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Mutual Protection of Foreign Investments in BRICS Member States

In collaboration with **Brevia**

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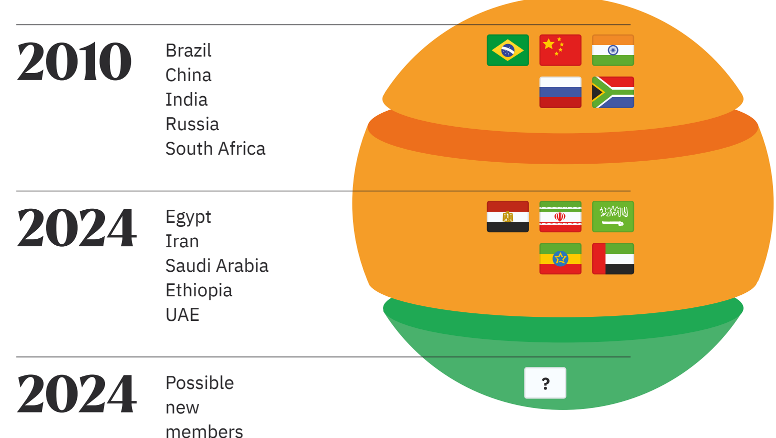
Introduction

The Report covers the international cooperation among BRICS states in protecting foreign investment.

BRICS is a group of states focused, inter alia, on the intensification of trade and investment ties and the facilitation of cooperation between companies from those states.[1] However, BRICS currently lacks unified rules or standards for protecting foreign investments.

As of 1 January 2024, BRICS has expanded from its original five members – Brazil, China, India, Russia, and South Africa – to include five new members: Egypt, Ethiopia, Iran, Saudi Arabia, and the United Arab Emirates ("UAE"). Russia held the BRICS presidency in the first year following the expansion, whereas Brazil assumes the presidency in 2025. While this report reflects the situation as of early October 2024, Indonesia officially joined BRICS on 1 January 2025, further expanding the group.

BRICS:



In 2022, during China's presidency, the United Nations Conference on Trade and Development ("UNCTAD") issued a report noting that the total inward Foreign Direct Investment ("FDI") stock among the BRICS states increased more than sixfold from 2010 to 2020, rising from $27 billion to $167 billion.[2] It's important to note that this data does not include the states that joined BRICS in 2024.

~28%

THE SHARE OF BRICS STATES IN GLOBAL GDP

Again, according to UNCTAD, in 2023, the total FDI inflows in the extended BRICS states accounted for a quarter (24.7%) of global FDI, and the outflows accounted for 16.5%.[3] The impact of BRICS states on the world economy is also evidenced by their share in global GDP: upon the group's expansion, it was supposed to reach 28%.[4]

Prospects for further expansion of the alliance have been discussed, with several states expressing interest in joining. According to public sources, Azerbaijan, Belarus, Bolivia, Colombia, Indonesia, Senegal, Thailand, Türkiye , and Venezuela have indicated their willingness to join BRICS.

Currently, BRICS does not have a comprehensive public study outlining the principles or standards for protecting foreign investment among its member states. As an informal alliance, it does not have a unified agreement or regulations governing cross-border investments. However, there are over 20 existing treaties among its members establishing various standards and levels of foreign investment protection.[5]

This Report aims to analyse the policies that BRICS states use to protect the rights of investors from other BRICS states, drawing on existing treaties. It will cover the following issues:

- Investments between which states are protected under those treaties?
- How do such treaties define the rights and obligations of investors and states?

- What mechanisms are in place for resolving investor-state disputes?

The Report will be valuable for experts, businesses looking to make new investments or structure existing ones, and governments seeking to review investment policies and develop cooperation terms.

The Report does not aim to propose models for standard regulation at the BRICS level. However, if there is a need for harmonisation or the establishment of unified rules to safeguard foreign investments within BRICS, cooperation in this area could be pursued through two main approaches:

1. Entering into a multilateral international treaty that establishes investment protection standards within BRICS. However, it may be challenging at this stage, as it would require a consensus among member states with different political, economic, and legal perspectives regarding the terms they are willing to offer to foreign investors;
2. Signing a framework agreement among the BRICS states delineating fundamental approaches and presenting options on certain matters for the states to choose from. This agreement may establish a matrix of terms, fostering standardised regulations.

For instance, member states will have the flexibility to select either investor-state arbitration or state-to-state arbitration as the method for resolving investment disputes. States will have the option to exclude specific areas from investor guarantees. Such an approach should promote mutually advantageous cooperation aligning with the unique perspectives of BRICS member states.

The approximation of domestic regulations on foreign investment could provide an alternative or interim solution, potentially paving the way for a multilateral international treaty. Engaging in such discussions may also facilitate the gradual alignment of key provisions within the individual BRICS states' bilateral investment treaties as they undergo renegotiation.

The Report is structured as follows: Section I provides an executive summary of the study; Section II offers an overview of foreign investment protection agreements among the BRICS states; Section III addresses the general policies of BRICS states regarding entering into bilateral investment treaties; Sections IV and V examine the key investor protection standards and mechanisms provided by the treaties between BRICS states.

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I. Executive Summary

For more than 45 years, international cooperation among the current BRICS members regarding investment protection has been evolving through the signing of international investment treaties. Bilateral investment treaties ("BITs") and various trade agreements serve as the primary means of safeguarding foreign investments among BRICS members. Additionally, several multilateral investment treaties exist among Islamic states.

Egypt and Iran signed the first BIT between BRICS states in 1977. However, it has never been enforced.

18 BITs

ARE IN FORCE AMONG BRICS STATES

As to the BITs that are currently in force, the first was signed in 1993 between China and the UAE, while the most recent one was entered into in 2024 between India and the UAE.

The key feature of such treaties is that they constitute agreements between two or more sovereign states, and individual investors are not parties to them. Nonetheless, in the event of a dispute with a state, foreign investors typically have recourse to an international mechanism to initiate proceedings against that state in an international forum. This enables them to seek compensation for violations of the protection standards delineated in the treaty between their home state and the host state.

While there are no reliable statistics demonstrating the correlation between the number of BITs and foreign investment stock, it is widely believed that the existence of a BIT enhances the state's appeal for investment and indicates a certain level of investment climate. However, it is important to note that BITs represent just one factor, and their mere presence does not necessarily reflect the actual state of foreign investment protection in a country.

As of October 2024, there were 18 BITs in force between BRICS states, most of which were concluded before the first BRICS summit. Consequently, these treaties do not necessarily reflect current practices spanning the past 15+ years. Over the last decade, Brazil and the UAE have been the most active in entering into bilateral investment treaties.

The number of BITs currently in force between a particular BRICS state and other BRICS member states varies. China has the most with 7, followed by the UAE with 6, and Russia with 5.[6] Egypt, Iran, and Ethiopia each have 4 BITs, while South Africa has 3. Meanwhile, Brazil (despite the country's active signing of BITs in recent years), India, and Saudi Arabia each have just 1 BIT in force.

BRICS states have adopted diverse approaches to providing guarantees to foreign investors. Most BITs are categorised as old-generation treaties, characterised by expansive language favouring investors and offering robust protection standards. As dispute settlement practice evolves, these standards may be modified through interpretation by international tribunals in ways that the states did not foresee when the treaty was signed. This may prompt some states to reconsider their policies on entering into BITs.

In recent years, there has been a discernible global trend towards an increased emphasis on the public interests of states. Among the BRICS states, this shift is notably pronounced within the policies of Brazil, India, and South Africa towards BITs.

For instance, the shift can be observed in the procedural options available to investors in the event of a dispute with a foreign state. Enforcing protection guarantees under a BIT can be quite challenging without these options. Some states are transitioning from offering investors recourse to dispute resolution mechanisms to a model where only the investor's home state has access to such mechanisms. Brazil is a good example of this shift, as it has moved away from the traditional investment arbitration model where investors could bring claims directly against the state in international arbitration. Under its treaty with the UAE (the only BIT it has in force with a BRICS country), only the investor's home state can initiate

legal action against another state on behalf of the investor rather than the investor itself.

However, some old-generation treaties, signed decades ago , also limit an investor's ability to resort to international arbitrations in case of a dispute with a foreign state. For instance, most of China's BRICS treaties contain a limited arbitration clause that only allows for arbitration of disputes over amounts of compensation, as opposed to establishing whether a state has breached its obligations under the BIT. Consequently, foreign investors are often left with no alternative but to pursue claims in the national courts of the respective state to establish the breach.

In terms of substantive investment protection standards, the so-called new-generation treaties signed in the past 10+ years (such as the UAE's treaties with Brazil, Ethiopia, India, and Russia, as well as the Egypt-Ethiopia (2006) BIT) contain more precise language that either limits or clarifies investor rights. For example:

- The state's responsibility may be excluded under specific circumstances, such as when it implements non-discriminatory measures to accomplish significant public goals;
- Certain protection standards (*e.g.*, full protection and security, fair and equitable treatment) are completely excluded, particularly those leading to conflicting interpretations stemming from the case law of arbitral tribunals.

Nevertheless, the states already have a foundation for harmonisation on several issues. For instance, the majority of BITs between BRICS states do not confine investments to specific assets; instead, they broadly define investments as any contribution made by an investor in a foreign country. Furthermore, BITs generally set forth identical protection standards. Nearly all of them allow investors to bring claims without a limitation period and grant access to investment arbitration.

Given global trends, the BRICS treaties are anticipated to undergo revisions, with departuress from the strong rights guaranteed to investors and potential adjustments to the procedures for investor-state dispute resolution.

When planning international projects, investors may find it beneficial to assess whether their home state has an agreement with the states they are investing in and also review the specific provisions of various BITs. Additionally, one may choose to explore alternative investment options, such as partnering with investors in states that already have such treaties.

Stare Decisis and Stricter Threshold for Declining Insolvency Jurisdiction

01

The definitions of “investment” and “investor” within the agreement and supplementary requirements for the protection of investments, such as approval from a specific authority,as exemplified in the case of Iran Specific circumstances under which protection is not granted. For instance, the UAE-India BIT does not safeguard against taxes.

02

The potential for restructuring or using alternative options to safeguard assets if state policies change, leading to the agreement termination The period during which an investor can file a claim after the BIT termination (“survival clause”) ranges from 5 years in the Ethiopia-Egypt BIT to 20 years in the Ethiopia-Iran BIT

03

The right of investors to bring claims against a state in investment arbitration, and if so, a limitation period. For example, under the UAE-India BIT, the limitation period is 5 years, while under the UAE-Ethiopia BIT – 3 years from the date the investor becomes aware or should have been aware of the breach by the state.

04

The extent of protection provided, particularly whether the agreement includes a broad standard of fair and equitable treatment for investors, encompassing various scenarios where investor’s rights under the BIT may be considered violated, including denial of justice.

05

Guidelines for calculating damages for expropriation. Most BITs among BRICS member states employ fair market value as the standard.

06

Case law and the interpretations rendered by arbitral tribunals with respect to particular BITs.

II. Overview of Investment Treaties Among BRICS Member States

BRICS states have the following treaties currently in force:

Bilateral Investment Treaties

BITs, in the modern sense, began to take shape following World War II. The first treaties were signed in 1959 by the Federal Republic of Germany with Pakistan and the Dominican Republic to protect German investments overseas.[8] Subsequently, other nations, including France, Switzerland, and the Netherlands, followed suit. The increasing popularity of BITs during this period can largely be ascribed to the willingness of the developed states to protect their investors in the developing states.[9]

The late 1980s marked the beginning of the next period identified as the "global era" prompting both developed and developing states to protect investments through BITs. This shift occurred as the distinction between capital-exporting and capital-importing states gradually dissipated.[10] From the 1990s to the 2010s, the majority of the world's BITs were signed.[11]

Within the current BRICS framework, as of October 2024, **30** BITs have been signed, with **18** in effect, **6** signed but not yet in force, and **6** terminated.

