Rethinking the Regulation of International Foreign Investment: Recent Developments in Brazil, South Africa and India

Akshat Agarwal[*]

Abstract *This article analyses the global rethink in international investment law regimes by focussing on recent developments in Brazil, India and South Africa which, among developing countries, have witnessed major outflow and inflow foreign investment in recent years. It compares and contrasts these regimes and identifies certain trends that are relevant globally. Finally, it speculates what the possible impact of these developments could be.*

[*] Akshat Agarwal is a Research Fellow at the Vidhi Centre for Legal Policy, New Delhi. Views expressed are personal.

I. INTRODUCTION

The international investment law regime has been in transition. With the proliferation of investor-friendly Bilateral Investment Treaties (BITs), concerns have been raised regarding the state's sovereign right to regulate and pursue legitimate policy objectives, such as sustainable development. Increasing investor-state disputes have only compounded the problem and have made many developing countries rethink the regulation of foreign investment. This article analyses recent legal developments in regulation in three BRICS countries – Brazil, South Africa, and India, and identifies major trends that have influenced these changes and its meaning in international investment law.

The choice of countries is for two primary reasons. *First,* these countries are amongst the major home as well as host states for foreign investment[1] with governments who have explicitly recognized the role of foreign investment in economic development.[2] *Second,* as is analysed later, these three countries have followed divergent models of regulation - thereby making for interesting case studies.

In the first part the article maps the major trends in international and investment law and explains why there has been a rethink amongst developing countries. The second part analyses the developments in Brazil, South Africa and India. The analysis is at two levels. At the first level the article contextualizes the reforms, while at the second it analyses the inclusion or omission of ubiquitous BIT provisions such as standards of protection (including the fair and equitable standard), expropriation and investor-state dispute settlement (ISDS). In the third part the article identifies certain trends common to these developments which can then be generalized to understand the shift in international investment law, globally. The last part of the article speculates the impact of these developments for these countries individually and the international investment law regime at large.

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1 UNCTAD, World Investment Report 12 (2016). Interestingly, most of the FDI outflows from the BRICS countries were to other developing countries.

2 BRICS, "BRICS Perspective on International Investment Agreements" http://brics.itamaraty.gov.br/category-english/21-documents/227-brics-perspective-on-international-investment-agreements.

II. CHARACTERISTICS OF THE PRESENT IIA REGIME AND THE NEED FOR A RETHINK

International Investment Agreements (IIAs) have long been the primary vehicle for the regulation of foreign investment. International Investment Law has thus come to be composed of a significant number of BITs which are the most common form of IIAs found in international practice.[3] Disputes relating to these treaties have been dealt with through Investor-State Dispute Settlement (ISDS) provisions with international arbitral tribunals deciding the dispute. Since arbitration does not follow the doctrine of precedent this has led to the creation of a complex, often diverging, body of jurisprudence. Commentators have used the "spaghetti bowl" metaphor to describe the convolution of international investment law owing to the proliferation of BITs.[4]

Another characteristic of this regime has been the preponderance of the treaties being signed between developed and developing countries.[5] With decolonization in the 1960s-70s and liberalization in the 1990s most developed countries felt the need for measures to protect their investments abroad. This was felt particularly necessary for countries whose political and legal systems were not considered sufficiently stable. As a result, many of these original treaties were very investor friendly and tipped in the favour of capital exporting nations.

This led to concerns regarding the adverse impact of such provisions on the state's sovereign right to regulate on issues of public policy. Instances where the state had undertaken regulatory measures led to ISDS claims being filed, which in the event of adverse decisions made the state liable for paying high compensation amounts. States therefore became wary of taking regulatory measures, a phenomenon described by commentators as the chilling effect on regulation.[6] Countries pursuing goals of sustainable development and economic redistribution against historically marginalized communities especially felt the brunt of this process.

Moreover, in many instances the international minimum standard as articulated in the BITs was not in conformity with domestic law thereby

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[3] Out of a total of 2958 BITs that have been signed 2367 are in force. *See* UNCTAD Investment Policy Hub, "International Investment Agreements" http://investmentpolicyhub.unctad.org/IIA.

[4] K.N. Schefer, *International Investment Law Text: Cases and Materials* 8 (1st edn., 2013).

[5] *Ibid.*, at 8-11.

