

SYMPOSIUM ON THE BRICS APPROACH TO THE INVESTMENT TREATY SYSTEM
THE UNWORKABILITY OF “BALANCED TREATIES” AND THE IMPORTANCE OF
DIVERSITY OF APPROACH AMONG THE BRICS

*M. Sornarajah**

There is much rethinking being done about investment treaties. While some level of uniformity existed when there was institutional direction by the World Bank and hegemonic pressure exerted by states in the Global North, geopolitical power is now shifting in ways that are producing greater diversity in approaches to the field. The evidence seems to indicate that each state that is of sufficient size or power will seek to fashion its foreign investment policy in the context of its own circumstances. This is certainly true for Brazil, Russia, India, China, and South Africa (the BRICS). Within this group of newly industrializing countries, it is clear that a uniform approach to investment treaties will not emerge, despite avowals to the contrary. In this essay, I offer an assessment of the divergent paths some of these states have taken. I contend that China has emerged as a newly hegemonic actor in international investment in a way that undermines its traditional role as champion for the Third World, and that India’s recent attempt to develop a “balanced approach” to investment treaties is unworkable. Only South Africa has developed an approach that seeks to protect its government’s ability to serve the goals of its people by subjecting foreign investment disputes to South African law and courts.

The Decline of the Neo-Liberal Model and the Rise of Diversity

At the height of neoliberalism, which drove the surge in investment treaties, authors from developed states advanced multiple justifications for the existence of a network of investment protection treaties. One argument was that the treaties advanced the rule of law by imposing a uniform standard of property and contract protection. Another was that they socialized states into stable patterns that promote investment flows. These justifications were advanced to promote or preserve a single, neoliberal model of investment treaties, maintained through institutional support and hegemonic pressure. And they were largely successful. The law on foreign investment thus became a part of the liberal peace, whereby the hegemon kept order ultimately through military power but also in more subtle ways through the formulation of legal prescriptions that accorded with its political vision of democracy and its economic vision of free trade, liberalization of the financial structure, and free entry for and strong protection of foreign investment.

The model for foreign investment was based on an economic theory that investment treaties lead to greater flows of foreign investment—a theory now under heavy challenge.¹ The bottom has collapsed from under that neoliberal model as it was founded on unprovable assumptions and led to a succession of economic crises. With

* *CJ Koh Professor of Law, National University of Singapore.*

¹ JONATHAN BONNITCHA ET AL., [THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME](#) (2017).

these crises as well as expansionist attitudes of investment tribunals causing concern to states, the fervor for the paradigm of investment protection that emerged during the neoliberal period has lapsed.

No single paradigm can be said to have taken its place. Instead, a diversity of approaches now coexist. They range from termination of treaties and their replacement with local laws to the so-called balanced treaties to strong treaties that continue to affirm protection. This diversity is well evidenced in the practice of the five BRICS states, all of which moved during this period from developing states into rapidly industrializing states. As this symposium shows, the five BRICS show five different trends. These trends accord with a growing plurality of solutions, which is to be welcomed. But, as I shall argue, some approaches are preferable to others.

China's Newly Hegemonic Approach

In its early investment treaties, China cautiously confined investor-state dispute settlement to matters relating to the extent of expropriation. Now it has moved to a treaty model that seeks to promote full protection and thus ensure that its vast capital outflows through its state-owned corporations and sovereign wealth funds are protected by treatment standards enforced through investment arbitration. To advance the new turn that China has taken, some Chinese scholars employ the same theoretical arguments that were used in the past to justify the asymmetric system.² For its part, the Chinese government seems to view the new model treaty as a beachhead from which to advance Chinese influence in specified areas of the world under the ambitious policy of One Belt, One Road.

China may hope to “socialize” other states to its new vision, but it is questionable whether it will succeed. Developing countries seem more likely to prefer that China adhere to its old vision as a defender of the nonaligned world from the dominance of the West, rather than assume the hegemonic mantle that the West is losing so rapidly. In addition, it may be difficult for China to persuade other states to accord property and contract protection while simultaneously espousing socialism as its dominant political philosophy. Freedom of contract and sanctity of property epitomize Western values of democracy and the free market. Most of the world regards the rule of law as enmeshed with democracy and civil liberties. China is an unlikely promoter of the rule of law.

In any event, my view is that China, as one of the leading progenitors of the New International Economic Order, has a duty to the developing world to find novel ways of dealing with foreign investment. The approach China now takes sits uneasily with the approach that Chen An and other older and wiser Chinese thinkers on international law once took to foreign investment protection devised by the West.³ It will do no credit to China to reemerge in Western clothes only because it has left the ranks of developing states and become a massive exporter of capital. Fidelity to roots as a leader of the Third World is the way for China to acquire soft power. China resisted strong investment protections as it industrialized, and should not advance arguments to deny such a choice to other states.

