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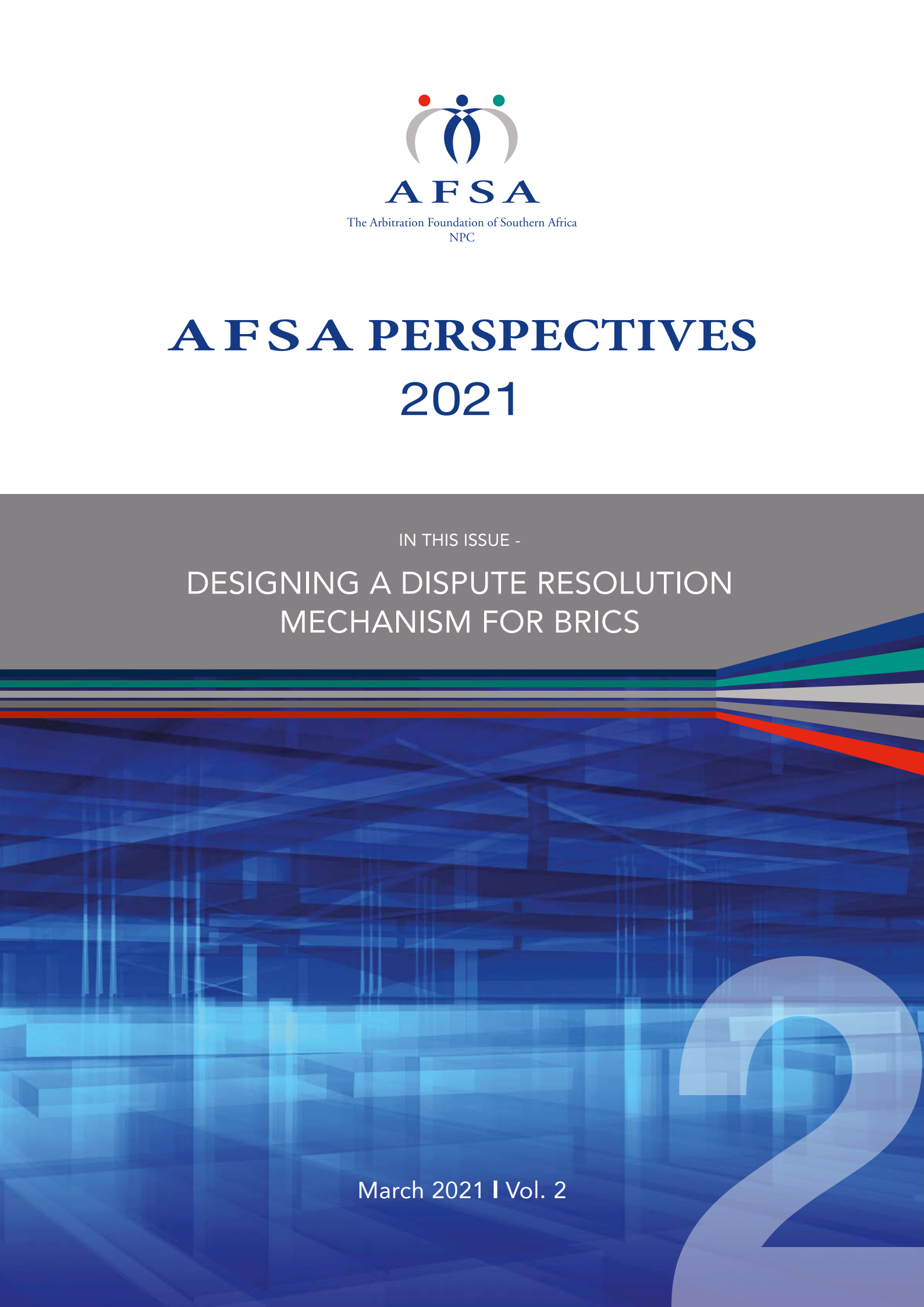
IN THIS ISSUE -

DESIGNING A DISPUTE RESOLUTION MECHANISM FOR BRICS



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2

INTRODUCTION

This edition of Perspectives tracks the progress which is being made in creating a shared Dispute Resolution Mechanism for the BRICS countries.

There are significant difficulties to be overcome in crafting such a mechanism and these are identified and examined by a number of our contributors.

