

# **A New Era of Foreign Investment Law and Policy? The Crisis of the Classic Theory and the Challenge of Regulation**

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## ***Abstract***

*This article asks whether and to what extent successive economic crises, including the one which started in 2007, have weakened the hold of the classic approach to foreign investment in the field of foreign investment regulation. It explores this question taking into account the apparent shift toward a multipolar world signalled by the emergence of the BRICS countries. It argues that the decline of the post-war superpower coupled with the absence of its replacement in a multipolar world order has prevented the emergence and implementation of a much needed new theoretical approach to foreign investment able to replace the classic theory.*

## **Introduction**

Under the influence of economic neoliberalism, which reached its apogee in the 1990s, the classic theory occupied a dominant position in the field of foreign investment law and policy. The post-war organisation of economic power, with the United States in its driving seat; the policies implemented by the Bretton Woods Institutions (i.e. the International Monetary Fund (IMF), the World Bank and the World Trade Organisation); and their influence on domestic legislation, particularly by means of Bilateral Investment Treaties

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(BITs) signed between capital importing and capital exporting countries, all posited the beneficial role of foreign investments as indisputable certainty.

However, since the connections between indiscriminate capital inflows and financial crises have started to be made and the emergence of the BRICS countries has pointed in the direction of a multipolar world order, the uniformly beneficial effects of investment liberalisation have been called into question. While reflecting on the theoretical controversies that have emerged as a result of this conjuncture, this article argues that the decline of the post-war superpower coupled with the absence of its replacement in a multipolar world order prevents the emergence and implementation of a much needed new theoretical approach to foreign investment.

Besides the classic theory, two other theoretical approaches have emerged with respect to foreign investment, namely the dependency theory and the middle-path theory. Contrary to the classical theory, according to which foreign investment leads to employment, growth and development, dependency theories, formulated by Latin American economists and political philosophers in the 1960s, saw foreign investors operating in the interest of their parent company or home state, leaving the host state unable to achieve the economic growth celebrated by the classical theory. Hence, this theory critiques the dependence of the host (usually capital importing) state on the home (usually capital exporting) state which foreign investment is likely to engender.

The middle ground between these two approaches, as evinced by its name, is occupied by the middle-path theory which accepts that foreign

investment might have beneficial effects on the economy of the host state, but warns this is possible only if appropriate regulation is put in place to make sure the investment is subject to appropriate conditions.<sup>1</sup> These three theoretical approaches differ as to their consideration of foreign investment's potential to produce beneficial effects, with the classical theory seeing them as a natural and automatic outcome, dependency theories viewing them as an impossibility and the middle-path approach considering them subject to the enactment of certain conditions, usually referred to as performance requirements. Hence, the examination of this potential is what is common to all aforementioned theories.

This correlation is also what permits the formulation of the 'three moments' identified by Trubek and Santos as characteristic of the Law and Development discipline.<sup>2</sup> According to the authors, the first moment corresponds to the period between the 1950s and the 1960s, when the aftermath of World War II and the reconstruction of societies demanded an interventionist and active state. In the 1980s, neoliberal thinking and the primary role this system of thought attributed to the market in regulating economic activities resulted in the emergence of the second moment which witnessed the critique and withdrawal of state intervention. Although the formulation of the classic theory goes back to the 1950s when Lewis and Rostow attributed the reasons for the 'underdevelopment' of certain societies to the lack of capital that was necessary to start up the industrialisation

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<sup>1</sup> Sornarajah, M, *The International Law on Foreign Investment* (3<sup>rd</sup> ed, Cambridge University Press 2010) 47-60

<sup>2</sup> Trubek, David M and Santos, Alvaro, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 1-4

process, it is with the second period that policies informed by the classic theories started to be widely implemented. In order to fully comprehend this shift in policy-making and economic development thinking, one must examine their political and historical background.

In the early 1990s, the end of the Cold War and the dissolution of the Soviet Union led to new states entering the international market, competing with capital importing (i.e. often developing) states to attract multinational companies, and leaving the United States as the one and only superpower. The prevalence of free market theories in the United States and Europe, the triumph of capitalism, and the belief that multinational companies should operate freely without restrictions - as they were considered the channel for further globalization - provided the conditions for the uniform dominance of the classic theory. This uniformity can be traced back to the policies implemented during this period by the International Monetary Fund (IMF) and the World Bank, which subscribed to what became widely known as the 'Washington Consensus', that is the belief in liberalisation, deregulation, privatisation, and reduction of public spending.