The first BIT currently in force was entered into in 1993 between China and the UAE, while the most recent one was signed in 2024 between India and the UAE.[12]

BITs IN FORCE

CHINA – UAE

1993

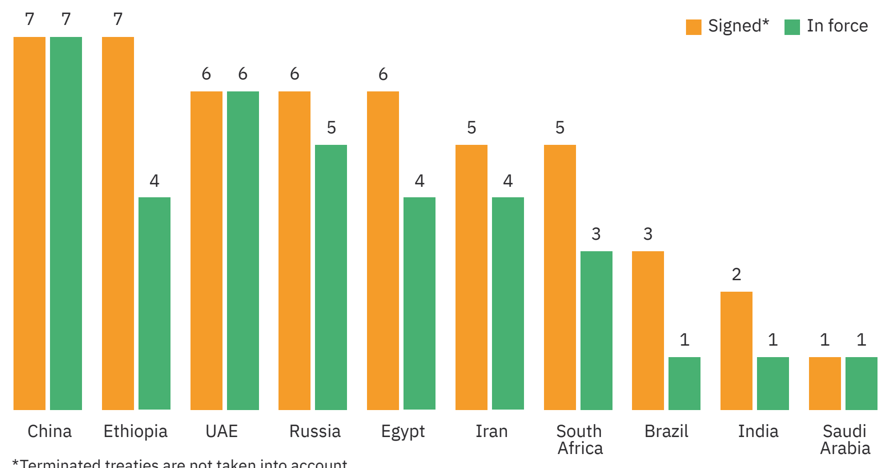
FIRST

INDIA – UAE

2024

MOST RECENT

BIT STATISTICS WITHIN BRICS :

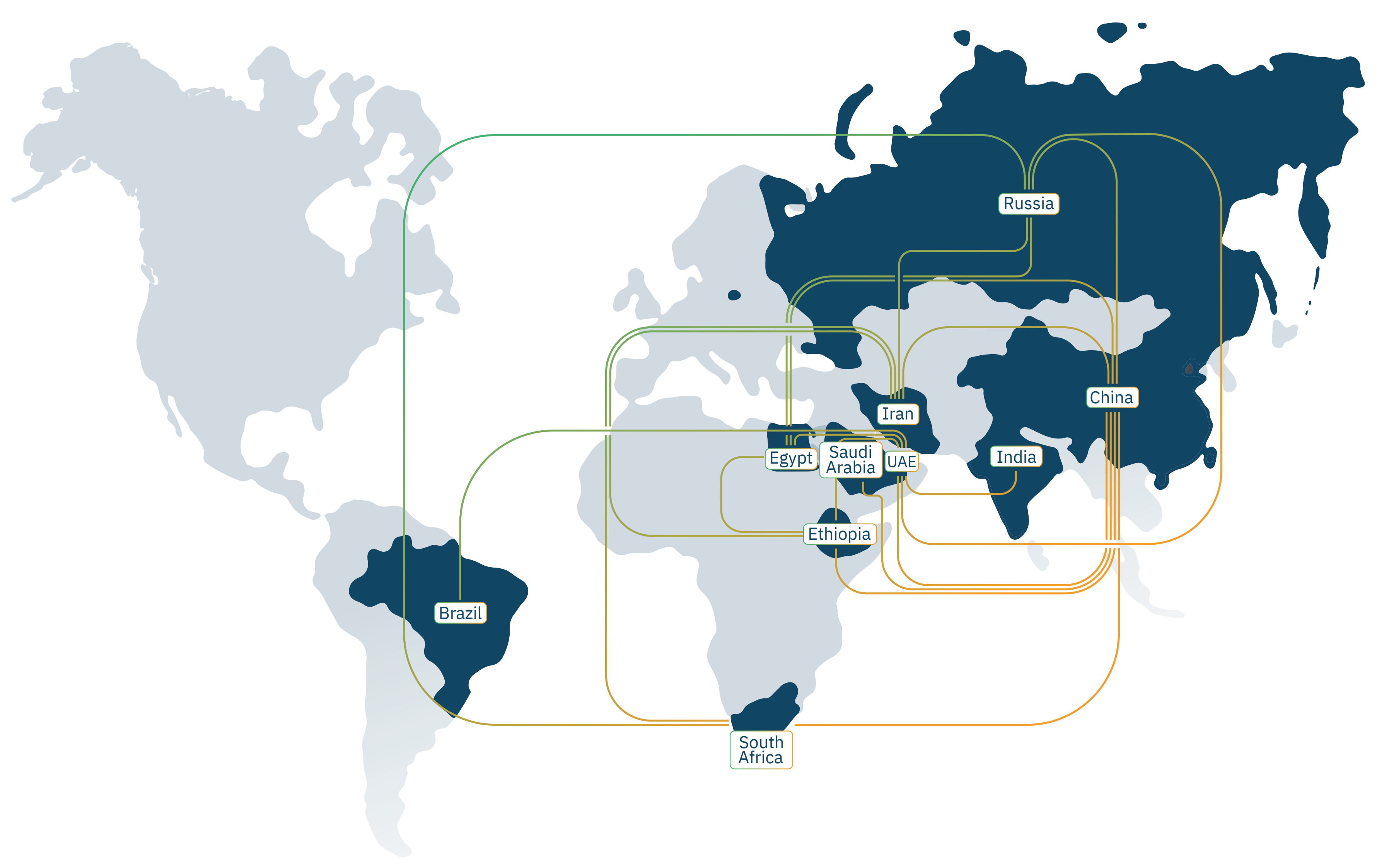


China currently has the highest number of BITs in force: covering agreements with seven states. However, it does not have a treaty with Brazil, and its treaty with India has been terminated. The UAE has 6 treaties in force, while Russia has 5. Egypt, Iran, and Ethiopia each have 4 BITs in force, and South Africa has 3. The states with the fewest treaties in force are Brazil[13], India, and Saudi Arabia (1 each).

In comparison, prior to the accession of new members, only 6 BITs were signed among BRICS states, with 3 currently in force (China-Russia (2006), China-South Africa (1997), and Russia-South Africa (1998)). Two treaties were terminated in 2017 and 2018 (India's treaties with Russia and China, respectively). The Brazil-India BIT, signed in 2020, has yet to be enforced. The expansion of BRICS has contributed to a renewed spectrum of approaches to international investment protection.

Among the BRICS member states, only India has terminated treaties with other alliance members (5 BITs with China, Egypt, Ethiopia, Russia, and Saudi Arabia). The India-UAE BIT (2014) expired, but it was replaced by a new treaty in 2024. According to UNCTAD, the new treaty became effective on 31 August 2024.

BILATERAL INVESTMENT TREATIES OF BRICS MEMBERS:



YEARS OF SIGNING BITs:

● BIT is signed but has not yet entered into force

◆ BIT does not allow for investor-state arbitration

✕ Terminated BIT. May provide protection by "sunset clause"

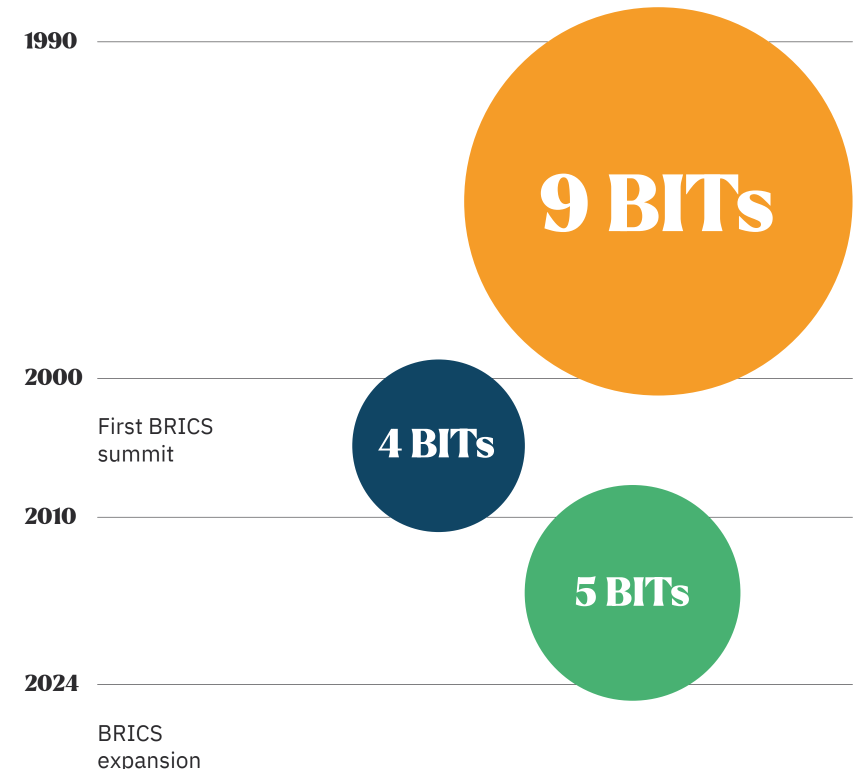
	Brazil	China	Egypt	Ethiopia	India	Iran	Russia	Saudi Arabia	South Africa	UAE
Brazil				2018 ●	2020 ●					2019 ◆
China			1994	1998	✕	2000	2006	1996	1997	1993
Egypt		1994		2006	✕	1977 ●	1997		1998 ●	1997
Ethiopia	2018 ●	1998	2006		✕	2003	2000 ●		2008 ●	2016
India	2020 ●	✕	✕	✕			✕	✕		2024 2013 ✕
Iran		2000	1977 ●	2003			2015		1997	
Russia		2006	1997	2000 ●	✕	2015			1998	2010
Saudi Arabia		1996			✕					
South Africa		1997	1998 ●	2008 ●		1997	1998			
UAE	2019 ◆	1993	1997	2016	2024 2013 ✕		2010			

Half of the effective bilateral agreements between BRICS states were entered into over 20 years ago, during the 1990s, and do not reflect recent practices. Most of these older treaties (5 out of 9) are attributed to China. Conversely, the remaining half of the agreements came into existence in the 21st century.

UAE & BRAZIL ARE THE MOST ACTIVE SIGNING NEW BITs

Over the past decade, Brazil and the UAE have been the most active states in terms of BITs, with each having concluded 3 treaties. Presently, 2 of the UAE's treaties are in effect: one with Brazil and the other with Ethiopia. Brazil has BITs with Ethiopia, India, and the UAE, but only the treaty with the UAE is currently in force.

SIGNING OF THE BITS CURRENTLY IN FORCE BETWEEN BRICS MEMBERS:



The BRICS member states have also entered into bilateral trade agreements currently in force, such as the Comprehensive Economic Partnership Agreement between India and the UAE in 2022 and the Agreement on Economic, Commercial, Investment, and Technical Cooperation between Egypt and Saudi Arabia in 1990. While these agreements encompass general obligations for states to protect foreign investment, they do not allow investors to file claims against states in international fora. Therefore, these agreements are not covered in this Report.

Multilateral Investment Treaties Involving BRICS States

Investment protection within BRICS is ensured not only through bilateral treaties but also within the framework of regional associations.

Several multilateral treaties are in force among the BRICS Islamic states (Egypt, Iran, Saudi Arabia, and the UAE), including those of the League of Arab States and the Organisation of Islamic Cooperation ("the OIC").

Two of these treaties are worth mentioning in the Report ("the Multilateral Treaties"):

Unified Agreement for the Investment of Arab Capital in the Arab States

Noteworthy as it establishes an international investment court that is able to resolve disputes arising from its framework as well as from other investment protection treaties among League members when such treaties provide for dispute resolution in an international arbitration or an international court.

Agreement on Promotion,Protection and Guarantee of Investments among Member States of the Organisationof the Islamic Conference

Noteworthy because a dispute has arisen within its framework between an investor from a BRICS country and a member state of the association.[14]

Currently, the Egypt-UAE BIT (1997) and the Egypt-Saudi Arabia trade agreement (1990) coexist with the Multilateral Treaties.

BRICS Foreign Investment Initiatives

In the previous decade, BRICS has introduced several initiatives to promote and harmonise investment among its member states. These initiatives involve a diverse set of tools that establish a common framework for cooperation between the states. One important objective is the establishment of a joint mechanism to bolster investment within BRICS.

However, all of these initiatives are political in nature and pertain to the advancement of new investments rather than the protection of existing ones, so they are not addressed in detail in the Report.

INVESTMENT PROMOTION WITHIN BRICS:

BRICS Trade and Investment Cooperation Framework

- Promoting trade and investment as one of the areas of work of BRICS
- Enhancing information exchange between trade/ investment promotion agencies of the BRICS states

2013

BRICS MoU on Trade and Investment Promotion

- Cooperation of BRICS trade and investment agencies
- Exchange of information and best practices

2019

BRICS Understanding on Investment Facilitation

- Enhancement of the practices identified in the Outlines
- Including facilitation of the foreign investment regulatory framework to the extent it complies with the legal objectives of the states

2020

Strategy for BRICS Economic Partnership 2025

BRICS Investment Strategy:

- Intensification of trade and investment ties within BRICS
- Improving the investment climate
- Raising investor awareness

2020

BRICS Trade and Investment Facilitation Action Plan

A “menu” of actions proposed to BRICS countries in the area of trade and investment

2014

BRICS Initiative on Trade and Investment for Sustainable Development

- Agreement on creating an investment environment for sustainable development

2022

Outline for BRICS Investment Facilitation

List of practices to promote intra-BRICS investment, i.e. introduction of an Ombudsman position

2017

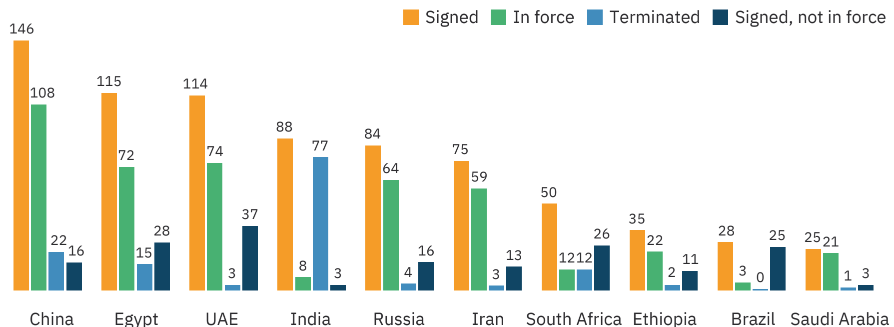
III. General Policy of BRICS States as Related to Entering Into BITs

The level of protection for foreign investment between BRICS countries is best understood in the context of their general practice of entering into bilateral investment agreements, both internally and with non-member states.

