

BUCHBESPRECHUNGEN / BOOK REVIEWS

Congyan Cai / Huiping Chen / Yifei Wang (Eds), The BRICS in the New International Legal Order on Investment: Reformers or Disruptors, Brill | Nijhoff, Leiden 2020, 241 pages, 143.00 Euro, ISBN: 978-90-04-37698-4

‘The BRICS in the New International Legal Order on Investment: Reformers or Disruptors’, edited by Professors Congyan Cai and Huiping Chen, is a collective volume on a topic of pivotal importance: the practice of the BRICS States in the realm of international investment law. In addition to the ‘Introduction’ (written by the editors) and the ‘Conclusion’ (written by Professor Cai), the book contains seven chapters written by a diverse group of scholars and practitioners mainly from BRICS countries. The first five chapters deal with specific BRICS countries (namely Brazil, Russia, India, China, and South Africa), while the last two chapters focus on more general themes (the BRICS approach in the recalibration of Bilateral Investment Treaties (BITs) and Investment Barriers and facilitation in BRICS countries).

Dr Felipe Hees and Mr Henrique Choer Moraes, both experienced Brazilian diplomats, explore the topic of ‘Investment Facilitation and the Contribution of the Brazilian Approach to the Reform of the Investment Treaty Regime’. The Brazil Model BIT as well as the BITs Brazil has signed with other countries (such as the 2015 Brazil-Angola BIT) reflect the idiosyncratic Brazilian approach. Such approach rests on the exclusion of Investor-State Dispute Settlement (ISDS), heavily diluted substantive State obligations towards foreign investors and the establishment of framework for resolving investment disputes based on joint State parties’ committees and national Ombudspersons. While the authors argue that ‘investment facilitation rules are compatible with the different policy preferences in questions such as dispute settlement’ (p. 24), they also recognise that ‘investment facilitation rules are different from investment protection ones’ and perform a ‘complementary’ function, both being ‘part of the menu of options in the context of the reform of the international investment regime’ (p. 25). Thus, given that ISDS are missing from Brazil’s BITs, it is difficult to see how the investment facilitation model, whilst certainly useful, constitutes a viable alternative to the traditional BIT / ISDS model and offers meaningful protection to foreign investors, including Brazilian foreign investors abroad.

Chapter 3, written by Dmitry K Labin and Alena V Soloveva, focuses on ‘Russia’s Foreign Investment Policy: Recent Developments and Future Trends in Terra (In)cognita’. The authors offer a useful taxonomy of the four generations of Russian BITs as well as an excellent overview of their content. Of particular interest is their insight that ‘[a]rguably, Russia’s reluctance to accept any modifications to its investment treaty reform stems from the scholarly-backed preference for private international law over public international law’, as ‘Russia’s tendency to favour commercial arbitration originates from a long-life character-

sation of international investment law as a form of private international law rather than public international law' (p. 50).

Xiaoxia Lin explores India's policy in relation to investment treaties ('India's Investment Treaties: How an Emerging Economic Giant Makes International Commitments'). Like the previous one, this chapter follows a useful periodisation and aptly highlights the central role of the *White Industries v India* arbitral award in India's change of tack.¹ It is hard to disagree with the author's assessment that '[g]iven the huge political and economic potential that India steadily acquires, this state arguably should be more open to investment treaties' (p. 85). However, one should also delve into the broader economic, political, ideological and cultural reasons for India's scepticism towards the traditional investment treaty paradigm.

The chapter on 'The Belt & Road Initiative and the New Landscape of China's ISDS Policy and Practice' provides an overview of one of the most significant trade developments of the last decade, China's Belt & Road Initiative, and explores its relationship with the Chinese policy and practice towards investment protection. Under that prism, the chapter summarises all the investment arbitrations launched on the basis of Chinese BITs, and describes China's actions externally (i.e. the Chinese position in the relevant fora such as UNCITRAL) and internally (i.e. the creation of new, or the reform of existing, Chinese dispute resolution institutions).

The last of the country-specific chapter, written by Engela C Schlemmer, concerns South Africa ('Investor Protection in South Africa – Eroded Bit by Bit'). It offers a complete anatomy of South Africa's BIT practice and analyses the evolution of South Africa's position towards ISDS (which is currently rather hostile). Importantly, the chapter includes an analysis of investment protection under the Southern African Development Community (SADC), which no longer provides for ISDS. According to the author '[f]or BRICS, the most advisable route may be to reach 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 scenario' (p. 162). Nonetheless, this seems a remote possibility. Not least because, as Professor Schlemmer observes '[i]t is doubtful at this stage whether a uniform approach to dispute resolution can be achieved' (p. 162), and dispute resolution is perhaps one of the most important, and by far the most controversial, issue in the context of the debate regarding the reform of the investment protection system.

Dr Andreas Buser's chapter ('Recalibrating Policy Space in Bilateral Investment Treaties: Is There a Common B(R)ICS Approach?') is well researched and adopts an incisive approach comparing and classifying BRICS approaches towards the international investment law status quo. The author accurately concludes that 'there appears to be no clear common BRICS approach on policy in international investment law' (p. 202). He also explains that 'B(R)ICS States' policies towards international investment protection from a

1 *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award, 30 November 2011.

historical perspective are quite diverse' (p. 171), but the temporal scope of the historical analysis is rather limited and does not include the experiences of Colonialism, Cold War and the Non-Alignment Movement which shaped – and continue to shape – States' perception of, and practice in relation to, foreign investment protection.²

Finally, Dr Xiuyan Fei focuses on 'Investment Barriers, Investment Facilitation and the BRICS Countries' Investment Treaty Policies and Practice'. Her chapter offers a pithy summary of the BRICS States' practice and contains useful diagrams and data.

In general, the book contains useful insights and sheds light on the BRICS approach(es) in investment law and policy, a topic of pivotal and growing importance. While the book could benefit from a more expansive historical, geopolitical and economic analysis (taking also into consideration development studies literature), it constitutes an essential reading not only for international economic law practitioners and scholars but for anyone interested in the tectonic shifts of the international economic regime we are currently observing.

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2 See e.g. Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, Cambridge 2013); Michail Risvas, 'Non-discrimination in International Law and Sovereign Equality of States: An Historical Perspective' (2017) 39 *Houston Journal of International Law* 79; Jason Webb Yackee, 'The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)' (2016) 17 *The Journal of World Investment and Trade* 401; Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, Cambridge 2017); Stephan W Schill, Christian J Tams, and Rainer Hofmann (eds), *International Investment Law and History* (Edward Elgar, Cheltenham 2018); Jason Webb Yackee 'Investor-State Dispute Settlement at the Dawn of International Investment Law: France, Mauritania, and the Nationalization of the MIFERMA Iron Ore Operations' (2019) 59 *American Journal of Legal History* 71.