# Towards a Repository of Policy Options for IIA Reform

## Research Project
## Transformation of the International Investment Agreement Regime: A BRICS Perspective[1i]

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The ongoing backlash against the international investment agreement (IIA) regime calls for policy solutions which not merely strike a good balance between public and private interests in principle but can be translated into workable practice. To explore such solutions, we need to think beyond the box and retreat from the neoliberal orthodoxy. This becomes even more important as we are living in a post-crisis world in which private corporations and investors do not enjoy the level of trust and credibility as they did in the 1990s when the neoliberal globalization was at the peak of its influence and the number of IIAs also witnessed a dramatic increase during that decade.

To begin with, we need to step back and ask some fundamental questions: Are investment agreements necessary to attract and protect foreign investment? Should countries rely mainly on a treaty-based approach to attract and protect foreign investment? Are there no other alternatives?

There is no denying that **each individual country will have to revisit and reform its IIA regime in accordance with its national circumstances and development strategies**. Nevertheless, there is a **plenty to learn from the BRICS countries** as they follow different approaches towards IIAs. **Brazil** is not a party to any BITs but still receives substantial amounts of foreign investment. The country had signed 14 BITs in the 1990s but Brazil’s congress refused to ratify them because of potential risks associated with the traditional ISDS system. Nevertheless, Brazil implemented some key elements of BITs (such as equal treatment to foreign investors) as part of its domestic reform agenda which was politically acceptable.

**South Africa** recently terminated its treaties and replaced its BITs regime with new domestic legislation (likely to become law in early 2015) which provides no recourse to any international arbitration. A foreign investor having an investment dispute with the South African government will have to use domestic dispute settlement mechanisms such as domestic courts and arbitration processes. Apart from enabling the government to protect the public interest, South Africa’s bill is likely to create a more level playing field between the foreign and domestic investors in arbitration.

**China**, on the other hand, pursues a rather flexible approach towards IIAs influenced largely by its partner countries. For instance, China signed an investment agreement with Taiwan in 2012 which does not include an international arbitration clause.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

**Russia's Model BIT** and most recent IIAs do not contain expansive provisions that are usually found in most international investment agreements. What is interesting to note is that the Russian approach allows the discriminatory treatment of foreign investors by excluding foreign investments in certain sectors of the economy and reserving the right to introduce exceptions to national treatment.

**India** has recently adopted a more cautious approach towards IIAs after served several arbitration notices by foreign investors challenging various policy measures (including court rulings) and demanding billions of dollars in compensation for the alleged violation of India's investment agreements. In 2012, **India launched a review of its investment treaties** and has recently prepared a **new Model BIT** to address the shortcomings of the current Model BIT of 1993.

India's new model BIT is undeniably a major improvement on the previous one. For example, unlike the 1993 model, which uses an "asset" based definition of investment which may include every kind of asset (e.g., money lying in a bank account), the new model adopts an **"enterprise" based definition of investment**, thereby narrowing it to foreign direct investment (FDI). The new model defines both persons and enterprises "conducting real and substantial business operations in the home state" as investors. This qualification is intended to deny investment protection to so-called "mailbox companies" which have a minimal commercial presence in the home country.

The most favoured nation **(MFN) treatment provision has been completely dropped in the new model**. By virtue of the MFN clause in a BIT, a foreign investor can "import" more favourable protection provisions contained in other BITs and use them to bring claims before arbitration tribunals. In 2011, India lost a case to an Australian company which successfully used the MFN clause contained in India-Australia BIT to import an "effective means of asserting claims and enforcing rights" clause from the India-Kuwait BIT.

The new model provides national treatment (treating foreign and local investors equally) but the qualifying **term "in like circumstances" has been inserted to narrow the scope**. The new model BIT also **contains binding obligations on investors** on matters related to corruption, disclosures and taxation. Any breach of these obligations may invite regulatory or legal action by the host country.

The new model retains the investor-state dispute settlement system (**ISDS) but it requires an investor to exhaust all local remedies** (judicial and administrative) before initiating international arbitration. In other words, an investor will have to first submit its claim before the domestic courts in the host country. Further, an arbitration tribunal is not given powers to re-examine any judicial decisions. It also contains expansive provisions to make the **ISDS more transparent and accountable**. To ensure arbitrators are impartial and free of any conflict of interest, detailed disclosure norms and codes of conduct for arbitrators have been introduced.

The new model includes a **long list of measures that will be completely exempted under the Treaty**. These include measures related to taxation, intellectual property rights (compulsory licensing), state subsidies, government procurement, public health and safety, environmental protection and financial stability.

**While the different approaches on IIAs adopted by individual BRICS countries provide a number of valuable insights, initiatives undertaken by other countries should also be examined to develop a comprehensive approach to reform the current IIA regime. In this regard, UNCTAD can provide a multilateral platform for dialogue on investment policy issues.**

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