[6] *See* K. Tienhaara, "Regulatory Chill and the Threat from Arbitration: A View from Political Science in Evolution in Investment Treaty Law and Arbitration" [C. Brown & K. Mills (eds.), 2011].

causing discrimination against domestic investors. Another issue was the adjudication of questions of public character, having immense domestic significance, by members of a tribunal who were essentially appointed to deal with contractual matters.[7] Such adjudication had the effect of encroaching on what was essentially the state's constitutional prerogative.

These factors have contributed to the feeling amongst developing countries that the current IIA regime be reformed. Interestingly, reverberations of these concerns are also visible in trade agreement negotiations such as Comprehensive Economic and Trade Agreement (CETA) and Transatlantic Trade Investment Partnership (TTIP), between developed countries.[8] For instance, the European Union (EU) has explicitly underlined the importance of the state's right to regulate and has even proposed the creation of an investment court to deal with disputes in order to avoid the structural problems of the investment arbitration system.[9] This similarity of arguments can be seen as an overall global shift in the international investment law regime.

III. ANALYSING THE MODELS OF REGULATION IN BRAZIL, SOUTH AFRICA AND INDIA

A. Brazil

In the context of international investment law, Brazil has always been the exception rather than the norm. At a time when most other Latin American countries opted into the BIT regimes, Brazil conscientiously decided against it.[10] While Brazil did sign BITs with many countries it ultimately did not ratify them.[11] As a result Brazil is not a state party to any of the traditional BITs that were entered in the 1990s and early 2000s. However, contrary to traditional wisdom Brazil has consistently received one of the highest inflows of foreign direct investment in the world.[12] While the relationship

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7 J. Kleinheisterkamp, "Investment Treaty Law and the Fear of Sovereignty: Transnational Challenges and Solutions", 78(5) Modern L.R. 793, 794-795 (2015).

8 C. Titi, "International Investment Law and the Protection of Foreign Investment in Brazil", 2 Transnational Dispute Management, 5 (2016).

9 F. Hoffmeister, "The Contribution of EU Trade Agreements to International Investment Law" in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* [S. Hindelang & M. Krajewski (eds.), 2016].

10 Maria José Luque Macias, "Reliance on Alternative Methods for Investment Protection through National Laws, Investment Contracts, and Regional Institutions in Latin America" in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* [S. Hindelang & M. Krajewski (eds.), 2016].

11 *Ibid.*

12 *Ibid.*

between BITs and increase in FDI remains unclear,[13] Brazil's consistent FDI inflows despite staying away from the traditional BIT regime are remarkable and perhaps indicative of the confidence that investors repose in its domestic legal regime.

It has been argued that Brazil's decision to refrain from the BIT regime is due to the continuing influence of the Calvo doctrine.[14] The Calvo doctrine which has its origins in South America, is based on the premise that foreign investors should not be treated in a manner different from domestic investors.[15] Thus according to this view, foreign investors were required to exhaust local remedies before they could utilize the ultimate remedy of diplomatic protection. The hold of the doctrine explains the initial hesitance of the Latin American countries towards international investment dispute resolution regimes such as ICSID. However, while other countries eventually changed their stance Brazil remained firm.

Since BIT's usually incorporate an international minimum standard, the same may diverge from the treatment meted out to domestic investors thereby leading to discriminatory treatment.[16] Further, the use of arbitration which is essentially contractual for resolution of disputes which were traditionally the sole constitutional domain of states was not viewed favourably.[17] This is especially because investment arbitration, unlike commercial arbitration, does not purely deal with private matters but also concerns matters of public policy having significant ramifications for the state party. The replacement of the existing system of diplomatic protection also did not appeal to the Brazilian policymakers.[18]

In recent years however, Brazil saw itself becoming a major capital exporter to many Latin American and African countries. Brazilian investors thus felt the need for investment protection and facilitation in these countries. It has been argued[19] that these developments led to the negotiation if new generation of IIAs known as Cooperation and Facilitation Investment Agreements (CFIA). This new model of IIA was a complete break from existing BITs. On date Brazil has signed CFIAs with Mozambique, Angola, Malawi, Mexico,

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13 *See* J. Tobin & S.R. Ackerman, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties" (Centre for Law, Economics and Public Policy Research Paper No. 293, Yale Law School 2005).

14 Titi, (n 8), at 6.

15 *Ibid*.

16 Titi, (n 8), at 7.

17 *Ibid*.

18 Titi, (n 8), at 8.

19 *Ibid*.