The BRICS states have taken different approaches to signing BITs. As shown in the charts below, some states like China, Egypt, and the UAE have entered into over 100 BITs while others have engaged in significantly lower numbers, with Saudi Arabia signing 25 BITs and Ethiopia entering into 35 BITs.[15]

However, on average, only around half of the BITs ever signed by BRICS members, either among themselves or with third countries, are currently in force.

STATISTICS OF BRICS MEMBER STATES BITs:

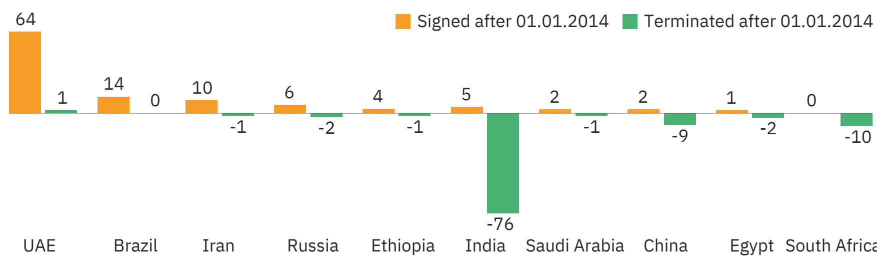


China holds the record for the number of BITs in force, with 108, followed by the UAE with 74 and Egypt with 72. Saudi Arabia and China have the highest percentage of signed BITs in force, standing at 90%.[16] Brazil, India, and South Africa have fewer than 15 BITs in force (3, 8, and 12, respectively).

108

CHINA'S BITS ARE FORCE

Over the past decade, the UAE has been the most active state in entering into BITs: with a total of 64 BITs signed, over half of them are in force. This aligns with the UAE's proactive approach to entering into agreements with other BRICS states.



Since 2014, some states, including China, India, and Russia, have undertaken the renegotiation of several BITs, replacing them with more advanced generation treaties that seek to balance the interests of states and investors in line with global trends (See subsection below). For example, China and Russia are now engaged in updating their bilateral investment treaty.

Over recent years, some BRICS states, such as India and South Africa, have terminated a significant portion of their BITs without signing a new treaty due to changes in their policies in this area (See subsection below for details). Generally, states have become more inclined to terminate investment protection agreements (not only BITs but also trade agreements containing investment protection provisions) over the past decade. By the end of 2023, 585 agreements had been terminated, with about 70% of these terminations occurring between 2014 and 2023.[17] According to UNCTAD, the termination of agreements since 2012 has affected approximately 13% of foreign direct investment globally.[18]

Generations of BITs

The approaches to investor protection and standards that states include in their BITs have evolved alongside the development of investment arbitration. Proceedings against states have prompted them to incorporate more detailed and balanced provisions in treaties.

BITs are commonly categorised into different generations that share comparable elements of protection. This classification is conventional and does not impose a set of “mandatory” conditions for a treaty to be assigned to a particular generation. Instead, it aims to reflect general patterns in states’ practice and international investment law.

FOR THE PURPOSES OF THE REPORT, IT IS WORTH TO DISTINGUISH THE FOLLOWING GENERATIONS OF BITs:

BEFORE 2012

Old-generation[19]

WITH A STANDARD ARBITRATION CLAUSE

The general and broad language of foreign investor protection standards

More favourable to investors, less to states

Arbitration is allowed for any disputes arising from the BIT

WITH A LIMITED ARBITRATION CLAUSE [20]

All the characteristics of the old-generation agreements but:

Investment arbitration is available only for claims in relation to the amount of compensation (*i.e.*, the tribunal may decide that the fact of infringement itself must be established by a state court)

9 BITs

- China – Iran
- China – Russia
- China – South Africa
- Egypt – Russia
- Egypt – UAE
- Iran – Ethiopia
- Iran – Russia
- Iran – South Africa
- Russia – South Africa

4 BITs

- China – Egypt
- China – Ethiopia
- China – Saudi Arabia
- China – UAE

AFTER 2012

New-generation

More specific and investor-restrictive wording of protection standards, for instance:

Exclude certain investor protection standards (full protection and security, fair and equitable treatment, and others)

Include conditions under which a state may be deemed not to be in breach of the BIT (*e.g.*, if it adopts non-discriminatory measures aimed at achieving the public good)

The right to use arbitration to resolve a dispute and/or an arbitration clause from another BIT is limited

5 BITs

- Egypt – Ethiopia
- UAE – Brazil
- UAE – Ethiopia
- UAE – India
- UAE – Russia

The majority of the BRICS members' BITs are old-generation treaties. This includes all of Iran's, China's, South Africa's, virtually all of Russia's, Egypt's, and half of Ethiopia's treaties. Saudi Arabia's only effective BIT, which is with China, also falls within old-generation treaties.

However, most of the UAE treaties (4 out of 6) pertain to new-generation agreements, as are the only effective treaties of Brazil and India, both are with the UAE.

Reforming investment treaties and replacing old-generation treaties with new-generation treaties is widely discussed in global fora. The focus is on imposing restrictions and adjustments on investor protection standards. States also tend to be more cautious about dispute resolution mechanisms.[21] For example, 50% of all treaties signed between 2020 and 2023 limit investment arbitration to specific investor claims or generally exclude investor-state arbitration.[22]

Nevertheless, the process of updating treaties is not quick. Statistics indicate that approximately half of global investments continue to be protected under the old-generation treaties, and the BRICS is no exception. The new-generation treaties cover only 16% of investments, and 35% remain without treaty protection.[23]

In 2020, in anticipation of forthcoming changes, UN Trade and Development ("UNCTAD") introduced the International Investment Agreements Reform Accelerator ("Reform Accelerator").[24] This initiative delineates options for amending the eight investment treaty provisions that are most in need of reform. UNCTAD asserts that one of the objectives of the reform is to reduce the risk of disputes against states arising from the implementation of legitimate public policy objectives.[25]

The proposals relate to the definition of areas and standards of protection but do not address dispute settlement (this reform is being discussed separately in United Nations Commission on International Trade Law ("UNCITRAL") Working Group III, see below, Section V, page 35). They are addressed in the Report because they reflect recent global trends in the execution of the new BITs. They give an idea of the extent to which current BRICS treaties protect investors against the background of recent treaties executed by other countries and general trends. Therefore, the Report refers to certain proposals explaining where they have been used.

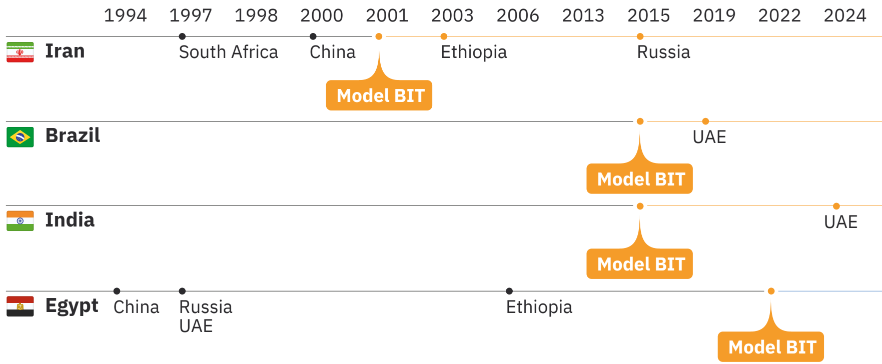
Model BITs

States often outline their approaches to international treaties in special instruments known as Model BITs. These are national acts that establish standards for protecting foreign investors and provisions for dispute resolution that a particular state adheres to when entering into a BIT.

Among the BRICS member states, five out of ten have model BITs: Iran (2001), Brazil (2015), India (2015), Egypt (2022), and South Africa (1998):

- Brazil's and India's Model BITs incorporate elements of new-generation treaties;
- South Africa's Model BIT, issued in 1998, is not illustrative as it does not reflect the changes in the state's investor dispute resolution policy, which were a result of the 2009 study. This study found that the then BITs primarily protected investors and did not adequately address South Africa's interests (See more below, page 21-22). Egypt's Model BIT is not available in English, so it is not addressed in the Report;
- Notably, only 4 out of 18 BITs currently in force between BRICS states were signed after at least one of the parties had adopted a model agreement: Iran-Ethiopia (2003), Iran-Russia (2015), Brazil-UAE (2019), and India-UAE (2024). All existing BITs of Egypt were entered into before the model agreements were issued.

MOST OF THE BRICS TREATIES ARE NOT BASED ON THE MODEL BITs:



On the other hand, China, Ethiopia, Russia, Saudi Arabia, and the UAE do not have Model BITs. The approach taken by Russia is of particular interest: the state previously had but later abandoned the concept of a model BIT. The Ministry of Economic Development asserts that "investment agreements should be entered into on the basis of economic feasibility and specifics of regulation of investment matters in each particular market."[26] Russia's principal approaches to new BITs are set out in Governmental Decree No. 992 "On Entering into Russian Federation's International Treaties on Promotion and Protection of Investments" dated 30 September 2016. Among other things, this decree clarifies certain investment protection standards (*e.g.*, when defining indirect expropriation, it is proposed to take into account the nature, character, as well as the achieved and declared objectives of the state measures, as well as their impact on the market value of the investment) and provide guidance on when state liability shall be excluded (*e.g.*, when protecting essential security interests). In terms of dispute resolution, the decree suggests resorting to a state court, *ad hoc* arbitration under UNCITRAL rules, or a permanent arbitration institution.

Review of Approaches to the Earlier Signed BITs

Over the past 15 years, the policies of three BRICS states, namely Brazil, India, and South Africa, have undergone significant changes, leading to the revision of earlier signed treaties. These changes have shifted the focus away from enhanced investor protection standards.

These revisions resulted in the termination of BITs under the old-generation model (India and South Africa) or the non-entry into force of BITs signed using this model (Brazil).

The distinct features of the policies employed by these three countries are described below as an example of the most significant changes. Other countries do not terminate most of their treaties but still periodically update some of them.

Brazil

CFIA INSTEAD OF A TRADITIONAL BIT IN BRAZIL

Brazil has never been part of the traditional ecosystem of international treaties protecting foreign investment, believing that it significantly limits state autonomy.[27] Brazil has signed a total of 28 BITs but has not ratified most of them. Only 3 BITs are currently in force: with Angola, Mexico, and the UAE.

Brazil's Model Agreement, Cooperation and Facilitation Investment Agreement ("CFIA"), introduces an alternative to the existing system of investor protection. Brazil has 3 treaties with BRICS states using this model: with Ethiopia (2018), the UAE (2019), and India (2020), of which only the UAE treaty is in force. These treaties have the following features:

- **A special procedure for investment cooperation between states:** a joint committee shall be established to administer the treaty, and an ombudsman shall be appointed to deal with complaints from investors about the actions of another state;
- **Replacing the investor-state arbitration with the state-to-state dispute settlement,** where a state acts in defence of "its" investor and the investor is engaged in the proceedings as a stakeholder rather than a party. Disputes under Brazil's BITs shall be resolved in ad hoc arbitration, and their subject matter can be either the interpretation of a BIT (the standard subject matter of inter-state disputes) or compliance by one state with the terms of the treaty (*i.e.*, disputes over violation of a particular investor's rights);
- **Limiting the possibility for an arbitral tribunal to award monetary compensation to the investor:**

  - Under the Brazil-India BIT, the arbitral tribunal shall only decide on its jurisdiction and whether there has been a breach of the BIT by the state but shall not consider issues related to compensation;

  - Under the Brazil-UAE and the Brazil-Ethiopia BITs, the arbitral tribunal shall consider compensation matters only if the parties expressly agree to it.

India

Since 2016, India has been actively terminating BITs. By 2019, it had terminated treaties with five BRICS states, namely China, Egypt, Ethiopia, Russia, and Saudi Arabia. The treaty with the UAE expired, but on 31 August 2024, a new BIT between India and the UAE entered into force.

The termination of India's BITs primarily stems from the historical dynamics of the state's involvement in investment disputes. India had not been a respondent in investment arbitration for a long time. According to public sources, the first award against it was issued in 2011 (*White Industries v. India*): the tribunal found that the delay of local courts in enforcing the arbitration award violated India's international treaty obligations. The award was criticised and reportedly contributed to the revision of the state's BIT program, including the 2003 model treaty, and renegotiating existing treaties.[28]

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INDIA'S BITS WERE TERMINATED

The 2015 Model India BIT is based on the new-generation model and provides the following:

- Submission of investor claims to the host state authorities (exhaustion of local remedies);
- Limitation period for referring a dispute to arbitration (12 months after the end of the proceedings in the national court / administrative body);
- Obligation of investors to comply with corporate social responsibility standards.

