

SYMPOSIUM ON THE BRICS APPROACH TO THE INVESTMENT TREATY SYSTEM

BALANCED INVESTMENT TREATIES AND THE BRICS

*Congyan Cai**

Brazil, Russia, India, China, and South Africa (the BRICS) have emerged as a new hub of power in international relations. They have begun to speak out jointly on a wide range of issues and to explore cooperating collectively. For instance, they strongly urge the Bretton Woods institutions to address their legitimacy deficits by transferring substantial voting power to emerging powers, and suggest that failure to do so will “run the risk of seeing [those institutions] fade into obsolescence.”¹ The investment treaty regime may be another field in which they can exert influence, but the investment treaty policies of BRICS countries are diverging now more than ever. In particular, India and South Africa have taken significant measures, such as terminating investment treaties, that cast doubt on whether the BRICS can play a collective role in reforming such treaties. In this essay, I make two arguments. First, the recent investment treaty policies of some BRICS (India, South Africa, and to some extent Brazil) have shifted from one imbalanced approach that is too protective of foreign investors to another that is too protective of host states and is likely to be rejected by major powers such as the European Union, the United States, and China. Second, the BRICS together have the ability to craft approaches to investment treaties that encourage greater balance in the regime overall, including by remedying some of the defects inherent in the traditional investment treaties.

From an Old to a New Imbalanced Approach: Recent Investment Treaty Policy of Some BRICS

Despite their common association as rising, non-Western powers, the BRICS vary in numerous ways, including in their preferred approaches to reforming investor-state dispute settlement (ISDS). The matrix set forth by Anthea Roberts helps to conceptualize these differences: On the one hand, China tends to favor “incremental” change and Russia tends to be a bystander; both seemingly lack the intention to substantially reshape investment treaties.² On the other hand, Brazil, India, and South Africa have adopted “systemic” or “paradigmatic” approaches that favor significant changes in terms of substance, procedure, or form.³ This matrix concerns the scale rather than the merits of reform, in part because the merits are difficult to assess in any objective sense.

The difficulty of normative assessment, however, does not mean that a general criterion is unavailable to identify whether a reform is good or bad. In my view, such a criterion exists: balance. In other words, it is sensible to examine approaches to investment treaty reform in light of whether they strike a balance between the competing objectives of protecting foreign investors and preserving the regulatory freedom of host states, and to reject those

* *Professor of International Law, Xiamen University School of Law, China.*

¹ [II BRIC Summit—Joint Statement](#), para. 11 (Apr. 16, 2010).

² Anthea Roberts, *Investment Treaties: The Reform Matrix*, 112 *AJIL UNBOUND* 191 (2018).

³ *Id.*

approaches that go too far one way or the other. The consensus has been that traditional investment treaties are imbalanced, and thus not good enough, because they accord broad treatment and protections to foreign investors but little support for the regulatory power of host states.⁴ Consequently, balance has emerged as a preferred objective among states,⁵ as seen in the UN Conference on Trade and Development's call for balancing the rights and obligations of states and investors as a core principle of investment policy-making.⁶ Measures aimed at making investment treaties balanced may be diverse. But a balanced approach will neither overshoot on reform nor "depriv[e] the [international investment agreement regime] of its purpose of promoting and protecting investment."⁷ For example, balance in ISDS means that investor-state claims mechanisms should be improved to prevent abuse, rather than totally abandoned, given that domestic remedies are inadequate, that a state is often reluctant to bring international claims on behalf of its nationals against another state, and that foreign investors can decide on their own whether to rely on domestic or international remedies.

Let us assume, then, that balance is a valid criterion for evaluating the merits of the various approaches to ISDS reform that prevail among the BRICS. From this perspective, both India and South Africa have, in my view, shifted from one flawed approach to another. That is, each has replaced old forms of imbalance with new ones.

First consider India. In gradually opening its economy, India has largely embraced a liberal investment treaty policy.⁸ But it was shocked by the *White Industries* case, the first award to find India liable to an investor,⁹ and other investment claims followed.¹⁰ In light of this experience, India reviewed its bilateral investment treaty (BIT) policy¹¹ and in 2015 approved a new Model BIT, updating its prior model from 2003. The 2015 Model BIT substantially curtails treatment and protections accorded to foreign investment under the 2003 version.¹² For instance, the new model, unlike most investment treaties, does not provide for most-favored-nation treatment or fair and equitable treatment. As for investor-state dispute settlement, this model permits an investor to resort to international arbitration only after exhausting all domestic judicial and administrative remedies "for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question."¹³ This requirement represents a considerable departure from prevailing investment treaties¹⁴ and creates a new imbalance in favor of the host state.

