DUALISM IN SOUTH–SOUTH ARBITRATION AND ITS IMPACT ON ISDS REFORM

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Introduction

For the longest time, international investment law was understood through the lens of this capital-exporting and capital-importing dichotomy of states. It is easy, perhaps obvious, to reduce such dichotomies to the global north-global south. However, recent trends tell a different story. UNCTAD authored, World Investment Report[1] , 2024 found that nine economies in Asia are among the top 20 investor states ("home economies of outflows"). Both India and China have found themselves on this list. Evidently, the countries that were once capital-importing are transitioning to capital-exporting and with this transition the north-south dichotomy grows weaker. This paper seeks to answer some crucial questions born out of the contradictions of a south-south investment arbitration landscape: how do Global South states, which denounce expansive investor protections when respondents, reconcile with the fact that their own transnational corporations rely on these very protections when investing in fellow developing countries? These questions reveal a distinct contradiction, which I call the dualism of South–South arbitration. This 'dualism' is the focus of the paper.

The argument made herein is two-fold. Firstly, the dualism exists and is tangible: as respondents, Global South countries often advocate sovereignty-defence, systemic or even paradigmatic change like BIT terminations, restrictive model treaties, or investment facilitation agreements which oppose investor–state dispute settlement (ISDS). As home countries, however, they accept or profit from their own transnational businesses using older, liberal treaties to make claims against peer developing countries. Secondly, this dualism is important because it significantly informs ongoing debates about reforming ISDS. If the Global South countries are unable to present a consistent position to move and instead erratically swing between sovereignty-defence and pragmatic adoption, their ability to present themselves as credible advocates of systemic or paradigmatic change in multilateral processes like

[1] UN Trade and Development, *World Investment Report 2024: Investment Facilitation and Digital Government* (United Nations 2024)

UNCITRAL Working Group III or ICSID amendment proceedings will be severely undermined.

In order to make this argument, this paper adopts India as its central case study and contextualises it within the wider Global South practice. It provides a doctrinal and policy analysis of awards of arbitration, treaty texts, and state practice through a lens informed by Third World Approaches to International Law (TWAIL) and Anthea Roberts' typology of reform approaches (incremental, systemic, paradigmatic). By recourse to this dual framework, it attempts to demonstrate the presence of dualism as well as how it negatively impinges upon and splits reform debates.

Global South as Respondents

Global South states find themselves in a difficult position when it comes to International Investment Law, on the one hand they are the harshest critics of investor–state dispute settlement (ISDS) cases, when in the position of being respondents. On the other hand, they turn around and push for the same protections they criticize, when their own multinational companies invest abroad. For example, the White Industries v India[2] garnered widespread criticism, it was argued that the award was tantamount to dilution of India's sovereignty, since the protection afforded to the investor was far above the protection available to domestic investors[3]. Almost on the heel of the award, India terminated several BITs and came up with its Model BIT 2016[4]. The model BIT made several substantive changes[5]. For instance, the definition of Investment was narrowed by shifting from an asset based definition to an enterprise based definition, additionally a 'characteristics test'(capital commitment, duration, profit expectation, risk, and development significance) is introduced which limits treaty protection. The Most Favoured Nation (MFN) provision, that was the main bone of contention in White v Industries, has been completely omitted. The Fair and Equitable Treatment (FET)

[2]*White Industries Australia Limited v Republic of India*, Final Award (30 November 2011) UNCITRAL https://www.italaw.com/cases/1170 accessed 26 September 2025

[3]Kothari R, 'Sovereignty v. Foreign Investor Protection: Which Is Greater? Analysis of Vodafone and White Industries' (*Bar and Bench - Indian Legal news*, 14 December 2020) https://www.barandbench.com/columns/sovereignty-foreign-investor-protection-analysis-vodafone-white-industries accessed 26 September 2025

[4]Government of India, *Model Text for the Indian Bilateral Investment Treaty* (2016) https://iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf accessed 26 September 2025

