

SYMPOSIUM ON THE BRICS APPROACH TO THE INVESTMENT TREATY SYSTEM

DISPUTE SETTLEMENT IN INVESTMENT-RELATED MATTERS: SOUTH AFRICA AND THE BRICS

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Many states use investment treaties to spur economic development by granting legal protections to foreign investors and providing for direct enforcement before international arbitral tribunals. Yet South Africa has taken a different course. As explained below, South Africa originally signed onto a number of investment treaties despite barely considering how the resulting obligations would affect its constitutional commitments and the authority of its domestic courts. After the shock of losing its first two treaty-based investment disputes, the country shifted from avidly entering into bilateral investment treaties (BITs) to opposing BITs absent compelling economic and political reasons to conclude them.¹ Today South Africa seeks to replace investment treaties and investor-state arbitration with protections under domestic legislation, along with mediation and dispute resolution before domestic courts. In this essay, I describe this shift and explore three difficult and yet-to-be-resolved questions that it presents: (1) Will foreign investors still be able to rely on protections under international law when bringing domestic cases? (2) If so, will the South African Constitution, as a matter of domestic law, displace any relevant commitments under international law? And (3) is the new South African approach consistent with international law?

South Africa's Shift to Domestic Legislation and Domestic Dispute Resolution

South Africa concluded a number of investment treaties after 1993, when it became a democracy and reentered the international arena. From 1994 through 1997, the government concluded fourteen BITs, mostly with European states in addition to Mozambique, Iran, Canada, China, Cuba, and South Korea. Although the reasons are unclear, twenty-eight of a total of forty-nine BITs concluded through 2009 never entered into force. Of those that did, three are with African states (Mauritius, Nigeria, and Zimbabwe), thirteen are with European states, and the others are with Argentina, China, Cuba, South Korea, and Russia. South Africa entered into these agreements to reassure existing and potential foreign investors that their investments would be protected, and thus alleviate uncertainty as to the future direction of its economic policy.

But South Africa did not enter into its BITs with care. Indeed, the government concluded these agreements without an apparent appreciation for their ability to constrain state conduct at all levels, including with respect to national programs of socioeconomic reform. The government also concluded them without enacting any accompanying legislation to regulate the conduct of foreign investors. To make matters worse, very little, if any, democratic deliberation took place before or during the negotiating phases or signing of the agreements: my

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¹ Engela C. Schlemmer, [An Overview of South Africa's Bilateral Investment Treaties and Investment Policy](#), 31 ICSID REV. 167, 190 (2016).

review of *Hansard's Parliamentary Reports* suggests that no discussion of the government's policy in relation to BITs occurred in Parliament or its committees. For the most part, parliamentary discussion was also absent on the BITs to which South Africa was a party.²

The consequences were predictable. The new treaties generated complaints that domestic regulatory actions—including some undertaken pursuant to domestic constitutional imperatives—had breached South Africa's obligations under international law. The most well-known case concerned whether certain mineral law amendments implemented as part of the socioeconomic reforms related to South Africa's Black Economic Empowerment policies were compatible with national treaty commitments.³

These complaints emerged alongside a growing international discomfort with the system of investor-state dispute settlement (ISDS). The damages awarded by some tribunals were more than the gross domestic product of some states. Defendant states included not only those perceived to have questionable legal systems and perhaps not-so-independent judiciaries but also developed states. And arbitral tribunals made findings concerning governments' internal policies and the validity of their legislation, including in instances where the domestic courts of the relevant state would not have jurisdiction or would be compelled to take municipal constitutional obligations into consideration.

So South Africa changed course. Starting in 2010, the government decided to terminate some BITs and allow others to lapse. As a result, nine BITs with European states were terminated from 2012 to 2014, the BIT with Argentina was terminated in 2017, and another two BITs will terminate soon (Italy in 2019 and Greece in 2021), leaving only ten in force.⁴ In place of its initial preference for these agreements, South Africa has developed a new domestic framework for promoting and protecting foreign investment,⁵ including by enacting the Protection of Investment Act of 2015, which entered into force on July 13, 2018.⁶

The Act has several noteworthy features: First, it omits the investor-state dispute resolution mechanisms provided for in South Africa's BITs. Thus, for all practical purposes, ISDS is limited to mediation and litigation in the domestic courts. Second, the Act significantly restricts the availability of international arbitration by allowing it only after exhaustion of domestic remedies, only if the government consents, and only "between [South Africa] and the home state of the applicable investor."⁷ The Act thus removes any possibility for investors to take any investment-related dispute with the government to arbitration.⁸ In this way, the Act returns foreign investors to the arguably unsatisfactory position they held prior to the adoption of the Washington Convention,⁹ which first recognized the importance of granting them a right to appear before an international tribunal to sue a host state for breaching obligations under international law. South Africa's reversal of approach is clearly not progressive when it comes to

² The sole exception appears to be a post hoc discussion on the BIT with Zimbabwe, which was the very last BIT that South Africa signed. See [National Assembly Hansard](#) 3 May 2010 (S. Afr.).

