishment MFN and NT and do not limit the use of performance requirements as an instrument of industrial policy.

Conclusion: FDI Trends and Policy Convergence?

Looking at the long-term trends in Canadian and Brazilian approaches to international investment agreements, this chapter has argued that each country has taken a very different approach. Canada's policy has been driven by both an ideological commitment to freer trade, as well as a substantive interest in defending its firms abroad. Brazil has approached the question of investment agreements from a largely instrumental perspective, asking if they serve the overall objective of furthering economic development in that country. Although the initial approach of the Brazilian government in the mid-1990s seemed to answer that question affirmatively, the Lula administration changed gears to assert the importance of the developmental policy autonomy of Brazil. That position remains the official line, despite some signals that the current government may be warming up to investment agreements. In this respect, the two countries show considerable divergence in how they approach investment agreements, which broadly correspond to the patterns of Canadian and Brazilian foreign policy identified by Haslam and Barreto (2009).

Fig. 2. Brazilian Foreign Direct Investment Flows, 1990-2010



Source: UNCTAD STAT, "Inward and Outward Foreign Direct Investment Flows, annual, 1970-2011". Available from http://unctadstat.unctad.org/TableViewer/tableView.aspx

However, Brazil's interests may be changing. Brazil has become an important capital exporter in Latin America, and even an important foreign investor in Canada. Fig.2. shows the significant increase in Brazilian outward FDI since 2002. Indeed, since 2002, broad direct foreign investment trends in Brazil look similar to those in Canada (see Fig.1.) In this respect, Brazilian enterprises are facing the political risk of investing abroad for the first time. This was most notable in the attempted nationalization of *Petrobras* facilities in Bolivia by the government of Evo Morales. However, the figures show a massive increase in Brazilian exports of capital since 2004, making Brazil a net foreign direct investment exporter (except, rather exceptionally in 2006 and 2009). This new pattern suggests that Brazilian enterprise, since 2002, is much more likely to need the protection offered by international investment agreements, than in the past. One of the advantages of international investment agreements is also that they convert a potential political crisis with another government into a commercial dispute to be settled in binding arbitration. As Brazil asserts itself as a regional and world power, these kinds of disputes would be best insulated from state-state political relations. Vale's abandonment of its Argentine potassium mine in March 2013 is just such an example of a commercial decision that, in the absence of an investment treaty, will likely spill over into the bilateral political relationship for many years. As a result, it seems that Brazil may well be on a threshold where its growing economic and political influence make it more likely to benefit from international investment agreements. Whether the advantages of IIAs can be balanced with the need to retain its developmental policy autonomy is an open question.

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(Endnotes)

[1] Calculated by author from data complied by UNCTAD, Compendium of Investment Instruments Online, at http://www.unctadxi.org/templates/DocSearch 780.aspx, accessed 17 June 2010.