

## INTRODUCTION TO THE SYMPOSIUM ON THE BRICS APPROACH TO THE INVESTMENT TREATY SYSTEM

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This symposium derives from a conference convened by Congyan Cai at Xiamen University in 2017, which brought together scholars and policy-makers from Brazil, Russia, India, China, and South Africa (the BRICS), together with several investment treaty specialists from Western states and international organizations. The idea behind the symposium was to investigate to what extent the BRICS took, had the potential to take, or should take a common approach to the investment treaty system. Part of the impetus for the Xiamen conference was the recognition that Western power in the investment treaty system had become less extensive in recent years than previously, while certain non-Western states were becoming more active in the regime.<sup>1</sup> This rebalancing led to questions about the extent to which the approaches of the BRICS do—and should—differ from each other and from their Western counterparts, and the implications that the BRICS' approaches could have on the current efforts to reform the investment treaty system. This introduction first gives a roadmap of the contributions in the symposium. It then reflects on some of the advantages and difficulties of bringing together scholars from diverse non-Western states and some of the lessons we learned in the process.

### *Roadmap for the Symposium*

We begin this symposium with a reform matrix by Anthea Roberts that sets out an overarching framework within which to locate different actors in the investment treaty system.<sup>2</sup> Taking the 2004 and 2012 U.S. Model Bilateral Investment Treaties (BITs) as its baseline, the matrix sets out three approaches to reform—incremental, systemic, and paradigmatic. The matrix then applies these approaches across three areas—procedure (dispute resolution), substance (rights and obligations), and form (treaty, legislation, or contract)—to show how divided the BRICS are over the way they deal with the investment treaty system. For example, some BRICS, such as Brazil and South Africa, have adopted a paradigmatically different approach to procedure, as they both reject investor-state arbitration, but Brazil has remained loyal to treaties as the form of protection, whereas South Africa has shifted to domestic legislation. India has become more cautious about giving protections to investors, whereas China has become more robust in this regard.

Henrique Choer Moraes and Felipe Hees outline the pioneering position that Brazil has assumed in the investment treaty system, not only as the sole major power never to have ratified a BIT, but also as the designer of a new model—the Cooperation and Facilitation Investment Agreement—which focuses on investment facilitation

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<sup>1</sup> For other recent work on this topic, see [RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH](#) (Fabio C. Morosini & Michelle Ratton Sanchez Badin eds., 2017) (discussing alternative approaches to the regulation of international investment among states in the Global South).

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

rather than investor protection, and alternative dispute resolution and state-to-state arbitration rather than investor-state arbitration.<sup>3</sup> They claim that Brazil's approach is deeply rooted within a public international law framework and has the advantage of "interoperability" because states can sign on whether or not they already hold a portfolio of BITs. For this reason, they consider that Brazil's model might prove an attractive basis for multilateral action, as Brazil is currently suggesting with respect to investment facilitation at the World Trade Organization.

Applying a method typical of the Russian academy, Dmitry Labin and Alena Soloveva seek to understand legal phenomena according to specific categories and definitions while comparing Western and Russian approaches.<sup>4</sup> They argue that both Western and Russian academic debates show an interest in how to understand the nature of the investment treaty system given its hybrid features drawn from public international law, private international law, and public law. But Western scholars often view the system primarily through a public international law or public law framework, whereas Russians commonly view the system primarily through a private international law framework (in stark contrast to the aforementioned Brazilian approach). They suggest that this perspective might help explain the Russian Federation's resistance to the reform debates under way at the UN Commission on International Trade Law.

Huiping Chen examines Chinese innovations of recent years in investor-state dispute settlement (ISDS).<sup>5</sup> Unlike some other BRICS that have shied away from investor protection and ISDS, China has extended the jurisdiction of existing commercial arbitral institutions in the country to cover foreign investment disputes and has created new Chinese institutions to deal with such disputes, as well as joint arbitration centers with states in regions where China invests heavily, such as Africa. Chen concludes that these developments should be understood as reflecting three important goals of China's broader international strategy: to protect China's outbound investors, to help shape international investment treaty discourse, and to offer alternative Chinese-initiated international institutions so as to disrupt the monopoly currently enjoyed by Western-initiated international institutions.