India's Unworkable “Balanced” Treaties

India has gone through a period of transition in recent years. It was a late-comer to investment treaties, signing its first in 1995.⁴ It has since entered into ninety-nine of these treaties, most of them based on the Model Treaty of 2003.⁵ This model was extremely friendly to foreign investors in that it stressed investment protection as any

² See Congyan Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL UNBOUND 217 (2018).

³ AN CHEN, *THE VOICE FROM CHINA* (2016).

⁴ *India: Bilateral Investment Treaties*, UNCTAD INVESTMENT POLICY HUB (2013).

⁵ *Agreement Between the Government of the Republic of India and the Government of the Republic of _____ for the Promotion and Protection of Investments* (2003).

Western treaty would. But India has now moved to a new model that seeks to achieve greater “balance” between the demands of state sovereignty and investment protection.

The origins of this shift lie in the fact that India’s initial fervor for investment treaties eventually resulted in the filing of a large number of arbitrations against it. *White Industries Ltd. v India* came as a particular shock.⁶ By establishing that the delayed provision of a judicial remedy to a foreign investor could constitute a violation of the fair and equitable standard in an investment treaty, the arbitration signaled to India that its legal system could become a significant source of liability. And indeed, since the *White Industries* award, India has faced a spate of cases. There are twenty-four known cases pending against India as of July 2018, all brought within the last few years. Some arose from taxation measures. Others arose from court decisions finding corruption in the award of spectrum licenses.⁷

India responded to these experiences in two ways. First, it moved to distance itself from the Model Treaty of 2003. So far it has terminated fifty-eight of the treaties that followed that model.⁸ India has also issued joint statements with twenty-five states to reinterpret many of the remaining treaties in a way that limits the model’s influence and operation.⁹

Second, India worked toward a new model treaty in 2015. The government began with a Draft Model that included a chapter containing many principles of corporate social responsibility, environmental protection, labor rights, human rights protection, and protection of public interests.¹⁰ This model also permitted countermeasures, stated that regulatory measures do not usually amount to indirect expropriation, and contained several exceptions to liability, but drew criticism for being too drastic and adverse to foreign investors.

In its place, the Law Commission of India ultimately endorsed a Final Model Investment Treaty that seeks to “balance” the values of state sovereignty and investor protection.¹¹ This model avoids the fair-and-equitable clause and the most-favored nation clause, the focus of much controversy in investment arbitration. It permits regulatory expropriation. It contains exceptions to liability based on environmental conservation and protection of cultural assets. It seemingly does away with some of the Draft Model’s elaborate provisions relating to state interests. But it also introduces provisions that undermine significantly any measures that seemingly protect foreign investors.

One example helps to illustrate the point. The Final Draft confines protection to “corporations which are organized and operated” under the laws of the host state.¹² The inclusion of the word “operated” means that throughout the course of the foreign investment, the foreign investor who seeks the protection of the treaty should have complied with the laws of the host state. Since the domestic law of the host state would contain environmental, labor, and human rights obligations, the use of the simple word “operate” ensures that failure to fulfill any of a wide range of obligations under the domestic law will remove the foreign investor from the protection of the treaty. A similar provision was interpreted in *Al Warraq v. Indonesia* to require the foreign investor to continuously abide by obligations to the host state if the investor is to invoke the jurisdiction of a tribunal against that state.¹³

Supposedly “balanced” treaties of this sort are essentially unworkable. They are doomed to failure because they seek to marry mutually incompatible aims within a single treaty framework. India’s Final Model BIT does not

⁶ [White Indus. Austl. Ltd. v. India](#), Final Award, (UNCITRAL, Nov. 30, 2011).

⁷ See [India – As Respondent State](#), UNCTAD INVESTMENT POLICY HUB (2013).

⁸ Kavaljit Singh & Burghard Ilge, [India Overhauls its Investment Treaty System](#), FIN. TIMES (July 15, 2016).

⁹ *Id.*

¹⁰ Grant Hanessian & Kabir Duggal, [The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?](#), 32 ICSID REV 216 (2016).

¹¹ [Model Text for the Indian Bilateral Investment Treaty: Bilateral Investment Treaty Between the Government of the Republic of India and _____](#) (2015).

¹² *Id.*, art. 1.6.

¹³ [Hesham Talaat M. Al-Warraq v. Indon.](#), Award on Respondent’s Preliminary Objections to Jurisdiction and Admissibility of the Claims (UNCITRAL, June 21, 2012).

achieve investment protection, as it contains so many exceptions to state liability that the investor can hardly maintain a claim.

Another weakness of these treaties is that they are unlikely to disturb the current system of investment arbitration. One longstanding problem with investment treaties in general is that, in the course of interpreting and applying them, a select group of arbitrators has assigned meanings that the treaties were never intended to carry. The chances are that the same set of arbitrators—whose selection is orchestrated by large law firms, which have derived much profit from the system—will interpret balanced treaties and their new provisions to ensure the continuation of the old system.