Financial aid provided by these institutions, particularly to those countries which had experienced the debt crisis of the 1980s, was often made conditional on the adoption of neo-liberal policies informed by such consensus.<sup>3</sup> This was for instance the case in 1982 when, after having considered withdrawing resources from the IMF, the Reagan administration obtained the introduction of conditionalities as an integral part of the

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<sup>3</sup> Sornarajah (n 1) 48-53

organisation's rescheduling of debt. 'The IMF and the World Bank', David Harvey notes, 'thereafter became centers for the propagation and enforcement of "free market fundamentalism" and neoliberal orthodoxy.'<sup>4</sup>

Albeit the dominance of the classic approach was absolute at this point, this was not because of conclusive evidence or empirical data. As Babb argues, the United States 'imposed' the Washington Consensus on International Financial Institutions (IFIs) through 'normative and coercive' means. Referring to normative means does not imply that neoliberal theories were orchestrated by the political power of the United States alone. However these theories and policies were actively selected and promoted, even funded, as they were particularly consistent with the US political and economic interests, particularly with regard to the opening up of foreign markets for its products. Likewise, coercion does not necessarily translate into military action. As the example of the Reagan administration mentioned above demonstrates, funds can be more persuasive than guns.<sup>5</sup>

Therefore, IFIs made their loans to (mainly developing) countries conditional on factors that had very little to do with the repayment of the loan and more with the dissemination of their preferred policies. This tactic had long been enforced by IFIs: however, while earlier on conditionalities were strictly concerned with fiscal and monetary areas, the 1980s and 1990s saw conditionalities employed as a means to impose political and structural

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<sup>4</sup> Harvey, David, *A Brief History of Neoliberalism* (Oxford University Press 2005) 29

<sup>5</sup> Babb, Sarah, 'The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor' (2013) 20(2) *Review of International Political Economy* 1

reforms, hence the term 'governance conditionalities'.<sup>6</sup> Capital importing states were in effect 'forced' to align their policies with neoliberal theories; since they were in need of foreign capital and seeking to attract multinational companies, these states took major steps towards liberalisation and deregulation of their markets.

A rather representative example is the case of Mexico, which under the Salinas administration conducted a five-year plan to achieve trade liberalisation, culminating in the promulgation of the Foreign Investment Act of 1993.<sup>7</sup> This reform was also part of Mexico's effort to conform to the requirements of the North American Free Trade Agreements (NAFTA). One of the most important aspects of the overhaul concerned the infamous constitutional provision of the Calvo Clause which, although it was not amended, saw various measures being taken towards its neutralisation.<sup>8</sup> The implications of restricting policy autonomy are crucial, in particular from the perspective of a capital importing (developing) state. The state puts itself in a voluntary restraint regime by conferring some of its key regulatory powers to international institutions attempting to ensure market efficiency and

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<sup>6</sup> Chang, Ha-Joon, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury Press 2007) 32-33

<sup>7</sup> Vargas, Jorge A, 'Mexico's Foreign Investment Act of 1993' (1993) 16 *Loyola of Los Angeles International & Comparative Law Review* 907

<sup>8</sup> The Calvo Doctrine refers to 'a body of international rules regulating the jurisdiction of governments over aliens and the scope of their protection by their home states, as well as the use of force in collecting indemnities'. See <http://www.britannica.com/EBchecked/topic/90348/Calvo-Doctrine>> accessed 4 January 2013

freedom. Stephen Gill refers to this phenomenon as the 'new constitutionalism'.<sup>9</sup>

The limitation of states' policy autonomy in favour of foreign investors was achieved by means of various legal provisions: from soft law instruments such as the guidelines issued by the World Bank to more binding arbitral awards; from BITs granting pre-entry and post-entry National Treatment and consequently reducing states' ability to employ performance requirements, to the multilateral agreements concluded during the same period by the World Trade Organisation (i.e. TRIPS, GATS and TRIMS) which provided for investors' market access, the underlying rationale was the same. In accordance with the classic theory, further protection and liberalisation of foreign investment would undoubtedly benefit the economy of the host state.<sup>10</sup>

With time however it became apparent to those capital importing countries which had opened up their markets to foreign investors that they did not necessarily experience the growth and development promised by neoliberal doctrines, and this cast serious doubts on the merit of the classic theory. The financial crises which unfolded in the 1990s constituted the turning point in theoretical debates concerning foreign investment, eventually leading to a shift within the IFIs which, by adopting the so-called Post-Washington Consensus, formally recognised that imperfect markets are not necessarily superior to imperfect states.<sup>11</sup> These circumstances led to the