Nevertheless, such a mechanism is an essential piece of the infrastructure which will be required to facilitate trade and investment within BRICS, and it has the potential to influence dispute resolution practice on the global stage.

Some preliminary work has been done by the BRICS legal communities to pioneer a model based on a fused or shared dispute resolution platform supported by the leading arbitration centres in each BRICS country.

AFSA is the designated BRICS Dispute Resolution Centre for South Africa and AFSA's Vice Chair, Lindi Nkosi-Thomas SC, who leads AFSA's project team for BRICS, reports to readers on the progress which is being made.

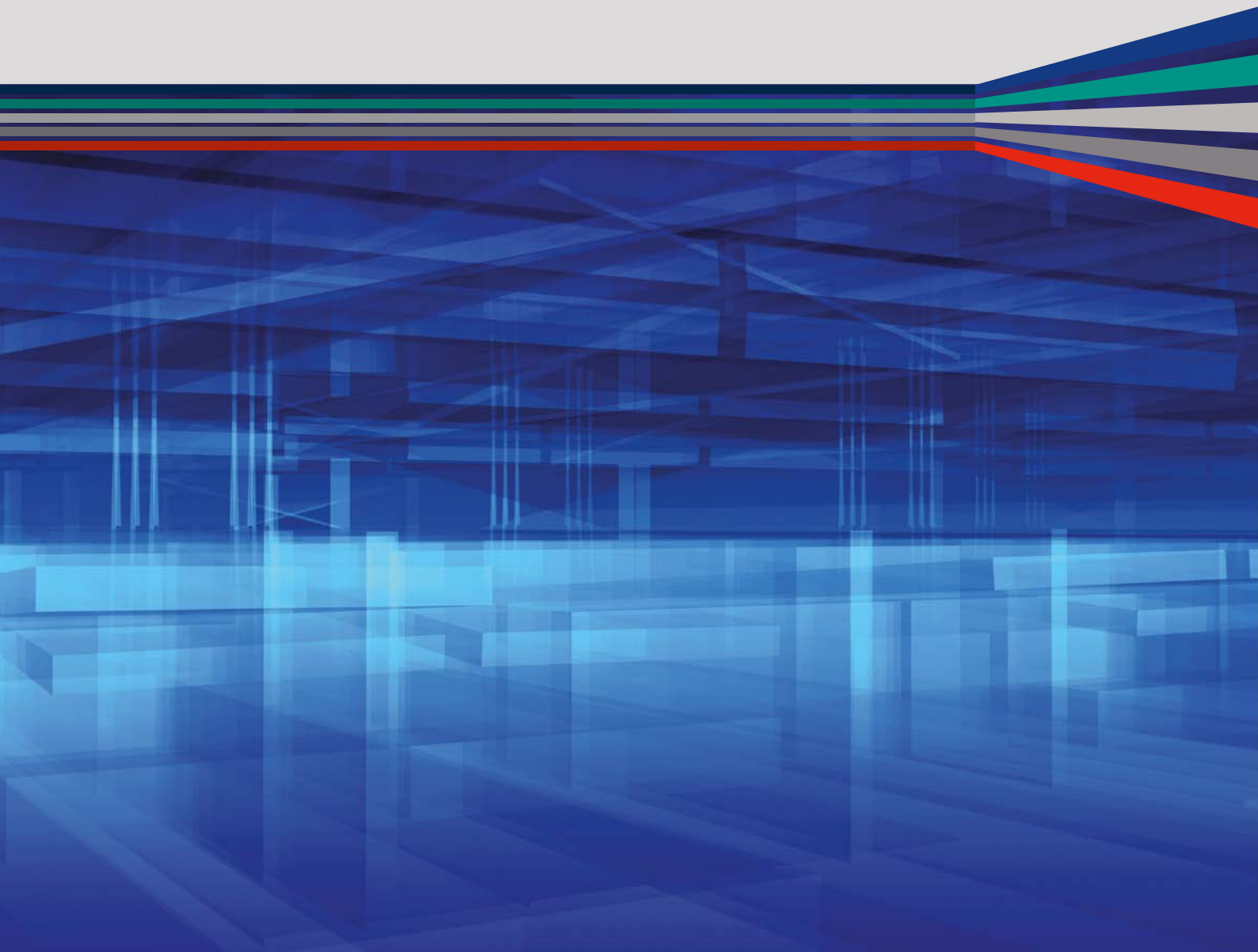
We welcome the insights of Alex Kamath from New York , who analyses the issues that might present challenges to the successful launch of the BRICS arbitral mechanism and we thank graduates of the AFSA International Arbitration Course for assessing how the BRICS arbitral mechanism can be made to work in practice.