Out of the 87 BITs signed by India, only 8 are in force (with Bangladesh, Belarus, Colombia, Lithuania, Libya, Senegal, the Philippines, and the UAE). The renegotiation of BITs with states is not quick: only 3 treaties have been renegotiated, with Belarus, Kyrgyzstan, and Uzbekistan (the latter 2 have not entered into force).[29]

South Africa

Regarding South Africa's policy on bilateral investment treaties:

- Among the 50 BITs that have been entered into, only 12 are in force (including 3 treaties with BRICS countries: China, Iran, and Russia);
- Among the treaties entered into in the 21st century, only the 2009 and the 2000 treaties with Nigeria and Zimbabwe, respectively, are effective. South Africa has not signed any new BITs since 2009; between 2000 and 2008, South Africa signed 21 BITs (only one with a BRICS

state, Ethiopia), of which only the treaty with Nigeria is currently effective;

- 12 treaties were terminated between 2013 and 2020, most of them unilaterally, and in 2014; no treaties with BRICS countries have been terminated.

In 2009, the South African Department of Trade and Industry studied the state's BITs entered into since 1994.[30] According to the study, as in the case of India, arbitration proceedings against South Africa were a prerequisite. The study found that many BITs contained provisions that largely served the interests of investors without considering the need to retain flexibility on key policy issues. As a result, in 2015, the State published South Africa's Protection of Investment Act (which came into force in 2018), which is aimed, among other things, to change the mechanism for resolving investment disputes, focusing on mediation and national fora as an alternative to arbitration. Arbitration remains available but only for disputes between South Africa and the investor's state and is subject to South Africa's consent.

Therefore, in contrast to South Africa's current approach, its effective treaties with BRICS members, all of which were entered into in 1997 and 1998, *i.e.*, before the reform, provide enhanced foreign investment protection by allowing the investors to resort directly to investment arbitration.

IV. General Terms and Standards for Protection of Foreign Investments Under BITs Between BRICS States

General Terms

When Should an Investment Be Made so that It Could Be Protected by a BIT?

Protection under a BIT may be subject to temporal restrictions depending on the date on which (1) the investment was made or (2) the dispute arose.

Certain BITs of BRICS states do not impose such restrictions: 4 China's BITs (with Iran, Egypt, Saudi Arabia, and the UAE) and the Egypt-UAE BIT (1997).

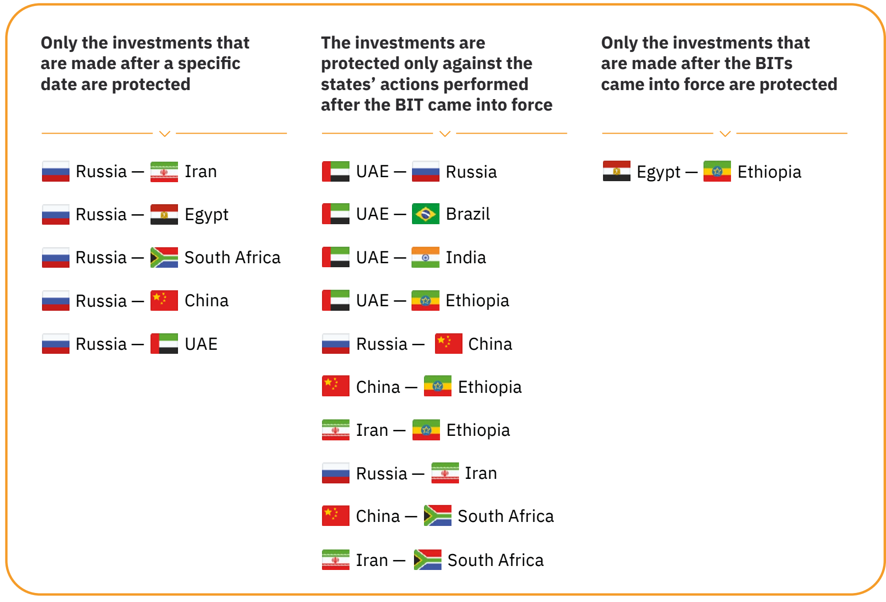
In general, treaties of BRICS states tend not to condition protection **upon the date of investment**. Thus, protection typically extends to investments made both before and after the entry into force of the respective BIT. Exceptions to this rule:

- Russia's BITs provide protection only for investments made after a specific date, which is expressly set out in the treaty and is not contingent on the time of its signing or entry into force. As a rule, this date is around or just after the dissolution of the Soviet Union, on 1 January (i) 1985 under the BIT with China; (ii) 1987 under the BITs with Egypt, the UAE, and South Africa; (iii) 1992 under the BIT with Iran;
- The Egypt-Ethiopia BIT only protects those investments that were made after the treaty entered into force.

Where a restriction is placed **on the commencement date of the dispute**, the BIT provides protection only for state actions taken after the treaty came into force. Such restrictions can be found in the Brazil-UAE, China-Ethiopia, China-South Africa, Ethiopia-Iran, Ethiopia-UAE, India-UAE, and Iran-South Africa BITs.

Restrictions on the commencement date of the dispute may apply jointly with restrictions on the date of investment. Russia's BITs with China, Iran, and the UAE include both conditions.

TEMPORAL RESTRICTIONS FOR INVESTMENT PROTECTION:



What Investment Shall Be Protected under BITs?

Most BRICS treaties do not exclude certain assets from protected investments. By default, an investment is broadly defined as any contribution made by an investor in a foreign state.

So far, only Brazil's BITs and the treaty between India and the UAE impose restrictions on the types of protected investments.

Brazil-UAE BIT

- Issuance of compulsory licences granted in relation to intellectual property rights in accordance with the Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (1994) "TRIPS Agreement" or to the revocation, limitation, or creation of intellectual property rights to the extent it is consistent with the TRIPS Agreement
- An order or judgment issued as a result of a lawsuit or an administrative process
- Portfolio investments and several monetaryclaims (e.g., that arise solely from commercial contracts for the sale of goods)
- Loans granted from one state to another
- Bonds, debentures, loans, or other debt instruments of a state-owned enterprise that is considered to be public debt under the legislation of that state
- Debt securities issued by a state
- Investments in natural resources in the case of the UAE*
- Pre-investment activity

Brazil-Ethiopia BIT (not in force)

Excludes similar investments as the Brazil-UAE BIT above, except for pre-investment activity and protection of IP rights from issuance of compulsory licenses under the TRIPS Agreement

* Natural resource concessions are also not protected under the UAE's recent treaties with Turkey, Hungary, and Israel (the prohibition applies to both states, unlike the Brazil-UAE BIT).

Brazil-India BIT (not in force)

Excludes similar investments and goodwill, brand value, market share, or similar intangible rights

India-UAE BIT

Excludes similar investments as the Brazil-India BIT

Additionally, Iran's treaties with China, Ethiopia, and South Africa with respect to investments in Iran protect only investments that have been approved by a specialised body, the Organisation for Investment, Economic and Technical Assistance of Iran, or its successor. The same approach applies to investments in South Africa, but no particular body is designated. However, investments in China and Ethiopia do not require additional approval to be protected.

Notably, the treaty between Iran and Russia contains no such restrictions.

The definition of "investment" is among the areas to be reformed in new-generation treaties, according to UNCTAD (See page 19 above). The states are invited to:[31]

- Exclude specific types of assets from the definition of investment. This recommendation addressed the practice of arbitral tribunals that have recognised a wide range of contributions as protected investments, including government bonds and commercial contracts for the sale of goods and services. In addition to the UAE treaties with Brazil and India, such exceptions are found, for example, in the Canada-EU Comprehensive Economic and Trade Agreement (2016) ("Canada-EU CETA") and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) ("CPTPP");
- Require investments to fulfil specific characteristics to be covered by the treaty (*e.g.*, a certain duration, contribution to sustainable development, etc.). This option is used in the India-UAE BIT (contribution of capital or other resources, expectation of profit or income, acceptance of risk) and, for example, in the Australia-China Free Trade Agreement (2015) ("Australia-China FTA").

Who is Eligible to be an Investor?

Default rule

Nationals of the home state or companies registeres in accordance with the laws of the home state

Brazil-UEA BIT

Permanent residents

Typically, protection is granted to nationals of the home state or companies registered under its laws. The Brazil-UAE BIT also extends protection to persons holding permanent residence permits.

Almost all treaties, except the UAE BITs with Egypt and India, do not explicitly allow claims by a "local" company that has a majority of foreign participation (*i.e.*, those registered in the host state). This presents a compelling issue in practice, as foreign investors frequently structure the investment through local entities. In the absence of provisions in the BIT allowing claims by local companies, only a foreign company or national can act as an investor (claimant) under a BIT.

All the BITs in force, except Egypt's treaty with the UAE, specify that only investments that were "made by investors" are protected. This language could be interpreted by arbitral tribunals as protecting only those investors who met the BIT criteria not only at the time when the dispute arose and the claim was brought, but also when they originally invested in the host state.

For example:

Investments of a third-country national who was not a national of the home state at the time but later acquired such nationality may not be protected.

It should be noted that in certain new-generation treaties the state may deny protection under a BIT (denial of benefits). Among the BITs of BRICS states, this applies only to the UAE treaties with India and Ethiopia: the state may deny protection if the investment is actually owned or controlled by an investor from a third state.

The specifics of the Arab League Agreement deserve particular attention: this treaty does not apply to investments involving (directly or indirectly) non-Arab investors. The provision was modified by the 2013 amendments, which lowered the required threshold for Arab investor participation to 51%. However, according to public sources, only 5 out of 22 states have ratified the amendments.

Additional Criteria for Companies

Several treaties provide for additional conditions that a foreign corporate investor must satisfy for its investment to be protected. These generally include the requirement of proof of the investor's legal and/or economic ties to its home state.

Half of the treaties do not contain such criteria. The domicile requirement in the China-UAE BIT (1993) applies exclusively to Chinese investors and does not extend to investors from the UAE. The China-Saudi Arabia BIT (1996) contains different criteria for investors from each country.

ADDITIONAL CRITERIA FOR COMPANIES

01

Having the right to invest in a foreign state (host state) under the laws of the home state
Egypt – Russia

02

Location and economic activity in the home state
Egypt – Ethiopia

03

Domicile in home state
China – Egypt
China – Ethiopia
China – UAE
(applies to investors from China)

04

Seat in the home state
China – Russia
China – Saudi Arabia
(applies to investors from China)
India – UAE*

05

Head office located in the home state
China – Saudi Arabia
(applies to investors from China)

06

Substantial economic activity and domicile in the home state
Ethiopia – UAE

*The India-UAE BIT establishes several alternative criteria in addition to the location and subjection to the laws of the home state:

- Substantial business activity in the home state, or
- Such activity is absent, but the direct or indirect owner is (1) a national of that state, (2) a legal entity conducting substantial business activity in the home state; or (3) the state itself.

Moreover, the India-UAE BIT expressly excludes branches and representative offices from the definition of investors.

Additional Criteria for Individuals

As stated above, it is typical that individual investors must be nationals of the home state. The issue of whether investors holding dual nationality (in both the home state and the host state) can be considered foreign investors warrants special consideration:

- 15 out of 18 BITs in force do not contain a dual nationality clause; in that case, the jurisprudence is controversial: certain tribunals grant protection to the claims of dual nationals,[32] others employ the "dominant and effective" nationality test,[33] others deny protection to such investors;[34]

- Iran-Russia and Iran-South Africa BITs explicitly state that dual nationals are not entitled to protection;
- The India-UAE BIT does not preclude the protection of investors with dual citizenship but stipulates that the citizenship should be determined on the basis of "the most effective nationality" test.

UNCTAD has proposed several measures (See page 19 above) regarding the definition of the "investor":[35]

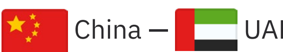
To exclude certain categories of natural or legal persons from treaty coverage, such as dual nationals (as implemented in Iran-Russia and Iran-South Africa BITs), as well as companies that are not engaged in real economic activities in the home state. This is the approach taken in the Egypt-Ethiopia, Ethiopia-UAE, and India-UAE BITs, and, for example, by the Egypt-Mauritius BIT (2014) and the EU-Singapore Investment Protection Agreement (2018);

- Include a denial of benefits clause, which is found, for example, in the Ethiopia-UAE BIT. As another example, a state may deny protection to investors with which it does not maintain diplomatic relations. Such clause is present in the China-South Korea Free Trade Agreement (FTA) (2015), the Canada-EU CETA, and the CPTPP.