[5] Prabhash R and Pushkar A, 'The 2016 Model Indian Bilateral Investment Treaty : A Critical Deconstruction' (2017) 38 NwJ Int'lL & Bus https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss1/1 accessed 26 September 2025

provision has been supplanted with 'Treatment of Investments' provision, although it retains all the normative contents of FET but distances itself from the existing jurisprudence of FET. The scope of indirect expropriation was narrowed down by a hybrid approach: on one hand the model BIT recognizes the 'sole effects test' that applies to severe or permanent deprivation, on other hand it requires that tribunals make an individualized proportionality analysis that compares the economic impact, duration, character, and motive of the measure. Moreover, by encapsulating the police powers doctrine without such limiting "rare circumstances" proviso found in some other treaties, it has tilted the balance in favor of host states and thus allowed considerable regulatory freedom while simultaneously cutting down on protection of investors. The 2016 Indian Model Bilateral Investment Treaty (BIT) allows investors to transfer funds associated with their investments, including capital, profits, dividends, and interest; however, this right is subject to domestic legislation, the principle of good faith in the enforcement of regulatory frameworks (such as taxation, insolvency, and labor laws), and temporary limitations in situations involving significant balance of payments or macroeconomic challenges. This represents a departure from prior extensive assurances of unrestricted transfers by intentionally incorporating protections that uphold the regulatory and macroeconomic autonomy of the host nation.

India is not alone in its criticism, Governments of Venezuela, Bolivia, and Ecuador have claimed that the social and political ends that their citizens desire have been hampered by their BITs and the Investor State Arbitration claims of international investors. Argentina government is a stark example of this, more than 40 claims were made against the Argentine government as a result of the emergency measures used to address the 2002 financial and economic crisis[6].

Global South as Claimants

The controversy around the MFN clause in White v Industries happened in 2011, by 2015 India had already developed a robust model BIT ousting the application of MFN. Yet in the same year an Indian company by invoking the MFN clause in India-Indonesia BIT initiated arbitration proceedings[7]. In order to fetch favourable terms from Indonesia's third-country treaties, the company argued that through MFN clause it is entitled to the 'full protection and

[6] Armand de Mestral, 'The Impact of Investor-State Arbitration on Developing Countries' (CIGI, 22 November 2017) https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries accessed 30 September 2025

[7] *Indian Metals & Ferro Alloys Limited v Republic of Indonesia*, Award (29 March 2019) PCA Case No 2015-40 https://www.italaw.com/cases/8019 accessed 30 September 2025

security' clause of the Indonesia–Germany BIT. Importing this cause of action, the Indian investor indirectly argued that Indonesia's putative regulatory and contractual intervention had violated a stability obligation, an obligation implicit in the 'full protection and security clause'. This framing of the argument that otherwise may not have been available under the India–Indonesia BIT alone was made possible by taking not only a creative but an expansive understanding of MFN provisions.

One of the most important shift in Investment arbitration's is that of the Fair and Equitable Treatment standard now inclusive of investors' legitimate expectations like stability in regulatory affairs. The expansion of FET standard, which also happens to be one of the most cited breaches in ISDS, was initially a result of a rising number of investors from Global North claiming protection under these standards. Overtime, the creative interpretations of various tribunals culminated in FET clause necessitating a "stable and predictable legal and business environment." Now that Global South investors initiated disputes are on the rise these investor protections are being frequently cited. Chinese enterprises going overseas through such initiatives as the Belt and Road Initiative are now also citing stability and expectations in host state claims. Beijing Urban Construction Group (BUCG) v. Yemen[8] is an apt illustration of this pattern wherein Chinese investors have cited legitimate expectations and stability apart from direct takings. As part of the Belt and Road Initiative, numerous corporations have invested in infrastructure and natural resources in volatile areas, which are naturally subject to unexpected local policy shifts. As a result of this, investors have looked to BIT protection. In the BUCG v. Yemen award, which was concerned with a contractual agreement for an airport terminal that was subject of disturbances caused by civil unrest. The Chinese claimant has claimed that Yemen thwarted its treaty rights and 'legitimate expectations', which necessitated the tribunal to confirm jurisdiction over a Chinese SOE (State owned enterprise) and Yemen's characterization of the dispute as a contractual grievance only. In 2017, the tribunal of ICSID ruled in favour of jurisdiction, dismissing Yemen's argument that disputes were contractual and confirmed BUCG's status as a protected investor despite being State owned. The ruling is indicative of perhaps a dangerous trend that Chinese investors may employ BITs to make states responsible for interfering with contracts as a precedent to advocate FET and violations of stability if state measures upset investment predictability even during crises.