Chile and Columbia.[20] Brazil has also said to have finalized the text of an IIA with India[21] but it is unknown if that follows the CFIA format. Focussing on dispute prevention through alternate dispute resolution and cooperation these agreements represent a new thinking in IIAs. A remarkable quality about the way these agreements were entered into was the extensive consultations which the Brazilian government conducted with its business community who were engaged in investing abroad. These discussions brought to light how considerations such as smooth processing of business visas was more important to the business community than disputes.[22]

While there is no model CFIA and the treaties that Brazil has signed with the various countries till now differ in specifics, certain broad characteristics can however be outlined. In consonance with developments across the world the agreements are aimed at securing sovereign regulatory space. However, what really sets them apart is their focus on fostering cooperation and encouraging mutual investment.[23] Moreover, according to Brazil's own admission they are meant to be dynamic and adaptable therefore giving leeway to negotiating parties.[24]

The CFIAs do not contain popular standards such as fair and equitable treatment or even full protection and security.[25] However, standards such as national treatment and most favoured nation have been included.[26] There are provisions for direct expropriation and related compensation, however provisions on indirect expropriation have been omitted.[27] The treaties do not provide for an ISDS mechanism, rather they only retain state-state dispute settlement.[28] Moreover, the treaty focusses on what it terms are dispute prevention strategies rather than dispute resolution. In this context, it is also important to discuss the various collaborative mechanisms that the CFIAs envisage.

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[20] UNCTAD Investment Policy Hub, "International Investment Agreements Navigator – Brazil", http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu.

[21] Indian and Brazil Conclude Negotiations of Bilateral Investment Treaty, HSF Arbitration Notes http://hsfnotes.com/arbitration/2016/12/05/india-and-brazil-conclude-negotiations-of-bilateral-investment-treaty/.

[22] Titi, (n 8), at 9.

[23] K.F. Gomez & C. Titi, "International Investment Law and ISDS: Mapping Contemporary Latin America", 17 Journal of World Trade and Investment, 515, 522 (2016).

[24] Renato Souza, "Cooperation and Facilitation Investment Agreement CFI", Presentation, UNCTAD Expert Meeting on the Transformation of the International Investment Agreement Regime (February 25, 2015) http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/Brazil_side-eventWednesday_model-agreements.pdf.

[25] Titi, (n 8), at 9.

[26] Titi, (n 8), at 10.

[27] *Ibid.*

[28] *Ibid.*

Aimed at focussing on institutional governance, the CFIAs create Joint Committees and Focal Points (Ombudsmen). The former is charged with the responsibilities of "sharing opportunities for expansion of mutual investment, monitoring the implementation of the agreement, preventing disputes and solving possible disagreements in an amicable manner."[29] These Joint Committees must intervene before any state-state arbitration can be initiated. The Focal Points are supposed to act as "communication and support channels" between the state and the foreign investors.[30] They are meant to facilitate a continuous dialogue with the investors and are supposed to contribute both towards shaping regulation as well as preventing disputes.

The Focal Points are supposed to coordinate between the investors and the Joint Committee to prevent and resolve any disputes. Means of negotiation and conciliation are to be utilized in this regard. Interestingly, the Brazil-Mexico CFIA contains general exceptions for prudential measures, national security and public order which therefore cannot be raised as disputes.[31]

Another feature of the cooperative approach is the development of specific working themes or agendas that are aimed at creating an "attractive business environment."[32] The idea is that these agendas will be flexible so that the parties can continuously negotiate on topics of importance to both. These may include environmental regulation, corporate social responsibility, security etc.

Commentators have seen Brazil's CFIAs as its attempt to enter the global IIAs regime.[33] It's also part of The Unison of South American Nations (UNASUR) negotiations for creation of regional dispute resolution centre.[34] While it's not known what form those negotiations will take, through its CFIAs Brazil seems to have taken a very innovative approach with cooperation as key. Perhaps, since Brazil's FDI inflows have remained largely unaffected despite its non-participation in traditional BITs, these new generation IIAs are also indicative of Brazil's focus on its role as a capital exporter. The widespread consultations with its business community and the countries with which Brazil has signed the CFIA till now buttress this argument.

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29 Daniel Godinho, Statement, UNCTAD World Investment Forum (October 16, 2014) http://unctadworldinvestmentforum.org/wp-content/uploads/2014/10/Godinho.pdf.

30 Souza, (n 24).

31 Titi, (n 8).

32 *Ibid*.

33 Gomez, (n 23).

34 *Ibid*.