Other steps by the Indian government have exacerbated this imbalance. In particular, India abandoned international investor-state claims altogether in a BIT signed with Brazil in 2017.¹⁵ And in 2016, India began to

⁴ See generally M. SORNARAJAH, [RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT](#) (2015).

⁵ See, e.g., UN Conference on Trade & Dev. [UNCTAD], [Investment Policy Framework for Sustainable Development](#), UN Doc. UNCTAD/DIAE/PCB/2015/5 at 8 (2015).

⁶ *Id.* at 6.

⁷ UNCTAD, [Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties](#), IIA ISSUES NOTE pt 2 (No. 2, June 2017).

⁸ Compare [2003 Indian Model Text of BIPA](#) with [2004 United States Model BIT](#).

⁹ [White Industries Austl. Ltd. v. India](#), Final Award, UNCITRAL (UNCITRAL, Nov. 30, 2011).

¹⁰ [India—As Respondent State](#), UNCTAD INVESTMENT POLICY HUB (Dec. 31, 2017) [hereinafter India As Respondent].

¹¹ [REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA](#) (July 30, 2017) [hereinafter HIGH LEVEL COMMITTEE REPORT].

¹² For details, see Grant Hanessian & Kabir Duggal, [The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?](#), 32 ICSID REV. 216 (2017).

¹³ [Model Text for the Indian Bilateral Investment Treaty](#) art. 15.2 (2015) [hereinafter 2015 Indian Model BIT].

¹⁴ Hanessian & Duggal, *supra* note 12, at 217.

¹⁵ [India and Brazil Conclude Negotiations of Bilateral Investment Treaty](#), HERBERT SMITH FREEHILLS, ARB. NOTES (Dec. 5, 2016); [Cooperation and Facilitation Investment Agreement Between Federative Republic of Brazil and ____](#) [hereinafter CFIA].

terminate a number of its investment treaties. As a result, twenty-two of eighty-three Indian BITs are no longer in force, including its treaty with China.¹⁶

South Africa has gone even further than India. The *Foresti* case,¹⁷ like *White Industries* for India, prompted South Africa to review a national BIT policy that had been quite liberal since the 1990s. This review, completed in 2009, suggested that South Africa retain but substantially improve its investment treaties.¹⁸ Nevertheless, the government decided in 2012 to start terminating them.¹⁹ To date, ten of a total of twenty-two South African BITs are no longer operative.²⁰ In their stead, the South African Parliament approved the Protection of Investment Act of 2015, which provides that foreign investment will be governed exclusively by South African law after a transitional period.²¹ Engela Schlemmer has suggested that although domestic law should have played a more important role in the protection of foreign investment in the past, protections pursuant to domestic law alone will be inadequate going forward.²² Like India, South Africa has created a new imbalance in favor of the state and against foreign investment.

The latest BIT policies of these two countries are also unbalanced in the weight they accord to the protection of their own outbound investment. In contrast with many other states in the developing world, India and South Africa, together with their BRICS peers, have emerged as major investment sources in addition to destinations. This development creates a need to balance state interests in not only maintaining public authority but also protecting overseas investors. In some ways, India and South Africa appear to recognize as much. For instance, in light of “sizable intra-Africa investments” by its nationals, South Africa has acknowledged the need to identify the best means of safeguarding those investments.²³ Moreover, Indian and South African experience in investment disputes would seem to underscore this need: To date, three of the four cases involving South Africa were brought by its own investors.²⁴ India has been a respondent state twenty-four times,²⁵ but Indian investors have also been claimants in five cases²⁶ and the number is sure to increase as Indian businesses expand their overseas operations. Nevertheless, the latest BIT policies of India and South Africa do not adequately account for each state’s growing need to protect investors.

In view of the imbalances, it is doubtful that some of the stronger reform measures that India and South Africa have instituted will operate well in practice. With respect to India, for example, several key players, especially the United States, the European Union, and China, may decline to make substantial compromises in negotiating investment treaties. In 2007 and 2008, India began negotiating BITs with the European Union and the United States, respectively, but they have been deadlocked after ten years of marathon bargaining because India is

¹⁶ [India: Bilateral Investment Treaties \(BITs\)](#), UNCTAD INVESTMENT POLICY HUB.