[8] *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30 https://www.italaw.com/cases/5904 accessed 30 September 2025

Doctrinal Analysis

The above discussion is evidence of dualism, TWAIL scholarship fails to explain this dualism or more aptly the oscillation of Global South countries. TWAIL scholars like B.S. Chimni[9] effectively characterize bilateral investment treaties as tools of "accumulation by dispossession" that narrow the policy space of developing countries, this structural criticism while true also runs the risk of being reductionist, it does not factor in the agency of Global South. As Prabhash Ranjan[10] reminds us, TWAIL frequently overlooks those moments when ISDS tribunals have confirmed a host country's right to regulate, or when developing government authorities have themselves misused public power against foreign investors[11]. This tension is immediately germane to the paradox of inquiry of this paper that is Global South countries criticize investor protections as neo-colonial restraints when they are respondents but curiously silent when their own transnational firms exploit those same protections offshore. Here, South–South arbitration presents us both halves of the blind spot; on the one hand, the ongoing structural asymmetry that Chimni highlights, and on the other, selective opportunism and governance failure that Ranjan flags. They imply that Global South's contradictory practice is not simple hypocrisy but a structural status of an asymmetric system wherein states move between victimhood and complicity.

Roberts[12] has provided a framework of assessing reform strategies, she divides it between- incremental, systemic and paradigmatic. Her typology is effective in understanding how the 'dualism' manifests itself in reform debates. The underlying thesis to her typology is that depending on the interests of the economies they fall under one of these reform types. For example, EU is a champion of systemic reform because it seeks a multilateral investment court. Paradigmatic reform states like Brazil and South Africa have rejected investor state arbitration in favour of domestic remedies, mediation, and state-to-state dispute settlement through investment facilitation models. And then there are incrementalists who would perform small adjustments to the existing system. However, global south countries display a dual role in the investment arena while still being predominantly capital-importing countries they rapid expand

[9] Chimni BS, *International Law and World Order: A Critique of Contemporary Approaches* (First paperback edition, Cambridge University Press 2018)
[10] Prabhash Ranjan, 'TWAIL's Blind Spots Concerning International Investment Law' (Afronomicslaw, 16 March 2020) https://www.afronomicslaw.org/2020/03/16/twails-blind-spots-concerning-international-investment-law accessed 30 September 2025
[11] See
[12] Anthea R, 'INCREMENTAL, SYSTEMIC, AND PARADIGMATIC REFORM OF INVESTOR-STATE ARBITRATION' (2018) 112 Am J Int'l L

in the role as capital-exporting countries. As respondents, Global South states often champion systemic or paradigmatic reforms (termination of BITs, model treaties, facilitation agreements).As home states, they revert to incremental or status quo positions, tolerating their TNCs' reliance on expansive protections.

A unified reform path towards State-Investment dispute is no longer possible in the world order that exists today and fragmentation of reform approaches is not only normal but also expected. This fragmentation however has wide ranging impact on the reform debates.

Reform Debates in the Shadow of Dualism

As Global South economies expand, their foreign direct investment (FDI) goes outward, frequently into areas of perceived political or legal weakness. China's "Go Global" and Belt and Road campaigns is the perfect illustration of this phenomenon. Because of such campaigns China now finds itself as a large capital exporter. As a result, China has identified ISDS as an important protection of its overseas investors' interests, especially in developing nations with poorly developed legal systems. This requirement of an efficacious international remedy drives China towards promoting the ongoing existence of an investor-state mechanism[13], placing it more firmly among the incrementalist[14] or systemic reform[15] factions.