B. South Africa

Unlike Brazil, South Africa did not alienate itself from the global IIA regime. In fact, post-apartheid it entered a number of BITs based on the standard Organization for Economic Cooperation and Development (OECD) template.[35] However, in the last decade after an extensive review of existing policies it sought to terminate many of these BITs especially with EU countries. The Government indicated that unless there were compelling economic reasons it would not enter any further BITs.[36] Instead it introduced a domestic legislation which would treat foreign and domestic investors at par and would incorporate the various protections that are traditionally associated with BITs. As is discussed below, these standards however differ from those generally considered to be a part of customary international law.[37]

South Africa's history of apartheid is significant to understanding this shift in policy. During the 1990s South Africa followed the policy of Black Economic Empowerment (BEE) which required the redistribution of its economic resources amongst the black populations.[38] The text of the OECD BITs obviously did not take this redistributive policy measure into account thereby proving to be an impediment in the implementation of BEE.[39] A direct result of this policy was the *Foresti*[40] case where the change in the mineral rights regime in favour of historically disadvantaged populations was challenged by the investors as modifying their existing rights and thereby amounting to expropriation.

This coupled with concerns regarding erosion of South Africa's regulatory powers led to a comprehensive of review of existing BITs.[41] Key outcomes of the review included the finding that many of the countries with which South Africa had entered into BITs with were not the largest sources of

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35 S. Woolfrey, "The Emergence of New Approach to Investment Protection in South Africa" in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* [S. Hindelang & M. Krajewski (eds.), 2016].

36 *Ibid.*

37 There has been much discussion about whether standards such as fair and equitable treatment constitute customary international law; *see* R. Dolzer & C. Schreuer, *Principles of International Investment Law* 134-137 (2nd edn., 2012).

38 Woolfrey, (n 35).

39 M. Mossallam, "Process Matters: South Africa's Experience Exiting its BITs", GEG Working Paper 2015/97, The Global Economic Governance Programme, University of Oxford (2015).

40 *Piero Foresti, Laura de Carli* v. *Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Award (August 4, 2010).

41 K. Bosman, "South Africa: Trading International Investment for Policy Space", Stellenbosch Economic Working Papers: 04/16, University of Stellenbosch, 21 (unavailable).

foreign investment into South Africa.[42] Various provisions of the BITs such as expropriation and, fair and equitable treatment had definitional ambiguities which the unclear jurisprudence of the IIA regime did not help with either. Due to the lack of a public interest exception the commercial interests of the investors often trumped the public interests of the state.

Substantive provisions of the BITs were also found to be inconsistent with domestic law. A notable example is the provision on expropriation. The BITs include direct or indirect expropriation and nationalization. The South African constitution on the other hand explicitly excludes indirect expropriation and nationalization from its guarantee of the right to property. This was clarified in *Agri South Africa* v. *Minister for Minerals and Energy*[43] where the constitutional court held that section 25[44] of the constitution excluded deprivation and regulatory takings from expropriation that required the payment of compensation. Further, while BIT's require the value of compensation to be the full market value of the property, the constitution considered market value as one amongst several other factors that could be considered while determining compensation.[45]

Thus, with the objective of protecting South Africa's right to regulate in public interest the Government passed the Protection of Investment Act on December 13, 2015.[46] Prior to this the Promotion and Protection of Investment Bill had been circulated in 2013 which due to severe criticism was then toned down.[47] Despite this the final Act contains many significant provisions that deviate from traditional BIT formats.

The interpretation section of the statute stipulates that apart from domestic law the statute is to be interpreted in accordance with customary international law and international as qualified by the South African constitution.[48] This implies that international standards cannot be applied autonomously rather they will have to be read in light of constitutional provisions. Further, instead of fair and equitable treatment which now includes various facets in

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42 Woolfrey, (n 35).

43 *Agri South Africa* v. *Minister for Minerals and Energy*, (CCT 51/12), 2013 SCC OnLine ZACC 9 : 2013 ZACC 9.

44 Constitution of the Republic of South Africa, 1996, S. 25.

45 Bosman, (n 41), at 22.

46 "Protection of Investment Act Approved", UNCTAD Investment Policy Hub http://investmentpolicyhub.unctad.org/IPM/MeasureDetails?id=2828&rgn=&grp=&t=&s=&pg=&c=&dt=&df=&isSearch=false.

47 A. Farish, "Protection of Investments Act: A Balancing Act between Policies and Investment", De Rebus http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/.