¹⁷ *Foresti v. S. Afr.*, ICSID Case No. ARB(AF)/07/1 (Aug. 4, 2011).

¹⁸ SOUTH AFRICA DEP’T TRADE & INDUSTRY, [BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW](#) pt. II (June 2009) [hereinafter BIT REVIEW].

¹⁹ Peter Leon et al., [South Africa: South Africa Declines to Renew Bilateral Investment Treaties with European Union Member States](#), MONDAQ (Oct. 5, 2012).

²⁰ [South Africa: Bilateral Investment Treaties \(BITs\)](#), UNCTAD INVESTMENT POLICY HUB.

²¹ [Protection of Investment Act 22 of 2015](#) §§ 13, 15 (S. Afr.).

²² Engela C. Schlemmer, *Dispute Settlement in Investment-Related Matters: South Africa and the BRICS*, 112 AJIL UNBOUND 212 (2018).

²³ [BIT REVIEW](#), *supra* note 18, at 7.

²⁴ [South Africa—As Home State](#), UNCTAD INVESTMENT POLICY HUB (Dec. 31, 2017); [South Africa—As Respondent State](#), UNCTAD INVESTMENT POLICY HUB (Dec. 31, 2017).

²⁵ [India As Respondent](#), *supra* note 10.

²⁶ [India—As Home State](#), UNCTAD INVESTMENT POLICY HUB (Dec. 31, 2017).

reluctant to accept the high standards expected by Western powers.²⁷ It is safe to predict that neither the United States nor the European Union will negotiate with India on the basis of its 2015 Model BIT. Nor is China likely to negotiate a new BIT with India based on that model. India also seeks authoritative interpretations of BIT provisions with some countries, but whether and to what extent its desired reforms will be accepted by other states remains to be seen.

To be sure, it is not inconceivable that India and/or South Africa will someday recognize that termination of investment treaties is inappropriate. In fact, South Africa acknowledged in its 2009 BIT review that “[d]emands for the conclusion of additional BITs are unlikely to recede.”²⁸ As for India, the government appears open to some proposals (for instance, for an appellate body or similar mechanism)²⁹ that have been approved or are under consideration by others such as the European Union. But these are not the dominant views at present.

Finally, Brazil’s approach to ISDS reform is unlike those of India and South Africa, but also exhibits a form of imbalance. Rather than withdraw from the traditional BITs that it has signed, Brazil has not ratified them in the first place and has instead adopted a “pioneering” approach to investment treaties³⁰ that manages to address investment facilitation as well as investment protection. In my view, the model treaty that reflects this distinctive approach—the Cooperation and Facilitation Investment Agreement (CFIA)—is imbalanced when it comes to ISDS because it provides standing in international arbitration proceedings only to states parties.³¹ The result is that investors have no control over whether a proceeding is initiated and how it is conducted. In this sense, Brazil does too little to promote investor protection, much like India and South Africa.

How the BRICS Can Remedy Defects in Western-Style Investment Treaties

The national BIT policies of the BRICS diverge in important ways, but these divergences mostly concern ISDS, which is merely one component of the investment treaty system. Looking at that system as a whole, the BRICS in fact share many views, especially with respect to the spirit, principles, and substantive components of investment treaties. This much is apparent from the BRICS Perspective on International Investment Agreements.³² Issued collectively by the BRICS in 2014, the statement asserted that investment treaties should strike a balance between the protection of investors and sovereign regulatory power and serve the sustainable development of host states. It also attached importance to robust domestic law and called for further improvement of and “build[ing] common approaches” to investment treaties.³³

Working from these commonalities, BRICS countries could remedy two defects inherent in the investment treaties that developed states have advocated for decades.

The first is that the treaties have largely failed to serve developing state interests in attracting new investment. The common position among developed states has been that by strictly honoring their obligations, enforced through international ISDS, host states can help promote capital inflows and national development. But this position has proven flawed: Contracting parties rarely cooperate or monitor implementation after concluding

²⁷ Madhyam Kavaljit Singh, *The India–US Bilateral Investment Treaty Will Not Be an Easy Ride*, E. ASIA F. (Feb. 10, 2015); Eur. Comm’n, *Overview of FTA and Other Trade Negotiations* (May 2018).

²⁸ *BIT REVIEW*, *supra* note 18, at 56.

²⁹ See, e.g., *2015 Indian Model BIT*, *supra* note 13, arts. 24, 29; see also *HIGH LEVEL COMMITTEE REPORT*, *supra* note 11, at 107, 113.