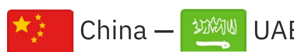
Public Investors

Public investors, which include state authorities and companies that are majority-owned by the state, are explicitly protected in 5 BITs within BRICS, all of which involve Arab countries. Multilateral Treaties also explicitly allow public investment. However, even in the absence of such a clause, the jurisprudence assumes that, for example, state-owned companies may act as investors.[36]

PUBLIC INVESTOR IS EXPLICITLY ALLOWED IN 5 BITs:



The federal government of the UAE, as well as local governments and their local and financial institutions



Institutions and authorities such as the Saudi Arabian Monetary Agency, Public Funds, Development Agencies and other similar governmental institutions having their head offices in Saudi Arabia

Public enterprises

Government of any of the contracting states

Legal entities, corporations, limited partnerships, trusts, or beneficiaries of trusts that are owned or controlled (directly or indirectly) by the state

What Happens to the Investor Rights if the BIT is Terminated?

Almost all BITs within BRICS feature a "sunset clause", enabling investors to retain protection for a certain period following the termination of the agreement. As illustrated in the graph below, the period may vary from 5 to 20 years.

INVESTMENT PROTECTION PERIOD AFTER THE TERMINATION OF THE BIT (Sunset Clause):

Investment Protection Standards

Traditionally, states have assumed various obligations to protect foreign investment, which include the following key investment protection standards:

KEY INVESTMENT PROTECTION STANDARDS:

National treatment
An obligation of a state to ensure that foreign investors receive treatment that is no less favourable than that afforded to domestic investors

Free transfer of funds

Compensation for losses
An obligation of a state to compensate investors for the losses incurred due to emergencies impacting their investments

Most-favoured nation treatment (MFN)
An obligation of a state to treat foreign investors from one country no less favourable than foreign investors from third countries (Practically means the possibility to benefit from guarantees from other BITs of the host state)

Prohibition of unlawful expropriation
Whether direct or indirect

FPS
Guarantee of full protection and security

FET
Guarantee of fair and equitable treatment

Compensation for lawful expropriation

If the state breaches any of these standards, investors may initiate proceedings against the state, asserting that their rights under the treaty have been infringed. They may seek damages along with accrued interest.

Investors should pay particular attention to umbrella clauses in BITs. These clauses extend protection to any obligations that the state has towards investors, beyond those explicitly detailed in the BIT. For example, an umbrella clause allows investors to pursue claims against a state in international arbitration for breaches of a commercial contract, subject to specific exceptions. In other words, this mechanism elevates individual contractual violations to the level of international treaty protection. The umbrella clause is found in 5 out of 18 ongoing treaties between BRICS countries: the Egypt-UAE BIT and 4 BITs of China, with Egypt, Russia, South Africa, and the UAE.

Certain BITs, on the other hand, limit or exclude the application of the treaty under specific circumstances. Specifically:

- Governmental measures related to taxes are not covered under the UAE BITs with Brazil, Ethiopia, and India;
- Migration laws are excluded in the Ethiopia-UAE BIT;
- The India-UAE BIT does not extend protection with respect to measures taken by local governments or related to public procurement.

In addition, certain treaties limit the territory where investments are protected. For example, the Protocol to the China-Russia BIT excludes the administrative regions of Hong Kong and Macao from the treaty's scope.

Full Protection and Security

Most BRICS treaties provide for full protection and security standard.[37]

Iran's BITs stand out: its treaty with Russia lacks this guarantee, while the agreements with China and South Africa encompass a variation of the standard, namely "full legal protection". This may be interpreted as a waiver of the physical protection of investments as provided under the regular standard of full protection and security. For example, tribunals have found a breach of physical protection guarantee in cases when a state law enforcement agency harmed an investment during a counter-guerrilla operation[38] or failed to protect an investment, where a hotel has been taken over by its employees,[39] etc.

The Brazil-UAE BIT expressly excludes the obligation of full protection and security and states that it cannot be used for the purpose of interpretation of the treaty.

The India-UAE BIT explicitly stipulates that the standard pertains only to physical protection and does not exceed the minimum standard of protection for foreigners under customary international law.

UNCTAD's proposals for states (See page 19 above) advocate for the reform of the FPS standard by explicitly linking it to customary international law and clarifying that the FPS standard refers to physical protection.[40] Among the BRICS countries, this approach is used in the India-UAE BIT and India's Model BIT. It is also used in several agreements outside BRICS, including the Canada-EU CETA, the CPTPP, and the Armenia-Singapore Agreement on Trade in Services and Investment (2019).

Fair and Equitable Treatment

The guarantee of Fair and Equitable Treatment ("FET") is provided in all BRICS treaties, save for the UAE BITs with Brazil and India.

The difference lies in whether the standard is interpreted broadly, without specification of the particular scope, or with certain restrictions.

In BRICS BITs, the state's obligation to ensure fair and equitable treatment of investments is constrained in two principal ways:

(i) First, by listing the types of investor activities covered by the guarantee;

(ii) Second, by explicitly identifying the situations covered by the standard (*e.g.*, protection against discrimination or due process guarantees).

Moreover, some treaties articulate that certain actions of the state are dee-

med unacceptable, thereby providing additional safeguards for the investor.

The UAE BITs with Brazil and India stand apart. The parties explicitly listed the obligations typically associated with the FET standard, including prohibitions on denial of justice, breach of due process, or targeted discrimination, etc.

However:

- In the Brazil-UAE BIT, the parties have clarified that the international law FET is not covered and shall not be used as an interpretative standard in dispute settlement procedures;
- In the India-UAE BIT, the parties have not referred to the FET standard at all, instead just listed the specific obligations.

This approach may reflect the states' intention to avoid a broad interpretation of the standard in the view of the investment arbitration case law. The FET standard is the one most often referred to in practice: investors have invoked it in 80% of all known disputes.[41]

UNCTAD invites states to adjust and limit the FET standard through several approaches (See page 19 above):[42]

- Replace it with an exhaustive list of state obligations, for example, denial of justice. This is the approach taken in the India-UAE BIT and India's Model BIT. Examples from countries outside BRICS: the Canada-EU CETA and the EU-Vietnam Investment Protection Agreement (2019);
- Clarify the standard, for example, provide that determination that there has been a breach of another provision of a treaty does not establish that there has been a breach of FET. Among the BRICS countries, this approach is taken, for example, by the UAE in its treaty with Uruguay and by China in its FTA with the Republic of Korea;
- Entirely omit the standard, as in the Australia-China FTA (2015) and Brazil's Model BIT.

National Treatment

Almost all BRICS treaties guarantee national treatment of foreign investments with a standard disclaimer: laws of the host state may provide for exemptions and designate certain sectors of the economy in which national treatment may not apply to foreign investments.

The China-Iran BIT and the UAE's treaties with Brazil, Ethiopia, and India clarify that national treatment applies only in “like circumstances”. However, under the UAE BITs with Brazil and India, circumstances will not be considered “like” if the differences in treatment arise from legitimate public aims. In addition, the Brazil-UAE BIT explicitly excludes compensation for different treatment that results from the inherent competitive advantages of domestic investors over foreign investors.

The Ethiopia-UAE BIT defines “like circumstances” to include factors such as the environmental impact of the investment, the economic sector involved, and the aim of the laws and regulations affecting the investment in a manner that does not apply similarly to local investors.

Under the Russia-South Africa BIT, the state is allowed not to grant the same benefits to the other party's investors as it accords to development finance institutions with international participation.

Only the China-Ethiopia, China-UAE, and Egypt-Ethiopia BITs do not provide for the national treatment.

For new treaties, UNCTAD suggests (See page 19 above):[43]

- Include criteria for determining “like circumstances” for national treatment. Among the BRICS countries, for example, the UAE uses this approach in its treaty with Uruguay. Examples outside BRICS include the CPTPP;
- Subordinate the right of national treatment to a host country's domestic laws. This option is also implemented in the UAE-Uruguay BIT;
- Include reservations to national treatment, *e.g.*, in cases of government procurement, subsidies and grants, taxes, etc. This approach is

used in the UAE-Uruguay BIT, as well as in the Australia-China FTA, the Canada-EU CETA, and the CPTPP.

Most-Favoured Nation Treatment

The Most-Favoured Nation ("MFN") standard is included in all BRICS treaties, except for the India-UAE BIT.

MFN traditionally encompasses exceptions pertaining to double taxation treaties or other tax treaties related to participation in a free trade zone, customs union, or economic union. Furthermore, some BITs provide that MFN shall not apply to benefits provided under certain agreements:

- **Russia's BITs** generally refer to the treaties between the Russian Federation and other former Soviet states;
- **The UAE's BITs** may contain a clause related to participation in the Gulf Cooperation Council (the Russia-UAE BIT) and the Arab League Agreement (the Egypt-UAE BIT);
- **The Russia-South Africa BIT** specifies that investors shall not refer to South African laws, the purpose of which is to promote the achievement of equality in its territory or designed to protect or advance natural or legal persons, or categories thereof, disadvantaged by unfair discrimination in its territory.

There are four types of restrictions in BRICS BITs, which may be combined:

- **By investor's activities benefitting from the MFN.** This includes the Egypt-Ethiopia, the China-Saudi Arabia, and the Brazil-UAE BITs (applies to ownership, use, and disposal of investments but does not extend to the fiscal policy);
- **By guarantees that may be covered by the MFN.** In the Russia-UAE BIT, the treatment shall apply only to fair and equitable treatment;
- **By guarantees that cannot be invoked through the MFN**. This includes a prohibition to apply procedural or jurisdictional guarantees from BITs with other states, which has become rather popular in recent treaties (the UAE's 3 BITs: Brazil, Ethiopia, and Russia). The exception for the BIT with Ethiopia goes further and prohibits the invocation of any standards from previously signed treaties;
- **By restriction of MFN application to "like circumstances".** This includes the BITs restricting the national treatment, namely by the UAE with Brazil and Ethiopia and by Iran with China.

Multilateral Treaties are distinguished in that they stipulate that MFN does not apply to any privileged treatment accorded by the host state in specific projects of particular importance to that state.

For new agreements, UNCTAD (See page 19 above) suggests similar options for restricting the MFN standard:[44]

- Include criteria for determining "like circumstances". In addition to the above treaties, this approach is used, for example, in the UAE-Uruguay BIT and the CPTPP;
- Circumscribe the scope of the MFN clause, *e.g.*, restricting its application with respect to double taxation treaties, economic integration treaties, dispute settlement clauses from other treaties, etc. For example, the Australia-China FTA, the Canada-EU CETA, and the EU-Vietnam Investment Protection Agreement do not allow referring to investor-state dispute settlement mechanisms from other agreements.

No Unlawful Expropriation

Considering expropriation, indirect expropriation warrants particular attention (rather than direct one). It is commonly understood as measures depriving an investor of the ability to use the investment and generate profits. The Brazil-UAE treaty expressly excludes indirect expropriation from its scope. The UAE's 3 other treaties – with Egypt, Ethiopia, and India – provide the criteria for indirect expropriation. Other treaties employ standard wording of expropriation measures but do not define the concept.

As illustrated in the graph below, the approaches to defining the boundaries of indirect expropriation differ across the 3 UAE BITs.[45]

APPROACHES TO DEFINING THE BOUNDARIES OF INDIRECT EXPROPRIATION:

By contrast, a measure is not expropriatory if it is aimed at the ordinary regulation of public relations (*i.e.*, it excludes the possibility of indirect expropriation in relation to non-discriminatory state measures aimed at protecting and securing legitimate public welfare objectives). The India-UAE BIT also provides examples of such welfare purposes: public health, safety, and environmental protection

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By outlining measures that may affect the investments: expropriatory measures include, for example, measures that partially or completely deprive the investor of its fundamental rights, prevent the investor from exercising its rights with respect to the asset

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By identifying possible measures and including criteria for their evaluation: to be considered an expropriation the impact of the measure should be assessed: the measure must deprive the investor of its rights with respect to the asset, either wholly or indefinitely. To determine this, consideration must be given to the economic impact of the measure on the investment, the duration of the measure, its purpose, the context and intent of the state in adopting the measure, and whether there has been a breach of the state's written obligation to the investor

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Moreover, treaties sometimes provide explicit exceptions to protection from unlawful expropriation. For example, the Ethiopia-UAE BIT stipulates that interference with intellectual property rights, such as granting of compulsory licences, is not protected. In a similar vein, the India-UAE BIT does not protect actions committed by the state in its private capacity.

Indirect expropriation, along with the fair and equitable treatment, is one of the most common claims investors invoke against states, appearing in 70% of disputes.[46] UNCTAD suggests that states should limit the standard or explicitly exclude indirect expropriation.[47] This is the approach taken in the Brazil-India BIT.

Compensation for Lawful Expropriation

Generally, expropriation is deemed lawful if it complies with the following principles: public purpose, non-discrimination (which is absent from the India-UAE BIT), due process, and prompt and adequate compensation.

There are various methodologies to determine the amount of compensation due. Most BRICS BITs employ market value as a standard. For example, the UAE BITs with India and Brazil refer to the market value of the property on the date immediately preceding the expropriation. Under the Brazil-UAE BIT, this method of determining the value of the assets applies only to direct expropriation.

The UAE's BITs with China, Ethiopia, and Russia, as well as the China-Russia BIT, permit the application of other universally recognised valuation standards along with the market value.