48 S. 3, Protection of Investment Act, 2015.

international law,[49] the statute only provides for fair administrative treatment.[50] This is further defined as the absence of arbitrariness or denial of administrative and procedural justice. Transparency, a right to be heard and right to be given reasons are also part of this standard.

The standard of full protection and security[51] is expressed as being the level of security that is generally provided to domestic investors in accordance with the minimum standard of customary international law. However, this is subject to available resources and capacity. This thus is a substantial of dilution of the way full protection and security has been understood generally in international investment law.[52]

Unlike the bill, provisions on expropriation have been omitted altogether from the Act. However, Ss. 10[53] and 12[54] are of interest in the regard. The former stipulates that the investors have a right to property in consonance with section 25 of the constitution thereby, as previously discussed, excluding indirect expropriation and nationalization. Section 12 further codifies the state's right to regulate and provides that the state may take actions that are aimed at "redressing historical, social, economic inequalities and injustices" among other things.[55] The section further begins with words, "notwithstanding anything to the contrary in this Act" thereby making actions in pursuance of this motive an exception to other protections under the statute. It is however unclear how the right to regulate will be applied in specific situations.

In terms of disputes the legislation excludes ISDS altogether. Section 13[56] provides for mediation between the disputing parties to resolve the dispute. It lays down elaborate rules for the appointment of the mediator. Concerns have been raised about the impartiality of the mediator since he will be a South African national with whom international investor may not be comfortable with.[57] Further, it states that the mediation provisions do not preclude the investor from applying for domestic legal remedies. State-State arbitration is only available as a last resort and subject to exhaustion of all

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49 *See* Schefer, (n 4).
50 S. 6, Protection of Investment Act, 2015.
51 S. 9, Protection of Investment Act, 2015.
52 In fact, an arbitral tribunal in a 2001 case under Switzerland-South Africa BIT had held that countries cannot escape responsibility by stating that they did the best they could in the circumstances. *See* Woolfrey, (n 35).
53 S. 10, Protection of Investment Act, 2015.
54 S. 12, Protection of Investment Act, 2015.
55 S. 12(1)(a), Protection of Investment Act, 2015.
56 S. 13, Protection of Investment Act, 2015.
57 Farish, (n 47).

domestic remedies. More importantly, it hinges on the consent of the government and will not be available otherwise. Such consent considering South Africa's policy stances is unlikely to be forthcoming.

It is interesting to however note that despite the legislation South Africa, in compelling economic circumstances, has kept the window open for BIT negotiations. While a model BIT is still not available, the same is expected to be consistent with the African Union Development Council (AUDC) model, whose drafting saw participation from South African representatives.[58] Thus, South Africa seems to be following a dual model of protection where the domestic framework is meant to be the standard of protection for all foreign investment while it may still enter into BITs with countries whom it exports capital to.[59] This is especially the case with other African countries where the domestic legal frameworks are not well developed and the investments of South African investors may be liable to expropriation.[60]

C. India

Recently India gave notices of termination to as many as fifty-seven countries, including many European Union countries, indicating its intent to terminate existing BITs.[61] This includes India's BIT with the Netherlands, which has been major source of foreign investment into India.[62] This radical move came at the heels of the Indian Cabinet's passing of a new model BIT in December 2015. The Government of India now wants to negotiate all new BITs based on this template and wants to release joint-interpretative statements for existing BITs that have been spared the axe of termination.[63]

Post economic-liberalization, India signed its very first BIT with the United Kingdom in 1994. Since then India entered several BITs which were predominantly investor friendly and tipped in the favour of capital exporting nations. The text of most of these BITs was based on the standard OECD model. Unlike South Africa and Brazil, India's rethinking of its investment

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58 Woolfrey, (n 35).

59 *Ibid*.

60 *Ibid*.

61 Asit Ranjan Mishra, "India to Trade Partners: Sign New Bilateral Investment Treaties by 31st March", *Livemint* (January 11, 2017) http://www.livemint.com/Politics/8IRq2uiGhDAxjyiO2lEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html.

62 "India Overhauls Investment Treaty Regime", *Financial Times* (July 15, 2016) http://blogs.ft.com/beyond-brics/2016/07/15/india-overhauls-its-investment-treaty-regime/.