³⁰ See Henrique Choer Moraes & Felipe Hees, *Breaking the BIT Mold: Brazil’s Pioneering Approach to Investment Agreements*, 112 AJIL UNBOUND 197 (2018).

³¹ *CFIA*, *supra* note 15, art. 24.

³² South Africa Dep’t of Trade & Industry, Press Release, *BRICS Perspective on International Investment Agreements* (July 15, 2014).

³³ *Id.*

traditional investment treaties, which are best understood as a business deal between the host state and foreign investors. The causal relationship between signing investment treaties and increased investment has not been established. And the treaties do little to build developing countries' capacity to comply and attract investment. These circumstances, coupled with a surge in investment claims since the late 1990s, have led many developing countries to withdraw their support for the treaties.

The BRICS offer a more promising approach by suggesting that in addition to imposing obligations on host states and according rights to investors, investment treaties should enable contracting parties to interact in a more constructive manner. This approach was introduced in the 2015 CFIA of Brazil, and has been supported by other BRICS countries within the BRICS and World Trade Organization forums.³⁴ Under the CFIA, institutions and mechanisms, such as joint committees and ombudsmen, will emerge and execute meaningful mandates to monitor implementation of the agreements and promote cooperation between contracting parties to facilitate investment.³⁵ Continuous interaction between contracting parties can enhance capacity building and reduce information asymmetry, which will not only help channel investment flows but also reduce the risk that host states will violate their obligations.

The second defect in traditional investment treaties is their inflexibility. Special and differentiated treatment, which is well established in the international trade system, finds no counterpart here, as investment rules are assumed to apply equally to the contracting parties. Negotiations typically proceed from a model text provided by developed countries without substantial departures or derogations. For instance, the United States has hardly made any compromises in its BIT negotiations over the years.³⁶ From preamble to operative provisions, the treaties leave no room for due regard for the special circumstances of host states in prescribing a BIT obligation (in particular, a "minimum" standard of treatment). As a result, investment tribunals have often found themselves at a loss as to whether the level of development of host states should be taken into account.³⁷ Yet there is a recent consensus among nearly all countries that the "policy space" of host states should be respected. This implies that an undifferentiated approach is problematic in its indifference to the regulatory needs of different states, and that a plural, flexible approach is needed.³⁸

BRICS countries are more likely than developed countries to support such an approach. Their receptivity can be inferred from the fact that the BRICS always support special and differentiated treatment in the international trade system and in their investment policies. According to the 2015 South African Protection of Investment Act, foreign investment shall be provided with "physical security in accordance with minimum standards of customary international law" but "subject to available resources and capability."³⁹ That is, although South Africa accepts the minimum standard of customary law, the particularity of South Africa shall also be considered. In similar fashion, China agreed in negotiating an investment treaty with the Association of South East Asian Nations (ASEAN) to consider the "different stages and pace of development among the Parties and the need for special and differential treatment and flexibility" for the newer ASEAN member states.⁴⁰

³⁴ See Moraes & Hees, *supra* note 30.

³⁵ *CFIA*, *supra* note 15, arts. 17–18, 22, respectively.

³⁶ KENNETH J. VANDEVELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 32, 41 (2009).

³⁷ See Nick Gallus, *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, 6 J. WORLD INV. & TRADE 711, 725–26 (2005).

³⁸ Roberts, *supra* note 2, at 196.

³⁹ *Protection of Investment Act*, *supra* note 21, § 9.

⁴⁰ *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the People's Republic of China* pmb., Aug. 15, 2009.

Conclusion

It is widely recognized that the emerging powers should have a greater say in international affairs, but some commentators are concerned about whether they can behave responsibly.⁴¹ Effecting investment treaties with greater balance can help BRICS countries to gain broader recognition as responsible powers, shouldering and sharing the work of maintaining international peace and increasing international prosperity. The absence of a robust network of investment treaties among the BRICS currently prevents them from fully exploring their potential to reform investment treaties as a group. But certain commonalities in their approach, albeit broad and perhaps somewhat rhetorical, could help them to improve their image and contribute to the balance of investment treaties over time.

⁴¹ See, e.g., Jorge G. Castañeda, *Not Ready for Prime Time: Why Including Emerging Powers at the Helm Would Hurt Global Governance*, FOREIGN AFF. 109, 109 (Sept./Oct. 2010); Stewart Patrick, *Irresponsible Stakeholders? The Difficulty of Integrating Rising Powers*, FOREIGN AFF. 44, 57 (Nov./Dec. 2010).