A significant number of BITs refer to the investment value without criteria for its assessment. The Egypt-Ethiopia BIT refers to adequate indemnity but does not specify a precise definition.

Compensation for Losses

All the BITs reviewed contain obligations for states to compensate investors for losses incurred in specific circumstances.

Twelve BRICS BITs in force incorporate a standard clause ensuring that investors receive treatment no less favourable than that accorded to other investors (whether from a third state or the host state) in the event of losses resulting from hostilities, civil unrest, and analogous events. The India-UAE BIT guarantees investors a non-discriminatory regime in such circumstances without specifying that it must be no less favourable than that granted to other investors.

The China-South Africa BITs, 3 of the UAE's BITs (with Brazil, China, and Egypt), and the Ethiopia-Iran BIT further clarify in what cases the investor shall have the right to compensation. In scenarios where property has been damaged or requisitioned by the state without necessity, compensation is mandated even if such compensation would not be extended to investors from any third state or, in certain treaties, domestic investors.

Free Transfer of Funds

All BITs between BRICS states guarantee the free transfer of related to investment funds abroad. This standard provision typically encompasses:

- A non-exhaustive list of types of funds, the transfer of which is guaranteed (though there are certain exceptions, for example, in the China treaties with Iran and the UAE);
- Reference to the applicable rate of exchange (either prevailing or market one) to a freely convertible currency;
- A provision for transfers without delay (only the China-Egypt and the China-Ethiopia BITs lack such a clause);
- Compliance with the laws of that state, generally inclusive of tax regulations (except the Egypt-UAE BIT).

However, 4 of the UAE's BITs (with Brazil, China, Ethiopia, and India) expressly permit to limit this guarantee. The BITs with Brazil, Ethiopia, and India allow for the restriction of transfers to protect the rights of creditors in cases of crimes, cooperation with law enforcement agencies, and enforcement of judicial decisions. The BITs with Brazil and India further clarify that the states are not prohibited from adopting non-discriminatory temporary restrictions in financial difficulties, such as a balance of payments crisis. The China-UAE BIT allows for reasonable restrictions in addition to standard foreign exchange laws for a certain period in a situation of fundamental economic disequilibrium, but the restriction cannot affect more than 50% of the investor's funds.

One of the Multilateral Treaties, the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (1981) ("OIC Agreement"), allows states to prohibit transfers abroad of more than 50% of salaries and fees.

Public Policy Exceptions

Four treaties between BRICS states refer to situations where the investor guarantees will not be applicable, thereby exempting the state from liability for breaches. These exemptions are generally associated with certain needs of the state, compelling it to adopt a certain measure that may infringe on the investor's rights.

In the Egypt-Ethiopia BIT, for example, such situations include the preservation and promotion of cultural and linguistic diversity. Domestic regulatory measures taken for this purpose will not violate the agreement.

Three of the UAE's BITs—with Brazil, Ethiopia, and India—contain a separate provision enlisting exceptional measures. Moreover, the Ethiopia-UAE

BIT expressly states that measures taken to fulfil another international obligation will not be considered a breach, reinforcing the state's compliance with its obligations under international law.

UNCTAD also invites (See page 19 above) states to include exceptions for domestic regulatory measures in pursuit of circumscribed policy objectives, *e.g.*, the need to preserve public order, objects of cultural or historical significance, etc.[48] These limitations are provided for in, for example, the UAE's BIT with Uruguay and Egypt's BIT with Mauritius, the Australia-China FTA, the Canada-EU, and the EU-Vietnam Agreements.

UNCTAD proposes to prevent abuse of the exceptions by the host States. This prohibition is provided in Brazil's Model BIT, as well as in the Egypt-Mauritius, the UAE-Uruguay BITs and the Australia-China FTA.

Stating Special Objectives in the Preamble

In certain cases, states delineate special objectives in the BIT's preamble to emphasise the importance of achieving these aims through the application of the BIT. Those are normally in addition to the objectives of mutually beneficial cooperation and the creation of favourable conditions for investment. In the event of a dispute, states may take these objectives into account when interpreting their obligations. For example, should a state enact regulatory measures to pursue the objectives specified in the preamble, this may serve as an additional argument against expropriation.

Among the BITs between BRICS states, the Ethiopia-UAE treaty can be noted for its special objectives. This treaty refers to the importance of investment for sustainable economic growth and development and the parties' intention to support investments aimed at the sustainable development of states. In addition, the treaty explicitly affirms the right of states to regulate investment in their territories to achieve domestic policy objectives. Similar objectives are set out in the UAE's BITs with Brazil and India.

V. Investor–State Dispute Settlement

Disputes between investors and host states may be resolved both through the national authorities of that state (which are not always favourable to the investor) and in international fora. The conventional forum for the resolution of disputes out of the BITs is international investment arbitration: the investor has the right to bring a claim against the state if the treaty between the investor's state and the host state provides for such an option.

Investment arbitration case law is important as it affects the interpretation of treaties and, as a result, future disputes arising from them. When considering a case, arbitrators are typically not bound by previous arbitral awards, leading to potentially divergent interpretations of the same treaties or rules and, consequently, a lack of a common view on certain matters. Yet, as a matter of practice, the existing interpretation of a particular BIT is usually taken into account in the awards.

In certain cases, case law can also impact state policies on the termination of existing treaties and approaches to execution of the new ones (See Section III above) to the point of excluding the investor's right to resort to arbitration. Among the existing BRICS treaties, only investors under the Brazil-UAE BIT do not have this right. Globally, there is an ongoing debate on the need for reform in the investor-state dispute settlement, with states actively considering various options under the auspices of UNCITRAL Working Group III in an attempt to improve the system or create alternative fora, including a permanent international investment court.

International proceedings initiated to resolve the disputes between BRICS investors and BRICS member states are scarce.

As of the date of the Report, there are ten known proceedings, see the table below:

5 AGAINST EGYPT

3 AGAINST INDIA

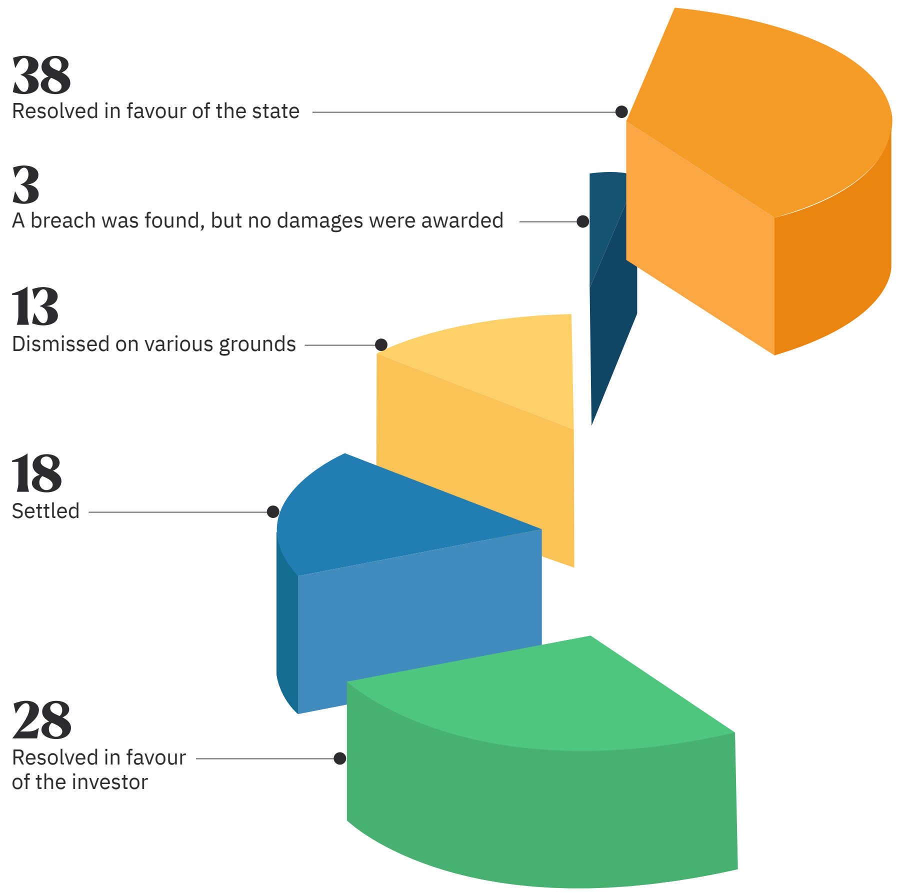
2 AGAINST SAUDI ARABIA

Half of them were initiated by the UAE investors prior to the state's accession to BRICS. The disputes primarily arose in the sectors of transportation and storage, real estate, information and communications, as well as manufacturing.

Investors from Russia and the UAE have filed claims against Egypt and India and investors from China and India against Saudi Arabia under the respective BITs. One dispute was initiated by an investor from Saudi Arabia against Egypt under the 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the OIC. In addition to these proceedings, Egyptian investors filed a notice of intention to initiate proceedings against Ethiopia in 2021, although no public data is available on whether a claim has subsequently been filed.[49]

Out of the 10 cases, 4 are still pending, 1 has been settled, and in 5 cases, tribunals have ruled in favour of the states. The greater number of decisions in favour of the states aligns with global statistics: from 1987 to 2023, 38% of publicly available cases were decided in favour of the state, 28% — in favour of the investor, and 18% were settled.[50]

GLOBAL INVESTMENT DISPUTE SETTLEMENT STATISTICS 1987-2023 (%):



INVESTMENT ARBITRATION PROCEEDINGS AMONG BRICS INVESTORS AND MEMBER STATES:

CASE	RULES	ARBITRATION CENTRE	SECTOR	OUTCOME
UAE — Egypt				
National Gas v. Egypt	ICSID Rules	ICSID	Transportation and storage	**Award in favour of the State**
Sajwani, D v. Egypt	ICSID Rules	ICSID	Transportation and storage	**Settled**
CTIP v. Egypt	ICSID Rules	ICSID	Transportation and storage	**Decided in favour of State**
UAE — India				
Strategic Infrasol and Thakur Family Trust v.India	UNCITRAL Arbitration Rules	Ad hoc	Real estate	**Pending**
RAKIA v. India	UNCITRAL Arbitration Rules	Data not available	Manufacturing	**Award in favour of the State**
Russia — India				
Naumchenko and others, v. India	UNCITRAL Arbitration Rules	PCA	Information and communications	**Award in favour of the State**
Russia — Egypt				
MetroJet v. Egypt	UNCITRAL Arbitration Rules	PCA	Transportation and storage	**Award in favour of the State**
India — Saudi Arabia				
Khadamat v. Saudi Arabia	UNCITRAL Arbitration Rules	PCA	Transportation and storage	**Award in favour of the State**
OIC Agreement				
Al Mehdar v. Egypt (IV)	Data not available	Data not available	Data not available	**Pending**
China — Saudi Arabia				
PCCW v. Saudi Arabia	ICSID Rules	ICSID	Information and communications	**Pending**

Overview of International Fora and Terms for Investment Arbitration

All effective bilateral investment treaties within BRICS, except the Brazil-UAE BIT, which will be discussed separately, provide for investment arbitration. The main distinctions lie in:

(a) The scope of arbitrators' jurisdiction (*e.g.*, is it limited only to the cases of compensation in case of expropriation);

(b) Applicable procedural rules and administration of the process by an arbitration centre;

(c) Obligation to exhaust local remedies; and

(d) Presence of a limitation period.

In the existing BITs, BRICS states allow investors to resort to institutional arbitration (under the rules of the International Centre for Settlement of Investment Disputes ("ICSID"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), and the International Chamber of Commerce ("ICC") subject to the consent of both parties to the dispute) and ad hoc arbitration, *i.e.*, not administered by an arbitration centre. Most BITs allow the claimant to choose from multiple forum options.

Ad hoc Arbitration

Almost all existing BITs between BRICS states allow *ad hoc* arbitration, except for the Egypt-UAE and the China-Saudi Arabia BITs, which provide for dispute resolution in ICSID only, as well as the Brazil-UAE BIT, which does not grant investors the right to resort to investment arbitration directly.

There are different approaches to the rules applicable to *ad hoc* proceedings, although in practice, these are rarely fundamentally different once a tribunal has been formed:

- The tribunal shall determine the rules of procedure under 6 treaties, 5 of which involve China (in the BIT with Russia, China agreed to arbitration under UNCITRAL rules). However, such treaties may be divided into three groups:
    - The tribunal may be guided by the ICSID Arbitration Rules: China-Egypt, China-Ethiopia, and China-South Africa;
    - The tribunal shall define the rules of procedure but choose between the UNCITRAL and the ICSID Arbitration Rules: China-UAE;
    - The tribunal has no guidance as to what applicable rules shall be chosen: China-Iran, Iran-South Africa;
- The UNCITRAL Arbitration Rules apply under 9 treaties: China-Russia, Egypt-Ethiopia, Egypt-Russia, Ethiopia-Iran, Ethiopia-UAE, India-UAE, Iran-Russia, Russia-South Africa, Russia-UAE.