63 Nicholas Peacock & Nihal Joseph, "Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries", Lexology (March 16, 2017) http://www.lexology.com/library/detail.aspx?g=94c6d6fd-7c08-4b3e-af75-8056be928a12.

law regime was more reactionary. In the last decade India found itself at the receiving end of large number of investor-state disputes. According to UNCTAD, India has been a respondent state in as many as twenty-one investor-state arbitrations.[64] Significantly, India lost the 2010 *White Industries*[65] case which dented Indian sentiments and made the government liable for paying a high compensation. In *White Industries,* the tribunal found that the undue delays in India's judicial system in enforcing a commercial arbitration award amounted to a breach of India's obligation to provide "effective means of asserting claims and enforcing rights" under the India-Australia BIT.[66] Interestingly, this was breach of the Most Favoured Nation (MFN) clause since the same was used to incorporate the above clause from the India-Kuwait BIT.[67] Disputes relating to India's taxation policy such as the *Vodafone* case also proved to be a thorn on India's side. Even after the model BIT was released disputes have continued to plague India. Most recently, a lot of public controversy was created in India due to the Antrix-Devas case.[68] Here again, an arbitral tribunal held the Indian government's actions of cancelling certain public licenses amounted to expropriation.[69]

Consequently, India unveiled a new Model BIT and has since issued notices of termination to States with whom it has existing BITs. The Model BIT is a complete break from India's previous regime since it is aimed at protecting the state's regulatory powers and does away with many traditional investor protection safeguards.

The model BIT in keeping with the *Salini*[70] test follows an enterprise based definition of investment.[71] This contrasts with the broad asset based definition that was previously followed. Moreover, there is negative list that excludes portfolio investments, intangible rights etc.[72] This can be seen as an attempt on India's part to restrict the scope of its BIT protections.

In terms of investor protection, the model BIT, due to broad interpretations, omits the ubiquitous fair and equitable standard of treatment and instead states that investments will be protected in circumstances where

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64 UNCTAD Investment Policy Hub, ISDS http://investmentpolicyhub.unctad.org/ISDS.

65 *White Industries Australia Ltd.* v. *Republic of India*, UNCITRAL, Final Award, (November 30, 2011).

66 *Ibid.*

67 *Ibid.*

68 Anuj Srivas, "India Loses Big in Arbitration Case over Antrix-Devas Controversy", The Wire (August 26, 2016) *available at* https://thewire.in/53993/india-loses-big-in-abritration-case-over-antrix-devas-controversy/.

69 *CC/Devas (Mauritius) Ltd.* v. *Republic of India*, PCA Case No. 2013-09.

70 *Salini Costruttori SpA* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4.

71 Model Text of the Indian Bilateral Investment Treaty, Art. 1.

72 Model Text of the Indian Bilateral Investment Treaty, Art 1.7.

there is a denial of justice on the basis of customary international law, un-remedied and egregious violation of due process or manifestly abusive treatment.[73] The model BIT contains a full protection and security standard but the same is restricted to the physical security of the investment.[74] While the national treatment standard is retained, the model BIT, interestingly, does away with a MFN clause.[75] This omission is perhaps a direct response to the *White Industries* case since the government does not want future BITs to be impacted by provisions in existing BITs. The problem is significant since many of the terminated BITs have sunset clauses[76] and therefore investments made prior to the date of termination will still be protected for a period of time. An umbrella clause that requires both parties to observe their contractual obligations has also not been included. Taxation measures and non-commercial services by the states have specifically been excluded from the ambit of protection.[77]

The model BIT imposes an onerous exhaustion of local remedies requirement for a period of five years before the raising of any investor-state dispute.[78] The model BIT however introduces a transparency provision that requires the parties to ensure that all law and regulations are readily available.[79] In terms of investor obligations, the model BIT casts several duties regarding corruption and other disclosures on the investor.[80] A further duty of engaging in corporate social responsibility in the host state has also been casted on the investor.[81]

IV. IDENTIFYING TRENDS IN THE MODELS OF REGULATION IN BRAZIL, SOUTH AFRICA AND INDIA

Brazil, South Africa and India provide interesting instances of the divergent models of investor protection that developing countries are formulating in response to the many problems associated with existing BIT regimes. This

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73 Model Text of the Indian Bilateral Investment Treaty, Art. 3.1.

74 "Unveiled: Indian Model BIT", Kluwer Arbitration Blog (January 18, 2016) http://kluwerarbitrationblog.com/2016/01/18/unveiled-indian-model-bit/.

75 *Ibid*.