³ [Foresti v. S. Afr.](#), ICSID Case No. ARB(AF)/07/1 (Aug. 4, 2010); see also Schlemmer, [supra note 1](#); Peter Leon, [Creeping Expropriation of Mining Investments: An African Perspective](#), 27 J. ENERGY & NAT. RESOURCES L. 597 (2009).

⁴ The remaining BITs are with China, Cuba, Finland, Korea, Mauritius, Nigeria, Russia, Sudan, Sweden, and Zimbabwe. Despite earlier reports to the contrary, it appears that a BIT with Senegal never entered into force.

⁵ [ATC140331: Report of the Portfolio Committee on Trade and Industry Undertaken During the 4th Parliament](#) (May 2009 – March 2014) (S. Afr.).

⁶ [Protection of Investment Act](#) 22 of 2015 (S. Afr.).

⁷ *Id.*, § 13(5).

⁸ No such provision applies to other forms of international commercial arbitration. See [International Arbitration Act](#) 15 of 2017 § 5 (S. Afr.).

⁹ [Convention on the Settlement of Investment Disputes Between States and Nationals of Other States](#), Mar. 18, 1965, 575 UNTS 159.

the protection of foreign investment, but would be viewed by some as progressive when judged from the perspective of preserving state sovereignty.

In effect, the new approach has created the possibility that any of three and possibly even four¹⁰ legal regimes might govern the resolution of investor-state disputes. First, a foreign investor in South Africa might receive protection only under general South African law.¹¹ This law might incorporate principles of international law—especially on state responsibility and the treatment of aliens—that do not conflict with the South African Constitution. Second, depending on its nationality, an investor might fall under the protection of a BIT, either because the treaty has not lapsed or terminated, or because it contains a so-called survival clause that renders its provisions applicable to investments made while the treaty was in force. To illustrate, Russia and China concluded BITs with South Africa. These agreements may still be in force, but even if they lapse, each contains a survival clause: foreign investors that enjoyed the benefit and protection of the BIT at the time of their investment will continue to do so for a specified number of years after the agreement loses force. In the case of the BIT with China, the survival period is ten years.¹² In the case of the BIT with Russia, the period is fifteen years.¹³ Finally, foreign investment disputes that arise in the future and are not protected by BITs are likely to be governed by the 2015 Act. In these ways, there is likely to be material variation in the duration and type of protection accorded to foreign investors in South Africa.

The Balance Between Investor Protection and the Preservation of State Sovereignty

The current landscape raises a series of questions about the future of ISDS in South Africa. First, to what extent will international law principles continue to govern the protection of investments under the new act? BITs enabled foreign investors to pursue treaty-based claims and thus rely on principles of international law in arbitrations with South Africa. As fewer and fewer of those treaties remain operative, they lose significance as a source of law. In theory, foreign investors could continue to rely on treaty-based principles in South African courts and mediation, as long as those principles are part of South African domestic law. But BIT principles are not, as the treaties have not been incorporated.¹⁴

Nor is it clear that other forms of international law will apply. Section 3 of the 2015 Act states that one must interpret and apply the Act in accordance with international law.¹⁵ Given that customary international law (CIL) requires a state to provide compensation, typically at market value, in the event of an expropriation of private

¹⁰ South Africa is a member of the Southern African Development Community (SADC) and bound by the [Agreement Amending Annex 1 of the SADC Protocol on Finance and Investment](#). This agreement removes the possibility of international arbitration as a mechanism of ISDS, but it is unclear whether it has entered into force.

¹¹ Prior to July 13, 2018, when the Protection of Investment Act came into operation, no statute provided for the protection of foreign investors. Moreover, the Act is not retroactive. As a result, all investments made prior to July 13, 2018 and outside of a BIT framework lack domestic legal protection other than that accorded by general South African law. The [Constitution of the Republic of South Africa](#) does, however, provide some protection in the form of a right against the arbitrary deprivation of property.

¹² [Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa Concerning the Reciprocal Promotion and Protection of Investments](#), Dec. 30, 1997.

¹³ [Agreement Between the Government of the Republic of South Africa and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments](#), Nov. 23, 1998. This protection is also enshrined in Section 15 of the [Protection of Investment Act](#), *supra* note 6.

¹⁴ [Progress Office Mach. CC v. S. Afr. Revenue Serv.](#), 2008 (2) SA 13 (SCA) (establishing that parties can rely on the provisions of a treaty in a domestic court only if the treaty has been incorporated into South African law).

¹⁵ [Protection of Investment Act](#), *supra* note 6, § 3.

property, one might imagine investors using similar arguments to advance CIL-based claims against expropriation. But this sort of argument remains untested.