Engela Schlemmer explains South Africa's decision to withdraw from the investment treaty system and to replace investment treaty protections with legislation and ISDS with resort to domestic courts.<sup>6</sup> These actions resulted from the shock South Africa experienced when early cases challenged South Africa's actions under its constitutional mandate to redress the historic injustices of apartheid. Schlemmer points out that many issues remain unclear under this new approach. These include whether foreign investors will still be able to rely on protections under international law when bringing domestic cases, whether international law commitments (if applicable) will be subjected to the imperatives of the South African Constitution, and what the new system means for the balance between investor protection and South Africa's right to regulate.

Congyan Cai argues that some of the BRICS, most notably South Africa, India, and to some extent Brazil, have sought to replace older-style investment treaties that were imbalanced in terms of providing too much protection to investors, with newer-style investment treaties that provide too much protection to host states.<sup>7</sup> He argues that such methods represent new "unbalanced" approaches because they do not meet the objectives of the investment treaty system, which he defines as striking an appropriate balance between investor protection and state sovereignty. He also argues that the methods are unlikely to be accepted by such major powers as the United States, the European Union, and China. Nonetheless, he notes the potential for the BRICS to forge a common approach

<sup>3</sup> Henrique Choer Moraes & Felipe Hees, *Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements*, 112 AJIL UNBOUND 197 (2018).

<sup>4</sup> Dmitry K. Labin & Alena V. Soloveva, *International Investment Law as International Law: Russian and Western Approaches*, 112 AJIL UNBOUND 202 (2018).

<sup>5</sup> Huiping Chen, *China's Innovative ISDS Mechanisms and Their Implications*, 112 AJIL UNBOUND 207 (2018).

<sup>6</sup> Engela C. Schlemmer, *Dispute Settlement in Investment-Related Matters: South Africa and the BRICS*, 112 AJIL UNBOUND 212 (2018).

<sup>7</sup> Congyan Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL UNBOUND 217 (2018).

to the investment treaty system by focusing on issues such as investment facilitation and the adoption of common but differentiated responsibilities that take into account host state development.

M. Sornarajah contends that the BRICS will never conform to a single approach and that such diversity should be encouraged because these states are differently situated.<sup>8</sup> He objects to China's embrace of the more typical Western-style approach to investment treaties, insisting that China is turning its back on its leadership of the Third World now that it is becoming a greater capital exporter. Sornarajah suggests that adopting such a new hegemonic approach will undermine China's soft power. He also negatively assesses India's attempt to produce a "balanced" investment treaty in its 2015 Model BIT, arguing that such an attempt is unworkable because it seeks to give the appearance of protecting foreign investors while unobtrusively trying to reserve significant powers to the state. He doubts that this attempt at balancing will work, given that such treaties still confer dispute resolution powers to international arbitral tribunals, albeit only after five years of litigation before domestic courts. Instead, Sornarajah prefers the South African approach, which safeguards investment protection through legislation enabling claims before domestic courts in what he views as a more honest, straightforward protection of state sovereignty.

#### *Reflections on the Process*

Cai has long had an interest in the capacity of Great New Powers to shape and shift the international system.<sup>9</sup> Roberts has an interest in both comparative approaches to international law and listening to a diversity of perspectives, and in understanding how changing economic and geopolitical power will play out in the content and structure of global governance.<sup>10</sup> Given these shared interests, putting together a conference not just about the BRICS approach to the investment treaty system but one that primarily involved scholars and practitioners from the BRICS seemed like an obvious step. Attempting to publish the outputs in a major international journal, such as *AJIL Unbound*, seemed a good way to share those perspectives with a broader community of international lawyers.