76 Ashutosh Ray, "Remodelling India's Investment Treaty Regime", Madhyam (July 18, 2016) http://www.madhyam.org.in/remodeling-indias-investment-treaty-regime/.

77 Model Text of the Indian Bilateral Investment Treaty, Art. 2.6.

78 Model Text of the Indian Bilateral Investment Treaty, Art. 14.3.

79 Model Text of the Indian Bilateral Investment Treaty, Art. 10.1.

80 Model Text of the Indian Bilateral Investment Treaty, Arts. 9 & 10.

81 Priti Patnaik, "Deconstructing India's Model Bilateral Investment Treaty", The Wire (September 16, 2016) *available at* https://thewire.in/66558/deconstructing-indias-model-bilateral-investment-treaty/.

coupled with the perception that ISDS is predominantly investor friendly has added to the discomfiture of these countries. Despite the divergence in approaches certain broad features common to all the approaches can be etched out. *First*, concerns regarding differential treatment of foreign and domestic investors have played a dominant role. This goes at the heart of the debates regarding the Calvo doctrine and whether pursuance of an international minimum standard of treatment can be at the cost of discriminatory treatment towards domestic investors. A possible solution would be to strive towards to the creation of uniform standards across domestic regimes but the same is easier said than done since countries have differing policy objectives. For example, the need to economically reintegrate black populations is an objective unique to South Africa.

Second, unsuitability of the ISDS as a forum to adjudicate questions of public policy and related perception of it being investor friendly. With increasing proliferation of BITs, arbitration tribunals have come to adjudicate issues of public policy which have made states increasingly uncomfortable. Arbitration as a mechanism of dispute settlement is a creature of contract and therefore aims to adjudicate essentially contractual issues. The constitution of tribunals which comprises international professionals is also reflective of the same. However, while this makes it fit to resolve contractual issues impartially, it also implies that its members may not have the requisite knowledge or experience to deal with constitutional issues of a public character. This is thus linked to the state's desire to create a sphere of regulatory autonomy so that legitimate regulation may not be subject to review by international arbitral tribunals.

Third, there is a clear relationship between stability and reputation of domestic legal systems and relative flexibility in regime choice. Both South Africa and Brazil, whose legal systems are known for their relative efficiency[82] have opted for more creative systems which according to them are most in consonance with their policy interests. India, on the other hand is infamous for endemic delays especially associated with its lower judiciary.[83] While reforms have been forthcoming,[84] the problem is far from solved. India's decision to stay within the BIT framework is perhaps thus a conscious acknowledgement of the same. What is particularly telling is that

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[82] Bosman, (n 41).

[83] Satya Prakash, Bhadra Sinha & Soibam Rocky Singh, "Waiting for Justice: 27 Million Cases Pending in Courts, 4500 Benches Empty", *Hindustan Times* (November 15, 2016) http://www.hindustantimes.com/india-news/waiting-for-justice-27-million-cases-pending-in-courts-4500-benches-empty/story-H0EsAx4gW2EHPRtl1ddzIN.html.

[84] *Ibid.*

the draft version of the Model BIT had omitted provisions on ISDS, but the same were re-incorporated after public and industry feedback.[85]

Fourth, balancing of interests as a capital exporting and capital importing nation. Initially, the BIT framework was premised on the relationship between capital exporting and capital importing nations. This meant that the treaty provisions were designed to favour investors from capital exporting nations. However, as capital importing nations have transitioned into capital exporting nations the dynamics have changed. Brazil and South Africa provide ideal cases in point where the model of investment protections is aimed at this balancing. While Brazil has been signing CFIAs, its own version of an IIA, with nations whom it exports capital to, South Africa has also expressed its willingness to enter into IIAs when there are compelling economic circumstances. At the same time both countries have considered domestic laws sufficient for protection of foreign investment. Only in India's case, since the country has only released a model BIT, with significantly reduced investor safeguards, the balancing remains unclear. India's decision to stay within the BIT system perhaps also stems from this lack of confidence in its own judicial system.

These trends when viewed in their totality provide insights into why these countries have modified their regimes and what factors should be considered in analysing shifts at a global level.

V. SPECULATING THE IMPACT OF THESE DEVELOPMENTS

With many of these debates reverberating in the negotiations around CETA and TTIP and the relationship between foreign direct investment and BITs remaining unclear, the positions that these BRICS countries have taken are not altogether surprising. As pointed out earlier arbitral tribunals have created a complex body of jurisprudence and in the absence of the application of the doctrine of precedent there is no certainty over which direction a dispute can go. Further, the chilling effect on regulatory freedom has proved a bottleneck in the achievement of legitimate policy goals. The question as to the impact of these developments however remains.