The BRICS project is the second of the key international projects to which AFSA is committed and it will reflect the same inclusive design as its CAJAC progenitor.

I hope you will find in this edition of Perspectives an intriguing glimpse into the future.

Adv. Michael Kuper SC

INDEX



Lindi Nkosi-Thomas SC

Lindi Nkosi-Thomas SC (Lindi) was called to the Bar in 1994. The status of silk was conferred by the President of the Republic of South Africa in 2009. She has been in active practice from 1994 and has an arbitration (both domestic and international), litigation and legal advisory practice.

Lindi is a Vice-Chairperson of the Arbitration Foundation of Southern Africa (AFSA), acts from time to time as Judge of the High Court of South Africa, is a Board Member of China-Africa Joint Arbitration Centre NP (CAJAC Johannesburg) and is the Chairperson of AFSA Municipal Division.

Lindi led a team that actively supported the Government of the Republic of South Africa towards the promulgation of the International Arbitration Act 15 of 2017 (the Act). The Act has incorporated the UNCITRAL Model Law into South African law, thereby completing the South African International arbitration legal infrastructure.

NOW THAT THE BRICS DISPUTE RESOLUTION CENTRES HAVE BEEN ESTABLISHED HOW DO WE ENSURE THEY GAIN TRACTION?

By Lindi Nkosi-Thomas SC

ABSTRACT

Intra-BRICS trade and investment is on an upward trajectory.

As intra-BRICS trade and investment continues to increase, so would trade and investment disputes and the need to establish a credible dispute resolution Mechanism for the BRICS bloc.

This article celebrates the designation of the BRICS Dispute Resolution Centres and suggests the practical steps for the realisation of a standardised, efficient, credible, and competitive BRICS Dispute Resolution Mechanism.

Key Words

Board of Governors, policy direction, endorsement, Summit, Advocacy, Declaration

1. INTRODUCTION

On 17 November 2020, the Leaders of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa held the XII BRICS Summit under the theme - **BRICS Partnership for Global Stability, Shared Security and Innovative Growth**. In Paragraphs 58 and 59 of the ensuing XII BRICS Summit Moscow Declaration, the Summit:

- recognised the importance of strengthening infrastructure data-sharing to better identify investment opportunities, leverage private sector investments and meet the infrastructure investment needs of BRICS countries;
- took note of the progress made by the BRICS Taskforce on PPP and Infrastructure and look forward to further cooperation among BRICS countries and to possible modalities of NDB's engagement in this initiative; and
- commended timely measures taken by the NDB[1] in order to combat the COVID-19 pandemic and its consequences embodied in the Emergency Assistance Program aimed to provide up to USD 10 billion for Emergency Loans to its member countries.

The National Development Bank (NDB) is a multilateral development bank established by the BRICS member states[2] to **"support public or private projects through loans, guarantees, equity participation and other financial instruments" and to "cooperate with international organizations and other financial entities and provide technical assistance for projects to be supported by the Bank."**[3]

As is convention, the Seventh BRICS Legal Forum was held on 19 November 2020, themed **"Law and Legal Order: values and principles in the context of global challenges of modernity."**

Intra- BRICS trade and investment is on the rise. The the XII BRICS Summit Declaration makes plain that intra-BRICS trade and investment will continue to rise.

At the X BRICS Summit held in Johannesburg on 26 July 2018, the Russian President Vladimir Putin

1. https://g.co/kgs/YRvT6h .
2. Agreement on the New Development Bank – Fortaleza, 15 July 2014.
3. Ibid.

called on the BRICS member states to increase trade partnerships and noted that intra-BRICS trade was already at $102 billion.[4]

Diplomatic relationships between South Africa and the People's Republic of China were first established in 2009, during the Nelson Mandela tenure in government.[5] In 2017, bilateral trade between the two reached US$ 39.17billion. Chinese companies also invested close to US$ 15.2 billion in stock FDI between 2003 and 2017.[6] The "Belt and Road Initiative—BRI", the Forum on China-Africa Co-Operation—FOCAC, and BRICS provide a three-pronged approach to South Africa–China's trade relationship.[7]

South Africa is China's largest destination of FDI in Africa. More than 180 large Chinese companies have established a presence in South Africa.