This task proved challenging, however. Although the BRICS exist as a group that is discussed in the media and that meets on a political level, there is little evidence of coordination among the BRICS when it comes to the investment treaty system. There is also scant engagement among the scholarly communities of the BRICS, as many study and work primarily in their home states. Even where they travel or work abroad, their movements often take them to the West rather than to each other. An example of these difficulties was that Cai (a Chinese scholar) needed to ask Roberts (an Australian scholar) for relevant contacts in Russia (which she only had because of previous comparative international law research). The vast majority of the scholars featured here had never met prior to the conference.

Language was also an issue. Almost all of the scholars in this symposium speak English as a second language. As many nonnative language speakers will attest, drafting in a foreign language is hard. It is more time consuming and the end result is often less nuanced and polished than the author would like. It also takes more time to edit. But speaking and writing in English was important, not just so that the authors could communicate with each other, but also so they could speak to many others located elsewhere. It is humbling for native English speakers to remember how much more easily they can participate in the international system and speak to nonnational

<sup>8</sup> M. Sornarajah, *The Unworkability of "Balanced Treaties" and the Importance of Diversity of Approach Among the BRICS*, 112 *AJIL UNBOUND* 223 (2018).

<sup>9</sup> Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 *EUR. J. INT'L L.* 755 (2013).

<sup>10</sup> ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

communities given the dominance of their mother tongue. As one Chinese official has quipped: “just imagine if the USTR [Office of the U.S. Trade Representative] had to defend itself in Chinese.”<sup>11</sup>

Academic styles also differed. For example, *AJIL Unbound* prides itself on offering analytical pieces. Legal scholarship in some of the BRICS academies tends to be more doctrinal and descriptive. Sometimes the papers contained analytical arguments, but the authors did not present them as forthrightly or expressly as is typical in American articles. Western scholars often focus on differences between Western states, particularly recently in the investment treaty system where the European Union and the United States have divided over the desirability of a multilateral investment court. But some of the BRICS scholars tended to refer to “the West” in more monolithic terms, a feature that reflected common patterns of discourse in their home academies. This tendency sometimes provoked editorial questions such as: “are all states in the West the same?” or “is it really accurate to call that scholar a Western scholar?”

Perspectives and assumptions also varied. One of the Chinese scholars expressed China’s desire to break the hegemony of Western-based institutions, whereas another scholar of Indian descent expressed the concern that China was becoming a new hegemon. Both were concerned with hegemony, but the perspectives on which states were being hegemonic, or were responding to being the victim of hegemony, differed sharply. In making normative claims, one question that arose was how to draw a baseline for judgments and from whose perspective a particular approach was to be judged. In a national scholarly community, presenting something as good for the state is often taken as sufficient. But when speaking in a transnational journal to scholars and policy-makers from other states, that baseline needs to be changed as what is good for some states might be bad for others. Assumptions are often tied to audiences.

### *Conclusion*

These are some of the challenges we faced, and discussions we had, in putting this symposium together. We ultimately concluded that the BRICS would doubtless be a more compelling force in reforming the investment treaty system if they acted in concert. Yet their different makeups as capital importers and exporters, along with their different histories, trajectories, and experiences with respect to investment treaties and ISDS, make this scenario highly unlikely, at least in the foreseeable future. Although some will lament this division as undermining the power of the BRICS to make the international system reflect their preferences, others will celebrate it as resulting in plural approaches by which different states with different profiles experiment with different systems. Either way, this symposium aims at enlightening the reader about the approaches of the BRICS, as well as showcasing the divergent approaches and viewpoints of scholars from these states, in the hope of making international law more international.

<sup>11</sup> Gregory Shaffer & Henry Gao, *From Paternalism to Partnership: The Development of WTO Law Capacity in China*, in *THE CHINESE LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY* (David Wilkins & Sida Liu eds., 2017).