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<sup>9</sup> Schneiderman, David, 'Investment Rules and the New Constitutionalism' (2000) 25 *Law & Social Inquiry* 757

<sup>10</sup> Sornarajah (n 1) 48-53

<sup>11</sup> Öniş, Ziya and Şenses, Fikret, 'Rethinking the Emerging Post-Washington Consensus' (2005) 36 *Development and Change*

'third moment' in the Law and Development discipline, which is what we are currently experiencing according to Trubek and Santos. Because the contours of this moment are yet to be clearly demarcated, one may trace only its basic characteristics and attempt to identify the emerging general norm, that of 'appropriate deregulation', with regard to the relationship between markets and the state.<sup>12</sup>

### **The First Cracks in the Classic Theory**

During the period 1994-2001, six developing countries, namely Mexico, Brazil, Korea, Malaysia, Thailand and Argentina, suffered severe financial crises, the effects of which are still apparent. The factors contributing to these crises varied, and while it is problematic to attribute any single explanation to very complex and different phenomena, one may trace common denominators. In their effort to promote development, states liberalised their markets to attract foreign investors so as to increase capital inflows.<sup>13</sup> States' financial liberalisation in conjunction with excess liquidity in international financial markets led to a sudden surge of capital inflows in their economies.

However, the inability of host states' markets to absorb them created a problem known as 'inflow-absorption'.<sup>14</sup> This is recognised to be a major contributing factor leading to instability, particularly when abrupt reversals of flows of capital appear because of what Chang refers to as the 'herd

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<sup>12</sup> Trubek and Santos (n 2) 8

<sup>13</sup> 'The movement of money for the purpose of investment, trade or business production', see <<http://www.investopedia.com/terms/c/capital-flows.asp>>

<sup>14</sup> Palma, Gabriel, 'The Three Routes to Financial Crises' (2002) International Capital Markets: Systems in Transition 297



behaviour' of foreign investors.<sup>15</sup> While these events have led to the questioning of the assumptions on which the classic theory is based, scholars disagree on the conditions that would need to be met for the foreign investment to be beneficial to the economy of the host state. Hermes and Lensink, for instance, consider the presence of a well organised and developed financial system a necessary pre-requisite. According to them, a sophisticated financial system constitutes the precondition for the recipient economy's ability to allocate capital inflows strategically.<sup>16</sup> Borensztein, De Gregorio and Lee argue that technological diffusion is a desired effect of foreign investment, which is a much needed ingredient of economic growth. However the entry of multinational companies - often taken as the main source of technological advances in capital importing countries - does not suffice to achieve such outcomes. This is because in order for the host economy to receive and successfully adapt the technology it must have a minimum threshold stock of human capital, that is, a certain level of education and training, which are pre-requisites for such transferral.<sup>17</sup>

Another study, conducted by Colen, Maertens and Swinnen, conditioned the positive impact of foreign investment on the host state's absorptive capacity, as well as on factors related to the type of foreign

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<sup>15</sup> Chang (n 6) 86-87

<sup>16</sup> Hermes, Niels and Lensink, Robert, 'Foreign Direct Investment, Financial Development and Economic Growth' (2003) 40(1) *Journal of Development Studies* 142

<sup>17</sup> Borensztein, E, De Gregorio, J and Lee, JW, 'How Does Foreign Direct Investment Affect Economic Growth?' (1998) 45(1) *J International Economics* 115

investment and the specific economic sector in which it occurs.<sup>18</sup> For instance, although there is no agreement on the matter, many scholars point to the fact that foreign direct investment is preferable to portfolio investment as a growth and development strategy. Indeed the sanctification of all types of foreign direct investment has long begun to decline, since short term unregulated investment may offer a temporary boost to the recipient economy, but in the long term the repercussions may prove catastrophic.<sup>19</sup>

This is what Radelet and Sachs, for instance, have argued in the context of the Asian financial crisis, which they saw due to a large extent to the overly rapid financial liberalisation.<sup>20</sup> This is why a more holistic approach is needed, one that contemplates slower liberalisation to allow the state to adapt to the new circumstances, develop its financial system, and educate its population. Such an approach should also include the ability to adopt policies that favour long-term over short-term foreign investment, as argued by Bengoa and Sanchez-Robles who have examined data from 18 Latin American countries.<sup>21</sup> Chile, for instance, has been able to avert the impact of the 'tequila effect',<sup>22</sup> which struck most Latin American countries, by adopting