In previous disputes arising from BRICS states' BITs, cases have been administered by the Permanent Court of Arbitration ("PCA"), where the UNCITRAL Rules were applied, reflecting standard practice.

International Centre for Settlement of Investment Disputes (ICSID)

Proceedings under the ICSID rules have two important distinguishing features. First, the arbitral awards issued in ICSID cases cannot be set aside in a national court and are directly enforceable in the states that are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("Washington Convention")

(*i.e.*, the countries that have joined ICSID). Otherwise, the award may be challenged in a national court of the state where the seat of arbitration is located. Enforcement of an arbitral award against a state is a separate matter, which often determines the actual outcome of a dispute.

Second, unlike other arbitration centres, at ICSID, the parties may request annulment by a three-person *ad hoc* committee formed by the Secretary General of ICSID and further review of the award.[51]

Four BRICS states joined ICSID:[52] Egypt joined in 1972, Saudi Arabia in 1980, the UAE in 1982, and China in 1993. Ethiopia and Russia signed (in 1965 and 1992, respectively) but have never ratified the Washington Convention. Brazil, India, Iran, and South Africa have not signed the Washington Convention.

Yet, only the disputes under the Egypt-UAE and the China-Saudi Arabia BITs can be referred to ICSID. The Egypt-UAE BIT provides that ICSID proceedings shall be the second stage of dispute resolution after proceedings at a national court. The China-Saudi Arabia BIT allows only disputes over the amount of compensation to be referred to ICSID, with national courts being competent in the rest. There is no public information on whether Chinese and Emirati investors in the above investment arbitrations have brought claims arising from these 2 BITs before the national courts in Egypt and Saudi Arabia.

Notably, the treaty between China and Egypt, signed after both states had acceded to the Washington Convention, provides only for *ad hoc* arbitration but not for ICSID proceedings.

Several treaties allow disputes to be submitted to ICSID, but only if both contracting states become parties to the Washington Convention, which has not happened to date. Such provision can be found in 8 treaties: China-Russia, China-Ethiopia, Egypt-Ethiopia, Ethiopia-Iran, Ethiopia-UAE (subject to the consent of both parties to the dispute), India-UAE, Iran-Russia, and Russia-UAE.

The China-UAE treaty stipulates that the states will discuss the possibility to submit disputes to ICSID when they become parties to the Washington Convention. However, for China and the UAE, the Washington Convention had entered into force before they signed the BIT.

Three UAE treaties, with Ethiopia, India, and Russia, and the China-Russia BIT, allow disputes to be referred to arbitration under the ICSID Additional Facility Rules (2022), which apply in situations where the host state and/or the investor state are not parties to the Washington Convention, *i.e.*, where the dispute cannot be referred to ICSID. However, in this case, the above features of the ICSID proceedings (annulment and direct enforcement with no possibility to set the award aside in a national court) will not apply to the proceedings.

Other Arbitration Centres

The Ethiopia-UAE treaty permits disputes to be referred to arbitration under the ICC rules but only with the mutual consent of the involved parties. Absent such consent, the investor may pursue *ad hoc* arbitration under UNCITRAL rules.

The Russia-South Africa BIT contains an arbitration clause under the SCC rules. However, this treaty, along with some others, offers an alternative to national court and international arbitration, by allowing arbitration **in the host state**, often without specifying applicable rules or the administering arbitration centre, potentially leading to uncertainty in practice. Other examples of such treaties include the Ethiopia-Iran BIT and Russia's treaties with Egypt and the UAE.

In addition, under the Egypt-UAE BIT, disputes may be referred to the Cairo Regional Centre for Commercial Arbitration ("CRCICA") if both parties to the dispute have agreed to it.

Opting for arbitration in the host state (*i.e.*, the respondent state) is uncommon within the current BIT investor dispute resolution system, as arbitration in a neutral jurisdiction has traditionally been considered advantageous.

However, the primary concern is not the arbitration centre that administers the proceedings but the legal seat of arbitration. It is understood to be a city, and in international disputes, this city is not linked to the state where the arbitration centre is located. The seat of arbitration is crucial as the national courts of that state may set aside the award upon the application of the losing party.

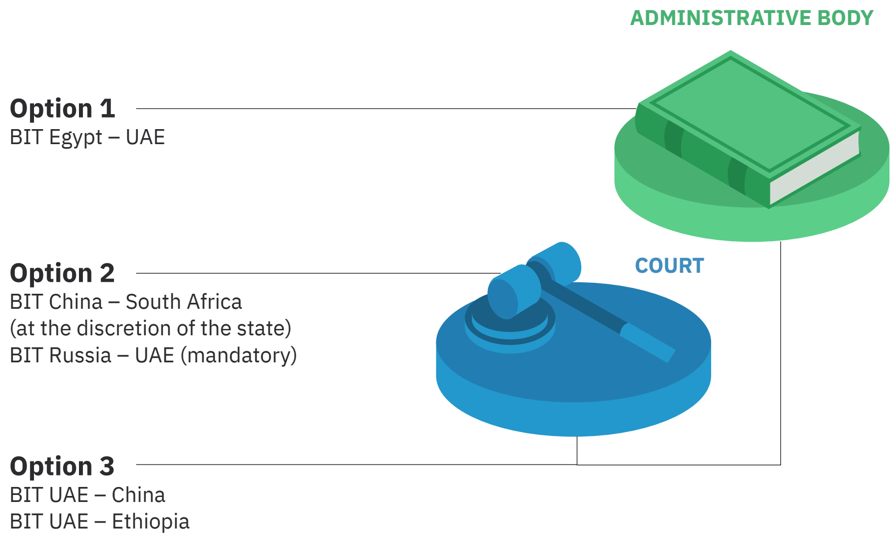
Unless the treaty specifies the seat (city), or it is defined by the applicable rules or agreed upon by the parties to the proceedings, it will be determined by the tribunal or the arbitration centre. For example, the China-UAE BIT refers to Stockholm as the default seat of arbitration, unless the disputing parties choose another seat of arbitration.

Additional Terms

The treaties discussed in this section all incorporate a **cooling-off period**, which refers to the duration of negotiations between the investor's submission of a notice of dispute and the initiation of arbitration. Across all treaties, this period spans six months, with the exception of the Egypt-UAE BIT, which provides for a three-month period. The India-UAE BIT additionally mandates the submission of the notice of intention to commence arbitration in 90 days prior to such commencement itself, and this period may run concurrently with the cooling-off period.

Certain treaties entail an additional stage before arbitration, **proceedings before the authorities of the host state**, in three variations:

EXHAUSTION OF LOCAL REMEDIES:



In practice, exhaustion of local remedies rule before arbitration is not always complied with, and in certain instances, arbitral tribunals have acknowledged that a claim may bypass domestic authorities and proceed directly to arbitration, depending on the circumstances.[53]

However, in certain cases, recourse to a local court may be the sole option for an investor. For example, some states have agreed to arbitration solely on specific matters, such as the amount of compensation. This is typical for old-generation treaties containing limited arbitration clauses.

In the event of a dispute arising from such agreements, the investor risks facing the arbitral tribunal's decision that the state's breach of the BIT itself has to be resolved in a domestic court.[54]

An example of a treaty providing for limited jurisdiction of the arbitral tribunal is the China-UAE BIT. Arbitration is allowed solely for disputes relating to the amount of compensation for expropriation, as well as for damages or losses resulting from certain actions of the state (requisition and destruction of an investment or property), and for other disputes, but only if the parties to the dispute agree to it.

Certain agreements permit arbitration only with respect to disputes related to the amount of compensation for expropriation, as evidenced in China's BITs with Egypt, Ethiopia, and Saudi Arabia. Moreover, the China-Egypt and China-Ethiopia BITs permit such recourse only if the investor has not previously brought the dispute before a local court. In practice, this may lead to uncertainty about the investor's rights to international protection. On the one hand, it may be construed that the state's breach must be established in a local court before resorting to arbitration on the amount of compensation. On the other hand, when going to a domestic court, the investor may be deemed to have waived arbitration, and furthermore, the matter of compensation will be adjudicated through proceedings in national courts. Certain arbitral tribunals have permitted investors to proceed directly to arbitration in such cases, as failure to do so would deprive the investor of the right to defence, and because the phrase "disputes involving the amount of compensation" may encompass not only claims over the amount of compensation but also disputes over breach of the BIT.[55]

The India-UAE investment treaty explicitly excludes recourse to arbitration concerning certain state obligations under the treaty, such as the entry and sojourn of personnel and transparency.

Yet, states have endeavoured to avoid parallel proceedings in a national court and international arbitration in other BITs as well. In addition to those described above, several treaties, such as China's BITs with Egypt (unless the parties have agreed otherwise), Ethiopia (only with respect to the amount of compensation), Iran, and South Africa, as well as the Egypt-UAE BIT, prohibit the submission of a dispute to arbitration if the investor has already commenced proceedings before a local court. However, 2 of Iran's BITs, with China and South Africa, deprive local courts of jurisdiction over disputes that have already been submitted to international arbitration under the BIT. The China-Russia BIT entitles the investor to choose between a domestic court and arbitration under the ICSID or UNCITRAL Rules, but once the investor has approached one of these fora, this choice is deemed final.

Most treaties do not stipulate a **limitation period**, except the India-UAE BIT, which provides for 5 years since the investor first acquired or should have first acquired knowledge of the measure in question and the incurred loss or damage, or 12 months since the conclusion of domestic proceedings (the limitation period to submit the dispute to local instances is 1 year) and the Ethiopia-UAE treaty providing for 3 years.

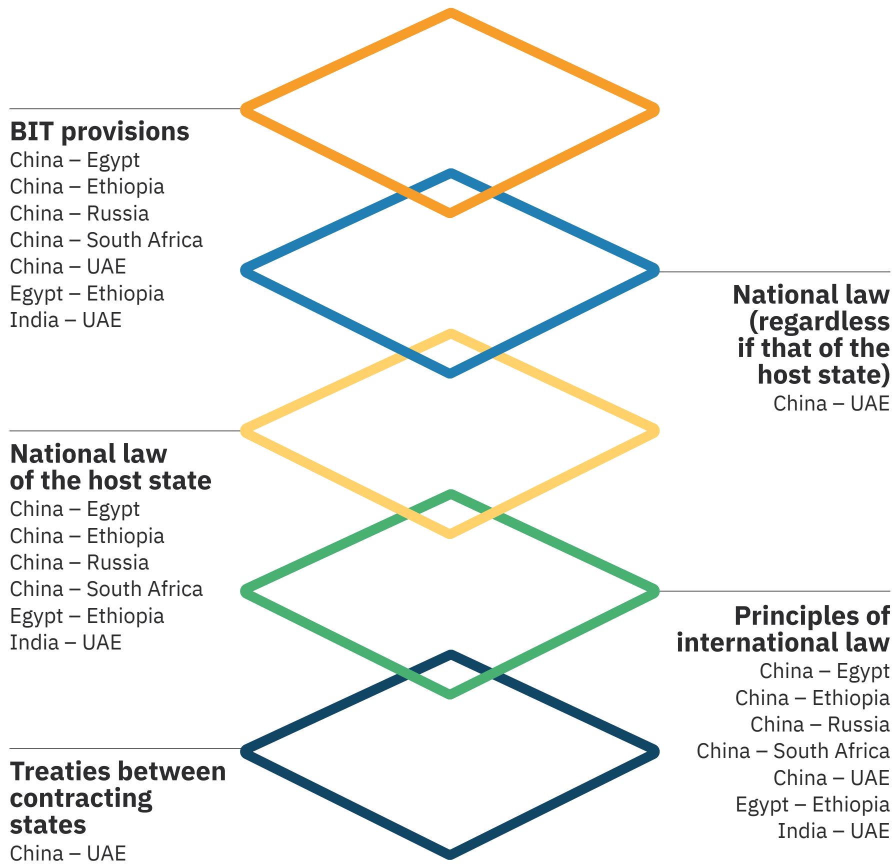
The treaty between India and the UAE is also noteworthy in that it accords priority to a direct contract between an investor and the host state over the BIT: if such a contract exists, the dispute can only be resolved as per the procedure set out therein, implying that the arbitration clause under the BIT may not be applicable in this case.

The issue of **a state's ability to sue an investor** under a BIT in international arbitration is controversial in practice. This primarily pertains to counterclaims when the investor commences the proceedings against the state, thereby accepting jurisdiction under a BIT to which the investor is not a party. Certain BITs, for example, the one between Iran and South Africa, allow "either party" to apply to the competent forum in the event of a dispute. In practice, state claims under BITs are extremely rare.

Almost half of the treaties analysed here (7 BITs) determine the **applicable law**. Most of them (5) are China's treaties: with Egypt, Ethiopia, Russia, South Africa, and the UAE, as well as the Egypt-Ethiopia and India-UAE BITs. Only 2 out of the 7 China's BITs with BRICS countries do not define the applicable law: with Iran and Saudi Arabia. Most often, in addition to

the BIT provisions, treaties refer to relevant national law and generally recognised principles of international law.