Brazil has long been an outsider to the global investment law regime, even its entry into treaty-making regime has been through the unconventional

[85] Nicholas Peacock, Alastair Henderson & Donny Surtani, "Indian International Arbitration E-bulletin", Herbert Smith Freehills (January 2016) http://sites.herbertsmithfreehills.vuturevx.com/33/10790/landing-pages/key-features-of-the-model-bit.asp.

CFIA model. Since the absence of BITs has not affected FDI inflows into Brazil it seems unlikely that CFIAs which are primarily aimed at protecting interests of Brazilian investors will have an impact on inflows either. Moreover, since these agreements have primarily been signed with the countries whom Brazil exports capital to the question of influencing inflow is not relevant. What remains to be seen is how the CFIAs novel provisions on dispute prevention and cooperation influence global treaty-making. The India-Brazil IIA, whose text has apparently been finalized, will be pivotal as an indication of the international impact of the Brazilian approach.

Criticisms to India's and South Africa's changes have been more vociferous since they transitioned from traditional BIT regimes and terminated many initial BITs with developed countries.[86] Concerns have been raised that these protectionist regimes may dent investor sentiment and adversely impact the inflow of foreign investment.[87] By enacting a domestic law South Africa has opted out of the IIA regime and has put foreign investors at par with international investors. Certain provisions of the Act have however been criticised on ground of being too broad and vague.[88] Despite this South Africa has kept the window open to enter into IIAs with countries where compelling economic circumstances make it necessary. This dual model of protection is akin to Brazil where a distinction is being made with countries whom South Africa exports capital to and countries from whom it imports capital from. The domestic legislation model is also efficient from the point of view of the investors since it combines various administrative law safeguards at one place.

The Indian approach is still to be tested since India has not signed any BIT since it released its new model. How successful India is in implementing its new model would thus depend on the negotiating power of the parties concerned. It must be noted that compared to other countries India's changes are not as far reaching since provisions on indirect expropriation and ISDS have been retained in the model. While the model BIT is noteworthy, for its provisions on transparency and corporate social responsibility it retains many of the provisions, such as ISDS, that have been considered problematic by other developing countries. Instead its omissions seem to be a direct response to prior disputes faced by India. Moreover, unlike South Africa and

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86 For examples, *see* M. Thadikkaran, "Model Text for the Bilateral Investment Treaty: An Analysis", 8 NUJS Law Review 31 (2015); Jeffrey Kron, "South Africa's Changing Approach to Investment Protection", Norton Rose Fulbright (April 2015) http://www.nortonrosefulbright.com/knowledge/publications/127737/south-africas-changing-approach-to-investment-protection.

87 *Ibid.*

88 Farish, (n 47).

Brazil, India does not seem to have made a distinction between protections in terms of the export and import of capital. India would thus probably do better by taking inspiration from other BRICS countries and adopt a more focussed approach to serve its interests better.

VI. CONCLUSION

The developments in Brazil, South Africa and India epitomize the rethinking in the global investment law regime. This rethink is occurring due to the structural features of the existing IIA regimes which have restricted the state's sovereign right to regulate. Moreover, due to the change in world economic order, with many capital importing countries having become capital exporting countries there has been a felt need to suitably modify existing frameworks of regulation.

Brazil, which has traditionally stayed away from the IIA regime, has now shown its willingness to enter into treaties through the mechanism of CFIAs which are rooted in dispute prevention and cooperation. South Africa however has followed the path of domestic legislation for protection of investment while at the same time keeping the door open for treaty negotiations in compelling economic circumstances. India has come out with a new model BIT which reflects global shifts, as visible in the South African and Brazilian approaches, but to a far lesser degree.

These countries have been motivated by concerns of differential treatment between foreign and domestic investors, unsuitability of ISDS in resolving public disputes, stability of their domestic legal systems and balancing of their interests as capital exporting and importing nations. These concerns remain relevant to other countries as well and therefore will impact global developments in investment law. It will be interesting to observe if and how other countries modify their own models of protection.

While it's too early to predict the success of these models, there is much that can be learnt from them and much that these countries can learn from each other. The developments are also most certainly indicative of increasing diversification in international investment law frameworks while at the same time maintaining the commonality of substance due to common undercurrents.