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<sup>18</sup> Colen, Liesbeth, Maertens, Miet and Swinnen, Jo, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence' (2009) 3 Human Rights & International Legal Discourse 177

<sup>19</sup> Chang (n 6) 88-102

<sup>20</sup> Radelet, Steven and Sachs, Jeffrey, 'What Have We Learned, So Far, from the Asian Financial Crisis?' (Mimeo, Harvard Institute for International Development 1999)

<sup>21</sup> Bengoa, Marta and Sanchez-Robles, Blanca, 'Foreign Direct Investment, Economic Freedom and Growth: New Evidence from Latin America' (2003) 19 European Journal of Political Economy 529

<sup>22</sup> 'The recent financial debacle in Mexico and its effects on other emerging markets (the Tequila effect)': Calvo, Guillermo A, 'Capital Flows and Macroeconomic Management: Tequila Lessons' (1996) 1 International Journal of Finance & Economics 207

policies that decreased short term capital inflows and regulated foreign investment. One of the most significant measures issued in 1991 was the requirement for foreign investors to deposit 20 per cent of their profit at the central bank for a period between 90 and 365 days. In 1992 this percentage was increased to 30 per cent for a period of one year. By implementing these policies Chile discouraged short-term investment and at the same time was able to monitor capital inflows.<sup>23</sup> Albeit presenting numerous problems, like profound social inequalities, it is not surprising that the Chilean case has been cited as example of 'appropriate deregulation'.

This new wisdom has not only called into question the main tenets of the classical theory but also challenged the Washington Consensus. The fact that these institutions pressured developing markets into premature and rapid liberalisation and the undeniable link of the latter with consecutive economic crises in different parts of the world, as mentioned above, undermined profoundly the effectiveness and authority of these institutions. Moreover, the Washington Consensus could not explain the existence of stable emerging economies which did not follow the neoliberal model in many key aspects. The economies known as the Asian tigers, for instance, liberalised their markets gradually and only partially, while maintaining control on short-term investment and attempting to attract long-term investment.

Severe criticisms against the policies of the IMF and the World Bank led to a slight, although significant, shift in their approach from one of

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<sup>23</sup> Cowan, Kevin and De Gregorio, José, 'Exchange Rate Policies and Capital Account Management: Chile in the 1990s' in Reuven Glick (ed), *Managing Capital Flows and Exchange Rates: Perspectives from the Pacific Basin* (Cambridge University Press 2011) 465-470

absolute liberalisation to a relatively more cautious, albeit conservative, approach. While market liberalisation remains a fundamental tenet, the Post-Washington Consensus acknowledges that the relationship between the market and the state is complementary rather than exclusionary. Therefore, without turning its back on neoliberal theory, the new wisdom acknowledges that states need some degree of policy autonomy and certainly more space for regulating foreign investment to make sure it is beneficial to their economies.<sup>24</sup>

The Post-Washington Consensus has generated a lively debate among scholars as to whether it represents a novel theoretical approach that moves away from neoliberalism or is simply an attempt to reproduce the same policy, while enacting it with different means. Ruckert, for instance, emphasises the poverty alleviation measures of the IFIs which would seem to point to a softening of the neoliberal agenda. However, he goes on to argue, this is not a real departure from the past wisdom, which also included 'social issues', but rather a reformulation of neoliberalism, what he terms 'inclusive Neoliberalism', which extends its reach as more spheres of life are regulated.<sup>25</sup>

That not much has changed is demonstrated by the fact that while this variant of neoliberalism considers economic growth dependent on poverty reduction, at the same time it makes wealth redistribution unfeasible by means of policies that lead to capital concentration, as was for instance the

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<sup>24</sup> Öniş and Şenses (n 11)

<sup>25</sup> Ruckert, Arne, 'Towards an Inclusive-Neoliberal Regime of Development: From the Washington to the Post-Washington Consensus' (2006) 39(1) *TRAVAIL: Capital et Société* 1

case with the rising oligarchy in Russia after the neoliberal 'shock therapy' in 1990.<sup>26</sup> In an attempt to respond to the grim economic reality that neoliberal policies had engendered (as well as the obvious inadequacy of their policies), the IFIs are reacting spasmodically trying to cover lacunae emanating from the previous one-size-fits all approach. The Post-Washington Consensus is therefore only euphemistically a new consensus: at best it remains a vague concept, characterised by conflicting interpretations and interests.