By way of example, FAW has established a truck manufacturing plant in South Africa.[8] The Industrial & Commercial Bank of China (ICBC) acquired a 20% stake in the Standard Bank of South Africa.[9] In the mining industry, Jinchuan Group, and the China–Africa Development Fund acquired a stake in South Africa's We Sizwe Platinum. Beijing Automobile International Corporation (BAIC) has established a motor vehicle manufacturing plant in South Africa. Hebei Iron and Steel Group (HBIS) acquired a majority stake in Palaborwa Mining Company Limited (PMC). Longyan Power Group Corporation has invested in South Africa's wind energy industry. Ji Dong Development Group invested in the Mamba Cement project.[10]

Chinese banks, such as Industrial and Commercial Bank of China (ICBC), Construction Bank of China, Bank of China (BOC), China Development Bank, have established a presence in South Africa and offer loans to South African and Chinese companies, established in South Africa.[11]

In 2018, during a visit to South Africa, President Xi Jinping announced investments in the range of US$ 14.7 billion. South African FDI in China topped US$ 80 billion by 2016. Companies like Naspers and South African Breweries (SABMiller) have entered into joint-venture agreements with Chinese companies.[12]

Inevitably, as intra-BRICS trade and investment continues to rise, so will commercial and investment disputes.

It was in recognition of this reality that the BRICS Legal Forum issued the V Moscow Declaration, 2017 calling upon the BRICS member states to establish BRICS Dispute Resolution Centres, within their respective jurisdictions, to create a shared dispute resolution mechanism for the BRICS trading bloc.

To that end the V Moscow Declaration, 2017 called for the establishment of a Board of Governors for policy direction, establishment of a panel of arbitrators and common institutional rules and to coordinate and fuse the functioning of the BRICS Dispute Resolution Centers already established at Shanghai and New Delhi and the proposed Centers in Brazil, Russia, and South Africa.

The VI BRICS Legal Forum held during October 2019 in Rio de Janeiro, having highlighted the **"urgent need to complete the project for the establishment of BRICS Dispute Resolution Centers within BRICS member states"**, designated the Arbitration Foundation of Southern Africa (**"AFSA"**) as the BRICS Dispute Resolution Centre for South Africa.

2. POLICY AND OPERATIONAL MEASURES REQUIRED TO ENSURE TRACTION OF THE CENTRES

The establishment of these BRICS Dispute Resolution Centres (**"the BRICS Centres"**) is a significant milestone. Now that the Centres have been established, the obligatory question becomes: "What are the policy and operational measures, that are required to ensure traction of these Centres?"

I suggest three such measures.

- First, the establishment of a Board of Governors for the BRICS Centres for policy direction (**"the First Measure"**);
- Second, the endorsement of the established BRICS

4. https://www.timeslive.co.za/politics/2018-07-26-brics-countries-vow-to-work-even closer-together.
5. The Beijing consensus. London: Foreign Policy Centre
6. Fostering intra-BRICS trade and investment: The increasing role of China in the Brazilian and South African economies, Raul Goevea et al.
7. Goevea et al, 2020.
8. Maritz, J. (2017). "Seven Chinese Companies that have Made it in Africa." Africa Business Insight, August 8th.
9. Torrens, C. (2018). "Chinese Investments in South Africa." July 25th, www.controlrisks.com.
10. Goevea et al, 2020.
11. Ibid.
12. Ibid.

Centres by the annual BRICS Summit (**"the Second Measure"**); and

- Third, advocacy (**"the Third Measure"**).

I propose to deal with these measures, in turn, below.

The First Measure

Clause 2 of the V Moscow Declaration, 2017 calls for the establishment of a Board of Governors for the harmonisation of the policies and the operations of the BRICS Centres thus far established.

A working committee made up of representatives of each member state has been established. It is currently seized with the task of drafting the uniform rules for the conduct of arbitration in the BRICS Centres using the China-Africa Joint Arbitration Centre (**"CAJAC"**) rules as a prototype. This is a significant milestone.