In sum, the balanced treaty, whether strong or mild, is difficult to justify. It is unlikely to generate foreign investment flows. It limits sovereign control over investment. It pursues incompatible aims. And it is unlikely to disturb the current system of arbitration. The only remaining justification lies in the suspicion that the simple fact of the adoption of these treaties by other states serves as indirect evidence of some sort of inscrutable utility that can be secured only through participation in the international investment regime.¹⁴ In this context, it will become increasingly difficult to sell investment treaties that are strong on investment protection to states.

South Africa's Return to Domestic Law and Courts

Unlike India, South Africa has taken the bull by its horns. South Africa took the extreme course of terminating its treaties, making its domestic legislation the only relevant law on foreign investment within South Africa, and making its courts the final arbiters of investment disputes. To a large extent this situation was precipitated by the *Foresti v. South Africa* dispute,¹⁵ which put in question the ability of South Africa to take measures to remedy the historical abuse of apartheid.

South Africa faced domestic problems that arose from its transition from white supremacist rule to democracy. It had to cater to its people's needs for reform. It was obvious that some of the measures South Africa would take would violate provisions of investment treaties. The Black Economic Empowerment Policy, for example, called for reverse or positive discrimination in favor of those who had been disadvantaged by discrimination practiced against them on racial grounds.¹⁶ Rapid economic advancement of regions and peoples would require the taking of measures that may be seen as violating equal protection norms or as interfering with property rights of those who had profited from the policies of the apartheid government. A system of foreign investment protection that was enforced by foreign tribunals would seem inappropriate in such a situation. The *Foresti* dispute,¹⁷ where foreign mining interests challenged the Policy, demonstrated the clash between investment protection and the interests of a state seeking to undo the socioeconomic dysfunction of a racist rule that had existed for so long.

South Africa then decided to terminate its investment treaties and enact legislation on foreign investment. This legislation was to be the exclusive basis for the protection of foreign investment in South Africa. Dispute resolution was to take place according to South African law by South African courts. A situation akin to the Calvo Doctrine and one favored by the documents of the New International Economic Order—which China, India, and Brazil had supported prior to the era of neoliberalism—came into existence.

¹⁴ The same rationale applies to tax incentives for investment. There is no proof that they attract investments, but most states offer them because other states do so and there is fear that a state will place itself at a disadvantage by failing to go along.

¹⁵ *Piero Foresti et al. v. S. Afr.*, ICSID Case No. ARB(AF)/07/01 (Aug. 4, 2010).

¹⁶ See Engela C. Schlemmer, *Dispute Settlement in Investment-Related Matters: South Africa and the BRICS*, 112 AJIL UNBOUND 212 (2018).

¹⁷ *Piero Foresti et al. v. S Afr.*, *supra* note 15. The case arose from the South African government's seizure of the mineral rights of Italian companies in order to rearrange the sector so as to profit black citizens.

Unlike the subterfuge of the “balanced treaty,” this was an honest solution to the problem of investment protection. And it is likely to be more effective. To be sure, the object of the balanced treaty, from the point of view of the state advancing it, is to guarantee that there are plenty of defenses in the event that liability is established. But if the same coterie of arbitrators that is known to favor the interests of foreign investors interprets these treaties, they are likely to interpret the new defenses as narrowly as possible and thus encourage the continuation of the old tendencies. Indeed, the few Western commentaries on the Indian treaty already indicate exasperation over its idiosyncrasies and evince a desire to deal with it as if nothing has changed.¹⁸

One question worth pondering is whether the approaches of South Africa and India might have more in common than first appears to be the case. The thrust of India’s Final Model BIT is to emphasize the need to attempt local remedies for five years. This is an effort to revive the old local remedies rule and make denial of justice the focal point of liability. As the *White Industries* award shows,¹⁹ Indian courts are notoriously slow. Perhaps the treaty will have the effect of encouraging these courts to create a system that finishes the course of investment disputes within the specified time period.

If this were to occur, the Indian courts would likely become the final arbiters of all but the most extreme cases, where their own judgments effected such egregious injustice as to give rise to a cause of action before an international tribunal. In such a scenario, and excepting the extreme cases, the new Indian treaty might start to look a lot like the South African approach: particularly when understood as extending protection only to investments that have adhered to all domestic laws, the treaty’s primary function would be to structure the application of domestic law and domestic remedies. Such a function would give rise to legitimate questions about the need for the treaty in the first place.

Conclusion

The pursuit of a single model investment treaty for all BRICS states is a futile one. Each state must be given the choice to make its own determination as to what is an appropriate foreign investment policy given its particular circumstances. Of all of the approaches adopted by the BRICS, I view South Africa’s as the most promising for the straightforward way in which it subjects investment protection to the goals of the South African Constitution and the processes of the South African courts.

¹⁸ Most of these commentaries appear on websites of large law firms. See, e.g., Allen & Overy, [Indian Model Bilateral Investment Treaty](#) (Aug. 5, 2016).

¹⁹ [White Indus. Ltd. v. India](#), *supra* note 6.