Protective ISDS provisions like the ones China is using do protect a nation's defensive interests but conversely could also be harmful to its offensive interests. Foreign countries may use those same restrictive provisions as a pretext to put restraints on those of its own investors. This requires a compromise that a country must permit liberal ISDS provisions such that its own investors are secure in foreign countries. China has found a near perfect solution to its dualism. By adopting a "bifurcated" strategy wherein it liberalises ISDS access in its treaties to protect its outward FDI while simultaneously strengthening domestic remedy mechanisms to avoid being a respondent itself[16].

India displays higher degrees of dualism as compared to China. One, it does not fit into a single category of Roberts typology and instead displays a hybrid approach to ISDS reformation being

[13] Lin Y, '"China's Disequilibrium" in ISDS: An Interplay of China's Trade-Offs and Domestic Institutions to Investment Treaty Policy' (2024) 15 Journal of International Dispute Settlement 573 https://academic.oup.com/jids/article/15/4/573/7728519 accessed 30 September 2025
[14] Roberts, 'Incremental, Systemic, and Paradigmatic Reform' (n 12)
[15] ibid
[16] Lin, '"China's Disequilibrium"' (n 13) 45.

both a capital importing and exporting country. According to Roberts, India is the closest example of a semi-paradigmatic approach. India's 2015 model BIT requires investors to exhaust domestic remedies over a period of five years before they can initiate international arbitration[17]. Moreover, India has rejected proposals for a permanent multilateral investment court[18]. However, it is of note that India does not completely reject the idea of international dispute mechanisms rather it seeks to make international dispute mechanisms complementary to domestic courts.

China and India's comparative experiences reveal the splintered and frequently inconsistent approach of Global South states to reform discourse. This splintering has had notable impact on the reformation process of ISDS. Scholars have been attentive to the fact that the UNICTRAL Working Group III does not have a strong regional bloc of Global South countries which has in turn resulted in a reformative process steered by US and EU priorities, which emphasize procedural reforms while "shying away from substantive issues raised by the Global South."[19]

Conclusion

The paper illustrates that the Global South's dual approach of resisting expansive investor protections when respondents, yet also approving of them when their own companies invest overseas generates a persistent dualism as core to South–South arbitration. This dualism is not accidental nor superficial; rather, it is a mirror of the structural unevenness of the international investment regime itself, as well as selective Global South agency that shifts between that of a victim and an accomplice. India's restrictive 2015 Model BIT and its concomitant use of older liberal treaties overseas are an example of this unresolved tension, whilst China's divided approach of liberalising ISDS protections overseas and bolstering remedies at home illustrates a contradictory but dualistic strategy of its own.

This dualism has far-reaching implications for ISDS reform. As Anthea Roberts' typology indicates, states belong to incremental, systemic, or paradigmatic reform factions. But Global

[17] Ranjan and Anand, '2016 Model Indian BIT' (n 5).
[18] PTI, 'India rejects EU, Canada's attempts for global investment agreement' *The Economic Times* (New Delhi, 23 January 2017) https://economictimes.indiatimes.com/news/economy/foreign-trade/india-rejects-eu-canadas-attempts-for-global-investment-agreement/articleshow/56737494.cms accessed 30 September 2025.
[19] Naimeh Masumy, 'ISDS Reform: The Dimming Yet Discerning Voices of the Global South States' *Opinio Juris* (1 September 2021) https://opiniojuris.org/2021/09/01/isds-reform-the-dimming-yet-discerning-voices-of-the-global-south-states/ accessed 30 September 2025.

South states cannot be consistent in any given camp because their dual status as capital exporters and importers fixes them in contradictory positions. As respondents, they advocate systemic or paradigmatic reforms to recover sovereignty. As home states, they accept or even promote incremental tweaks that keep investor protection intact for their outward FDI. Fragmentation is the result: Global South voices are split and thus diluted in multilateral platforms like UNCITRAL Working Group III, where procedural priorities of the US and EU lead and substantive interest of developing states is marginalized. The reform process is thus unlikely to bring about a harmonized transformation of ISDS. Rather, what results is pluralism: a quilt of models and disjointed reform trajectories indicating divergent interests. This result is especially expensive for the Global South. Unless the states reconcile their dual functions, reform suggestions will keep being discredited as self-serving, and structural asymmetries of the investment regime will endure behind a veil of procedural change.