However, there remains further polycentric matters that require the urgent attention of the Board of Governors, such as:

- The adoption of a Constitution to provide BRICS Centres with the necessary founding agreements to govern their relationship and activities and to record their aims and objectives;
- The formulation and implementation of the governing policies of the BRICS Centres to be entrenched in the Constitution;
- The adoption and publication of the uniform rules of procedure for the resolution of disputes referred to BRICS Centres, which rules should cater for the conciliation, mediation, adjudication and arbitration of commercial and investment disputes;
- The establishment of a shared panel of arbitrators and mediators for appointment in the resolution of disputes referred to BRICS Centres;
- The representation of the BRICS Dispute Centres in all matters of common concern;
- The establishment and maintenance of a BRICS Centres' website;
- The design and adoption of a logo for the BRICS Centres as a visual imagery to represent and establish a symbolic market presence of the BRICS Centres;
- The publication of materials, brochures and informational material as may be required from time to time;
- The doing of all things as may be necessary or desirable to advance the aims, objects and interests of BRICS Centres and to ensure their efficient and proper management and administration;
- The ensuring that the major arbitral institutions, the universities and the business sector within the BRICS member states, are informed of the core-principles and values of the shared, uniform and self-contained BRICS arbitral mechanism;
- The Harmonisation of all applicable laws in each of the BRICS member states to ensure recognition and enforcement of the BRICS Centres' intra-BRICS arbitral awards; and
- The development of the Accession Protocol by means of which arbitral centres from the emerging countries, outside of the BRICS, may accede to the BRICS arbitral mechanism.

Therefore, the urgent establishment of the Board of Governors is proposed. It is suggested that such a Board of Governors be made up of two representatives from each of the BRICS member states.

The Board of Governors shall act as an official voice of the BRICS Legal Forum to the respective Governments on matters of standardisation and harmonisation. Ultimately, the BRICS dispute resolution mechanism seeks to create a bridge for the gap occasioned by the well-known disparities that exist in the bloc, in the way of legal systems, language and culture.

By way of illustration, although all the BRICS member states have ratified the New York Convention (NYC), India signed the NYC on 10 June 1958 and ratified it in on 13 July 1960, with two caveats.

Under the first reservation, India recognises and enforces binding awards from only 48 NYC notified territories, even though there are currently in excess of 160 contracting states to the NYC. South Africa and Brazil are not NYC notified territories, resulting in arbitral awards from these jurisdictions not enjoying recognition in India.[13]

In this regard St. Petersburg Declaration, 2020 provides that the Legal Forum **"urge[s] the governments to undertake on priority the issue of mutual recognition of judicial verdicts and awards amongst BRICS Member States."** This is laudable.

13. Sahil Tagotra, Ishita Mishra, Recent Developments in the Enforcement of New York Convention Awards in India.

However, this piece-meal approach to harmonization is to be eschewed in favour of a holistic and structured approach under the leadership and guidance of the Board of Governors.

Under the second reservation, India agreed to enforce NYC awards arising from relationships that are *'commercial'* in nature. As the term *'commercial'* is not defined in the Act, there is uncertainty as to its precise meaning.

In R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co. (1994), a case on the enforcement of a foreign award under the Foreign Awards (Recognition & Enforcement) Act, 1961 (the erstwhile applicable Act in India before the coming into force of the enactment 1996 Act), the question that arose was whether R.M. Investment's consultancy agreement with Boeing, could be considered a *'commercial'* agreement. The Supreme Court relied on UNCITRAL Model Law, and held that, **"the expression 'commercial' must be construed broadly having regard to the manifold activities which are part of International trade today"**, and upheld the stay of the litigious suit thus holding that the dispute was arbitrable.

The judicial systems in the BRICS member states are arbitration friendly as the above Indian case amply demonstrates.[14]

The Supreme Court of Appeal of South Africa aptly stated as follows in this regard:

> **"The South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country."** [15]

There remains, however, some disparities in the laws and procedures in the BRICS countries that require synchronisation. The Board of Governors, once established, ought to undertake an urgent wholesale audit of these laws and procedures with a view to their urgent harmonisation.