The tenets of the classic theory have certainly been challenged by successive crises and the wealth of information we have on the failure of past neoliberal policies. This has, however, not led to the emergence of a new consensus: there is certainly an appreciation of the limits of the one-size-fits-all approach of the past and of the need for 'appropriate deregulation', however, as various scholars have pointed out, what we are dealing with is no longer the Washington Consensus but 'Washington Confusion'.<sup>27</sup>

### **Shift of Power: The Emergence of BRICS**

In 2007, another economic crisis constituted the catalyst for thinking again about the need for appropriate regulation. This time, the crisis struck so-called developed economies, starting with the USA. Claims about the inadequacy of the classical theory, which had already appeared during the financial crises of the previous decade, have now become more influential. The 'Empire' that had given the United States the power to dictate the rules of

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<sup>26</sup> Harvey (n 4) 12-17

<sup>27</sup> Naim, Moises, 'Washington Consensus or Washington Confusion?' [2000] Foreign Policy 87

the post-war game, including the 'appeal' and implementation of the classic theory of foreign investment around the world,<sup>28</sup> is now fragmented.

The new emerging economies, in particular Brazil, Russia, India, China and since 2010 South Africa (BRICS), have transformed themselves from recipients to sources of foreign investment and have become influential forces in the international market. They have various political and historical backgrounds, strategies and approaches.<sup>29</sup> For instance, 'While the internationalization of Brazilian and Indian companies is primarily driven by economic motives, many Chinese and Russian firms receive substantial political support from their governments to invest abroad, especially in strategically important industries'.<sup>30</sup> These new protagonists in the foreign investment scene have their unique *modus operandi*, while old powers, in particular the United States, are shifting their focus from the aggressive market access approach of the past to an approach that concentrates primarily on domestic policies, particularly in light of the effects of the crisis on employment and growth. As Lexington has put it, referring to the 'Obama Doctrine': 'The president has plans; but they revolve around fixing America, not the world'.<sup>31</sup>

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<sup>28</sup> Rodrik, Dani, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform' (2006) 44 *Journal of Economic Literature* 973

<sup>29</sup> Alvarez, José E, 'Contemporary Foreign Investment Law: An Empire of Law or the Law of Empire?' (2008) 60 *Alabama Law Review* 943

<sup>30</sup> Gammeltoft, Peter, 'Emerging Multinationals: Outward FDI from the BRICS Countries' (2008) 4(1) *International Journal of Technology and Globalisation* 5

<sup>31</sup> Lexington, 'The Obama Doctrine: Barack Obama's foreign-policy goal in his second term: to avoid costly entanglements', *The Economist* (London, 1 December 2012)

The concentration of the United States on its internal affairs may seem like a turning point in the direction of international economic affairs; however it still remains the leading power, holding its weighted rights within the IFIs.<sup>32</sup> As noted earlier, the confidence in the IFIs and their policies has waned, and this is demonstrated by the lending statistics of the IMF. In particular, after the Argentinian crisis, Latin American states have hesitated to borrow from the IMF and East and Southeast Asian states have refrained from seeking arrangements with it.<sup>33</sup> In light of the above, the following question arises: does the new reality which is still emerging and taking shape, as evidenced by the debates on the existence of a third moment in Law and Development, suffice to claim that we are witnessing the beginning of a new era of foreign investment policy?

The proliferation of BITs points to the confusion existing with respect to this area of international law and policy, as well as to the impossibility of arguing that a new theory that balances liberalisation and deregulation is in place. This is not to say that changes are not underway: the fact that the flow of investment is no longer unidirectional (i.e. with capital importing countries usually corresponding to developing countries) and that the BRICS countries are requesting more regulatory autonomy has led the United States and other capital exporting countries to deviate from the strict neoliberal policies of the

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<sup>32</sup> These are voting rights commensurate to the financial contribution made by the state

<sup>33</sup> Babb (n 5)

past.<sup>34</sup> BRICS countries have also adopted more heterodox policies in order to make sure that foreign investment is beneficial to their economies as much as they are to foreign investors. To varying degrees, they have all adopted industrial policies, making sure that foreign investment is sought and encouraged in strategic sectors, for instance by offering tax breaks and other incentives.