The involvement of an investor's home state also raises uncertainties. For example, what will the home state argue in arbitration with South Africa? Will it act as a representative of the foreign investor or on its own behalf? Will it contend that the South African government has not complied with its own statute (the argument that the investor would have raised), or that it breached CIL by failing to provide the minimum standard of treatment to aliens? The Act does not provide clarity on the substantive law that will govern the arbitration, other than by reference to a vague standard for fair administrative treatment.

If the question arises under the Act, it is doubtful that reliance on international law principles will succeed unless the parties agree that the dispute will be settled purely on that basis. The interplay between international law and South African law, especially with respect to the interpretation of statutes and the application of CIL, is not settled. Thus, disputes that might arise under the 2015 Act are likely to be fraught with uncertainty.¹⁶

The second question is whether the South African Constitution will, as a matter of domestic law, displace any relevant commitments under CIL. While Section 3 of the 2015 Act requires that the interpretation and application of the Act must be done consistently with international law, the Act is subject to the South African Constitution, which provides that CIL forms part of South African law "unless it is inconsistent with the Constitution or an Act of Parliament."¹⁷ For investors, this hierarchy of authority could prove problematic because it is black-letter law in South Africa that the compensation to be paid after expropriation need not reflect market value, which is merely one of several factors that influence the amount of the award.¹⁸ Moreover, South Africa is currently considering a proposal to amend its constitution to permit expropriation without compensation. If this proposal succeeds, CIL-based claims against expropriation are likely to conflict with the Constitution more clearly than ever before, and thus fail on account of the doctrine of constitutional supremacy.

The possibility of constitutional displacement of CIL is significant for several reasons. One is that, absent the ability to rely on international law in South African courts, investors from states that lack a BIT with South Africa will have to rely on their home states to raise international law-based objections at the intergovernmental level or in future arbitral proceedings under the 2015 Act.¹⁹ The other reason is that constitutional displacement would likely generate disparate outcomes in similar disputes depending on the nationality of the investor: In international investment arbitration based on BITs, arbitrators are not bound to consider the constitutional law that influences and often dictates a government's actions. As a result, investors from states that still have a BIT with South Africa are unlikely to encounter the displacement problem. In contrast, investors from other states may have to present their disputes to municipal courts that must follow the South African Constitution. This problem is likely to persist until there is one uniform ISDS system in South Africa.

The final question is whether South Africa's new regime is consistent with international law. A state generally has the right to choose the policies by which it will govern within its own national borders. Still, all states are bound by international law, regardless of what municipal law might say. Absent BITs, the legality of South Africa's regulation

¹⁶ See Erika de Wet, *The Reception Of International Law In The South African Legal Order: An Introduction*, in *THE IMPLEMENTATION OF INTERNATIONAL LAW IN GERMANY AND SOUTH AFRICA* 23, 37 (Erika de Wet et al. eds., 2015).

¹⁷ *S. AFR. CONST., 1996* §§ 232, 233.

¹⁸ *Id.*, § 25(3).

¹⁹ See *Protection of Investment Act*, *supra* note 6, § 13(5) ("The government *may consent to international arbitration* in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor.") (emphasis added). As a result, there is no obligation on the South African government to agree to international arbitration with an investor's home state.

of foreign investment is likely to depend heavily on CIL, but the contours of that law are often contested and indeterminate. In this sense, the consistency of South Africa's regulatory actions with international law will likely become harder to ascertain.

Conclusion

South Africa is not the only BRICS member that has had problems with investor-state arbitration. The *Yukos* case garnered extensive publicity,²⁰ and governments are plainly reluctant to accept awards and even more so to comply with them, notwithstanding their initial consent to international investment arbitration. From a political standpoint, this attitude may be understandable, especially in light of the magnitude of the damages awarded in some instances and the lack of a system of appeal. But a damages award follows only after a determination of illegality. From a legal perspective, noncompliance is not defensible. *Pacta sunt servanda*.

Whether the above deficiencies should cause governments to shy away from proper ways of resolving disputes and complying with awards and enforcing them is questionable and an issue that future negotiators in the BRICS will have to take into account. If the goal is to treat all investors within the BRICS equally, the diverse approaches to investor protection and dispute resolution now followed by the different members should be replaced by a uniform or harmonized approach. Moreover, the members should undertake to recognize, enforce, and comply with one another's arbitral awards and domestic judgments.

The advisable route may be for the BRICS countries to come to an agreement on general principles of protection for investors based on the principle of reciprocity, as well as on the role of constitutional imperatives in this context. Clear guidelines about the types of protection that should be accorded to investors and investments and different modes of dispute resolution need to be considered. It is doubtful at this stage whether a uniform approach to dispute resolution can be achieved, but a way needs to be found for all investors to be treated equally and fairly through the application of the same legal principles to the extent possible. More wisdom than that of Solomon will be required.

²⁰ [Yukos Universal Ltd. \(Isle of Man\) v. Russ.](#), PCA Case No. AA 227 (UNCITRAL July 18, 2014).