APPLICABLE LAW IN BITS IS DETERMINED AS FOLLOWS:



As a default rule, it is up to the arbitral tribunal to **allocate the arbitration costs** in its award. However, almost half of the BITs of the BRICS states (7) incorporate a predetermined cost allocation mechanism.

As with the applicable law, the majority of these treaties are with China (except for its BITs with Russia and Saudi Arabia). In these treaties, each party is responsible for its own costs and the fees of its appointed arbitrator, while the president's fees and other costs are to be shared equally. Under China's treaties with Iran and South Africa, the tribunal may allocate costs differently.

The UAE's treaty with Ethiopia compels the parties to share all costs equally, except for expenses for legal representation, which shall be borne by each party.

Finally, it should be taken into account that **investment arbitration proceedings are not always confidential**. In practice, this means that some of the materials, as well as the award and other information regarding the case, may become public. This can occur, for example, if transparency rules apply, or if such a requirement is provided by the respective treaty.

The two main international instruments relating to the rules on transparency are:

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration Mauritius Convention on Transparency	**UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration**

To date, none of the BRICS states has signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014) ("Mauritius Convention on Transparency").[56]

The UNCITRAL Rules on Transparency apply by default to arbitrations under the UNCITRAL Rules commenced under the treaties entered into after 1 April 2014 (parties may also agree to apply the Rules to a dispute arising from earlier treaties). Three effective BITs between BRICS states have been entered into after this date: Iran-Russia (2015), Ethiopia-UAE (2016), and India-UAE (2024). Neither of them expressly excludes the UNCITRAL Rules on Transparency, thereby making them applicable.

The India-UAE treaty explicitly indicates that with the mutual agreement of the disputing parties, the state shall, to the extent possible, make available to the public the notice of dispute and notice of arbitration, pleadings and other written submissions, transcripts of hearings, decisions, orders, and awards issued by the tribunal.

In addition, the India-UAE treaty, which entered into force in August 2024, contains several procedural features inherent in the new-generation BITs, including the criteria for arbitrators, a prohibition on third-party funding, provisions for early dismissal of claims, the option for the parties to establish an appellate body.

State-to-State Investment Arbitration in Support of Investors

The Brazil-UAE BIT does not provide for investment arbitration; instead, it establishes its own dispute resolution framework. A key feature under this BIT is that only the investor's home state, rather than the investor individually, can bring a claim against the host state.

Prior to resorting to arbitration, the state must apply to the **Joint Committee for the Administration of the Agreement**. The treaty also designates a position of an ombudsperson in each state (*i.e.*, the Brazilian ombudsperson in Brazil to assist investors from the UAE and vice versa), who shall be authorised to deal with various investor requests.

If the pre-arbitration stage does not lead to a settlement, any state may initiate ad hoc arbitration or apply to a permanent arbitration institution.

The Brazil-UAE BIT delineates more detailed provisions for the formation of the arbitral tribunal, which is generally required to render an award within 9 months. Unlike most other treaties, this BIT stipulates requirements for arbitrators, including expertise or experience in public international law, international investment rules or international trade, or investment dispute resolution.

Notably, the tribunal's mandate under the treaty is confined to assessing whether state measures breach the BIT. The arbitrators can only decide on damages if the parties have signed a separate arbitration agreement, and only if the investor has neither resorted to a local court nor arbitral tribunal, or when the investor has withdrawn the respective claims from domestic authorities.

Certain provisions of the treaty cannot be subject to arbitration, such as corporate social responsibility, combating corruption and illegality, environmental, labour and health provisions, investment compliance with domestic laws, and security exceptions. In addition, disputes over facts or measures that had occurred before the BIT came into force cannot be submitted to arbitration. The BIT also provides for a limitation period of 5 years from the date on which a party knew or should have known of the facts giving rise to the dispute.

Specifics of Dispute Resolution under Multilateral Treaties

The 1980 Arab Investment Agreement provides three methods for settling a dispute: conciliation, *ad hoc* arbitration, and recourse to the Arab Investment Court ("AIC").

Conciliation provides for the engagement of a third party agreed by the parties to the dispute or selected by the Secretary-General of the League of Arab States at the parties' request. Moreover, such third party is supposed to formulate specific proposals to settle the dispute.

The AIC is the first international court to handle investment disputes. It started operating 20 years after the 1980 Agreement was signed. According to publicly available data, the Court delivered 20 judgments by the end of 2020.

Notably, the AIC also has jurisdiction over disputes arising from other international treaties between the members of the League of Arab States if (i) the treaty authorises disputes to be referred to international arbitration or an international court, and (ii) the parties to the dispute agree to such referral. The AIC shall be authorised to issue legal opinions on matters within its competence.

In practice, Arab countries sometimes provide for potential dispute resolution in the AIC in their BITs,[57] yet there are no such examples among the treaties entered into between BRICS states.

The 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference ("OIC") also provides that parties may establish a special organ for the settlement of disputes arising under the agreement.

Before the establishment of an organ, the parties may resort to conciliation and request the Secretary General of the OIC to choose the third party and initiate *ad hoc* arbitration.

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Annex

1. The BRICS Economic Partnership Strategy until 2025.
URL : https://www.economy.gov.ru/material/file/636aa3edbc0dcc2356ebb6f8d594ccb0/1148133.pdf.

2. BRICS Investment Report (2022). P. 10.
URL: https://unctad.org/system/files/official-document/diae2023d1_en.pdf.

3. Based on Annex table 1 to the UNCTAD report “World Investment Report 2024: Investment Facilitation and Digital Government”. The data on FDI outflows do not include Ethiopia, as information for this country is not available. URL: https://unctad.org/topic/investment/world-investment-report.

4. Concept Note and Programme of High-Level Panel Discussion on BRICS Summit Outcome (2023). For the purposes of the Report, information current as of early October 2024 has been used.
URL: https://unctad.org/system/files/information-document/gds_ecidc_2023d01-brics-cn_en.pdf.

5. As stated above, for the purposes of the Report, information current as of early October 2024 has been used.

6. Russia has BITs with the following BRICS countries: China, Egypt, Iran, South Africa, and the UAE. There are currently no active BITs with Brazil, Ethiopia, India, and Saudi Arabia.

7. As of the end of 2023, there were at least 2,608 active BITs and trade agreements worldwide that include provisions for the protection of foreign investments. Source: World Investment Report 2024: Investment facilitation and digital government. Chapter 2. C. 21.
URL: https://unctad.org/topic/investment/world-investment-report.

8. UNCTAD/ITE/IIT/7. Bilateral investment treaties in the mid-1990s. P. 8.
URL: https://digitallibrary.un.org/record/264901?v=pdf.

9. Vandevelde K. J. A Brief History of International Investment Agreements. Davis Journal of International Law & Policy, 2005, 157. Pp. 170-171.
URL: https://papers.ssrn.com/sol3/paperscfm?abstract_id=1478757.

10. *Ibid*. P. 182.

11. IIA Issues Note: Recent developments in the IIA regime: accelerating IIA reform (UNCTAD). 2021, Issue 3. P. 1. URL: https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf.

12. Egypt and Iran signed the first BIT within the BRICS framework in 1977; however, it never came into force.

13. The doctrine suggests that Brazil’s agreements are not BITs in the traditional sense, but for the purposes of the report, this distinction is not significant.

14. For more detail, see below, Section V, p. 36.

15. To access data on signed BITs and their current status for all countries except Russia, an information portal UNCTAD International Investment Agreements Navigator was used; URL: https://investmentpolicy.unctad.org/international-investment-agreements. As regards Russia, data were sourced from the official website of the Ministry of Economic Development of the Russian Federation; URL: https://www.economy.gov.ru/material/ departments/d11/investicionnye_soglasheniya/perechen_soglasheniy_mezhdu_pravitelstvom_rf_i_pravitelstvami_inostrannyh_gosudarstv_o_pooshchrenii_i_vzaimnoy_zashchite_ kapitalovlozheniy/. To ensure uniform criteria across all countries the following adjustments were made to the statistics: (1) 3 signed BITs that have ceased to be in effect (including those for which the sunset clause has expired) were added: with China, Turkey, and Uzbekistan; (2) the multilateral agreement of the Eurasian Economic Union was excluded.

16. In the calculations, terminated BITs were not considered (approximately 18% of the total number of signed BITs among BRICS countries). The majority of the terminated BITs, 77 out of 139, are agreements of India.

17. World Investment Report 2024: Investment facilitation and digital government. Chapter 2. P. 22.
URL: https://unctad.org/topic/investment/world-investment-report.

18. *Ibid*. P. 25.

19. Old-generation treaties can be concluded even after 2012, for example, the old-generation BIT between Russia and Iran was signed in 2015. New-generation treaties, in their turn, may be concluded before 2012, *e.g.*, the Egypt-Ethiopia BIT.

20. UNCTAD, International Investment Agreements Reform Accelerator, 2020. P. 2.
URL: https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

21. World Investment Report 2024: Investment facilitation and digital government. Chapter 2. P. 22.
URL: https://unctad.org/system/files/official-document/wir2024_en.pdf.

22. *Ibid*. P. 24.

23. *Ibid*. P. 2.

24. UNCTAD, International Investment Agreements Reform Accelerator, 2020.
URL: https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

25. *Ibid*. P. 2.

26. Official website of the Ministry of Economic Development of the Russian Federation.
URL: https://www.economy.gov.ru/material/departments/d11/investicionnye_soglasheniya/.

27. Baltag C., Joshi R., et Duggal K. Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little? ICSID Review - Foreign Investment Law Journal. 2023. Vol. 38. Issue 2. Pp. 418-419.
URL: https://doi.org/10.1093/icsidreview/siac031.

28. Pathak H., Singh S. Deconstructing India's Evolving Approach Toward International Investment Agreements. URL: https://www.iisd.org/itn/2023/07/01/deconstructing-indias-evolving-approach-toward-international-investment-agreements/.

29. The India-UAE BIT of 2013 has not been taken into account, as it was replaced by the BIT of 2024. This sentence refers to the replacement of old-generation agreements with new-generation treaties, whereas the India-UAE agreement of 2013 already belongs to the new-generation.

30. Bilateral Investment Treaty Policy Framework Review: Government Position Paper. 2009. URL: https://pmg.org.za/policy-document/161/.

31. UNCTAD, International Investment Agreements Reform Accelerator, 2020. Pp. 10-12. URL: https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

32. For instance, *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-03, Decision on Jurisdiction, 15 December 2014*; *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000; *Sergei Viktorovich Pugachev v. The Russian Federation*, Award on Jurisdiction, 18 June 2020.

33. *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019; *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023.

34. *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019; *1. Enrique Heemsen and 2. Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019.

35. UNCTAD, International Investment Agreements Reform Accelerator, 2020. Pp. 13-15. https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

36. *State Development Corporation "VEB.RF" v. Ukraine*, SCC Case No. 2019/113 and V2019/088, Partial Award on Preliminary Objections (Case No. V2019/088), 31 January 2021; *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.

37. Specific wording may differ, but this typically does not affect the interpretation of the standard.

38. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

39. *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000.

40. UNCTAD, International Investment Agreements Reform Accelerator, 2020. P. 23. URL: https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

41. *Ibid.* P. 20.

42. *Ibid.* P. 20-22.

43. *Ibid.* Pp. 15-17.

44. *Ibid.* Pp. 18-20.

45. In the BITs with Egypt and Ethiopia, the term 'indirect expropriation' is not used; however, the application of the mentioned approaches specifically to indirect rather than direct expropriation can be inferred from the meaning of the limitations. Nevertheless, their application to direct expropriation cannot be ruled out.

46. UNCTAD, International Investment Agreements Reform Accelerator, 2020. P. 24. URL: https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

47. *Ibid.* Pp. 24-25.

48. *Ibid.* Pp. 26-28.

49. Trafo Tech and Cynosure Agro-Processing PLC v. Federal Democratic Republic of Ethiopia

50. World Investment Report 2024: Investment facilitation and digital government. Chapter 2. P. 31. URL: https://unctad.org/system/files/official-document/wir2024_en.pdf.

51. According to Article 52 of the ICSID Convention, annulment of the award may be requested on one or more of the following grounds:
a) that the Tribunal was not properly constituted;
b) that the Tribunal has manifestly exceeded its powers;
c) that there was corruption on the part of a member of the Tribunal;
d) that there has been a serious departure from a fundamental rule of procedure; or
e) that the award has failed to state the reasons on which it is based.

52. ICSID official website. URL: https://icsid.worldbank.org/about/member-states.

53. *BG Group Plc v. The Republic of Argentina*, Final Award of 24.12.2007, *Ambiente Ufficio S.P.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 08.02.2013.

54. *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award of 16.02.2023.

55. *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction of 31.05.2017; *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction of 13.12.2013.

56. According to the UN data, as of now, 24 states have signed the Convention, and 9 have ratified it.

57. For instance, the Algeria-UAE BIT (Article 9).

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