In short, the BRICS have followed an interventionist policy and regulated foreign investments by means of performance requirements, thus enacting different forms of state activism.<sup>35</sup> This common element, this approach centred on 'appropriate deregulation', is the very essence of the middle path theory Sornarajah refers to. The global economic crisis and the emergence of new powers in the political field have dented the hold of the classical theory and enhanced the need for a new approach to foreign investment. As alternatives to both the classic theory and the Washington Consensus, scholars have been considering the appeal of the 'Southern Consensus', the 'Beijing Consensus' and the Post-Washington Consensus (the latter analysed in the previous section). The 'Southern Consensus' is identified by Gore as a convergence between East Asian developmentalism and Latin American neostructuralism and portrayed as the main challenge to neoliberal policy.<sup>36</sup> Although this paradigm presents very interesting aspects, combining

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<sup>34</sup> Trubek, David M, 'Reversal of Fortune? International Economic Governance, Alternative Development Strategies, and the Rise of the BRICS' (2012) <[https://media.law.wisc.edu/s/c\\_638/3fwq9/eui\\_paper\\_final\\_june\\_2012.pdf](https://media.law.wisc.edu/s/c_638/3fwq9/eui_paper_final_june_2012.pdf)> accessed 6 August 2014

<sup>35</sup> Babb (n 5)

<sup>36</sup> Gore, Charles, 'The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries' (2000) 28 World Development 789



active state intervention with progressive liberalisation, it has been seen as an evolution of the Washington Consensus rather than as the emergence of a new regime.<sup>37</sup> As evidenced by its name, the 'Beijing Consensus' suggests that the success of China in the global market offers an alternative to the settled neoliberal policy. However, the devotees of the Beijing Consensus disregard the particularity of China in relation to other states and the history of its reform process, which render arguments about its international implementation unsatisfying.<sup>38</sup>

Although the search for an alternative to the classic theory and especially to its one-size-fits-all implementation is of concern to many scholars, the driving force behind the proposition and spread of a new theory is currently lacking. The unipolar system of the 1990s has given way to a plethora of states aiming to replace the previous superpower, and while the latter has been affected, it still remains the strongest actor. The BRICS, though they sometimes appear unified at the international level, cannot be considered as a group of common interests and purposes. In their meeting in New Delhi in March of 2012 they highlighted the importance of quotas reform in relation to the decision making process of the IFIs and the need for enhancing financial assistance to developing states. Nonetheless, a month later their votes for the next president of the World Bank demonstrated a clear lack of unity. Only South Africa stood by the Nigerian candidate.<sup>39</sup> This

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<sup>37</sup>Ban, Cornel, 'Brazil's Liberal Neo-developmentalism: New Paradigm or Edited Orthodoxy?' (2012) *Review of International Political Economy* 1

<sup>38</sup> Kennedy, Scott, 'The Myth of the Beijing Consensus' (2010) 19(65) *Journal of Contemporary China* 461

<sup>39</sup> Blackden, Richard, 'World Bank vote shows lack of mortar to hold BRICs together', *The Telegraph* (London, 19 April 2012)

fact is indicative of the instability and uncertainty of the forthcoming developments in the political and economic international scene.

### Conclusion

The emergence and establishment of a new theory for the conduct of international economic affairs is supposed to follow profound changes in the political and economic arena, as was the case with the classic theory and the intellectual dominance it acquired in the post-war period. The political uncertainty triggered by the decline of the United States and the emergence of the BRICS countries has more recently signalled the shift from a unipolar global system to a multipolar one. The forthcoming alliances and diplomatic balances in the international arena are likely to provide the conditions for the emergence of a new theoretical approach to the regulation of foreign investment. As it stands now, however, we seem to be undergoing a transitional period: we are in the midst of a third moment whose contours are yet to be delineated. In his attempt to predict the future political map, Edelman characterises the prevailing climate of challenge to the classic theory as a 'Broken Consensus'.<sup>40</sup>

The absence of a dominant power in the global economy prevents the emergence and consolidation of a new theory. The declining appeal of the classic theory and the discrete signs of a shift towards a middle-path approach are yet to inaugurate a new era in foreign investment regulation. To conclude, although significant challenges have been brought to the classic theory and

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<sup>40</sup> Edelman, Eric S, 'The Broken Consensus' (2010) 173(4) World Affairs 51

the policies it has inspired, its appeal has softened but not vanished; as Babb notes, the Post-Washington Consensus points not to a revolutionary but to an evolutionary transformation of neoliberal rationale and policies.<sup>41</sup>

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<sup>41</sup> Babb (n 5)

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