Once a standardised BRICS arbitral mechanism is firmly in place, would it then be opportune for the mechanism to be extended to the rest of the emerging countries outside of BRICS.[16]

In this regard, arbitral centres from the rest of the emerging countries world have the option of acceding to the BRICS arbitral mechanism through compliance with the Accession Protocol developed by the Board of Governors.

The Second Measure

As demonstrated above, the BRICS Centres are creatures of the BRICS Legal Forum Declarations.

The BRICS Legal Forum, being a body comprised of legal experts from each member state, takes place parallel to the annual BRICS Summit (**"the Summit"**). To this extent, it is similarly placed as the BRICS Think Tanks Council (BTTC), which is comprised of experts from each member state.

These parallel *fora* are part of the overall Summit process contributing as they sometimes do to the discussions and decisions of the Summit. The Fortaleza Declaration[17] took note of these parallel fora and specifically declared[18] in regard to the BTTC that:

> **"We welcome the BTTC Study "Towards a Long-Term Strategy for BRICS: Recommendations by the BTTC". We acknowledge the decision taken by the BTTC, taken at its Rio de Janeiro meeting in March 2014 to focus its work on the five pillars upon which the BRICS long-term strategy for cooperation will rest. The BTTC is encouraged to develop strategic pathways and action plans that will lead to the realization of this long-term strategy."**

A similar declaration endorsing the BRICS Centres ought to be sought. Such a declaration will engender visibility and credibility of the BRICS Centres, to the business and legal communities within the BRICS bloc and beyond.

It is therefore crucial that the BRICS Centres be so endorsed and recognised by the Summit.

In endorsing and recognising the Centres, the Summit

14. See also from India -Banyan Tree Growth Capital LLC v. Axiom Cordages Ltd. (2020)- enforcement of a SIAC award, and in Centrotrade Minerals & Metals Inc. v Hindustan Copper Limited (2020) – enforcement of a foreign award.
15. Zhongji Development Construction Engineering Company Ltd and Kamoto Copper Company SARL, 2015 (1) SA 345 (SCA) at paragraph 30, page 12.
16. http://steconomiceuoradea.ro/anale/volume/2014/n1/004.pdf
17. Para 62, of the VI BRICS Summit – Fortaleza Declaration, July 15,2014.
18. At para 66.

should be moved to urge the public and private sector business entities to adopt the BRICS dispute resolution clause and, having done so, refer their disputes to the BRICS Centres.

The Summit is the culmination of a year-long process of meetings of officials, politicians, and non-state actors from member countries. These actors spend the year in question trying to reach agreement on specific deliverables they hope their leaders will endorse in the Declaration, which is the summit's primary output.[19]

In this regard, may I suggest that the Board of Governors should authorise representatives of each of the BRICS Centres to liaise with their respective Governments, during this preparatory phase for the annual summit, to ensure diplomatic recognition and endorsement of the BRICS Centres already established, at the Summit.

The recognition and endorsement of the BRICS Centres at the Summit would lend invaluable impetus to this BRICS shared dispute resolution initiative.

Buy in from the public and private business communities is crucial. The advocacy that I deal with, as a third measure must, of necessity, reach these important stakeholders as well as their attorneys and transaction advisors.

Ultimately, the goal is to engender confidence in this initiative to a point that the business communities within the BRICS countries would refer intra-BRICS disputes to these specialist BRICS Centres.

The Third Measure

The last measure that I wish to propose is advocacy. Here, I have in mind a robust showcasing of the international arbitration expertise that reposes within the BRICS countries and the advantages of referring disputes to these Centres.

By way of example, AFSA, being the designated BRICS Dispute Resolution Centre for South Africa, was ranked the top arbitration centre on the African continent by the School of Oriental and African Studies (SOAS) University of London.[20] This and many other achievements of the BRICS Centres must be showcased widely.

In the work of Redfern and Hunter on International Arbitration (6th edition)[21] the authors suggest that the basic requirements of an international arbitral institution include:

- Permanence.
- Modern rules of arbitration.
- Specialised staff.
- An independent and a pro-arbitration judicial system.

There is no gainsaying that the BRICS Centres satisfy the above basic requirements.

Additionally, there are attributes such as cost, speed and the creation of a BRICS international arbitration jurisprudence that render the BRICS Centres competitive that require advocacy.

Cost

Cost in this context refers to administration costs, arbitrators' fees and disbursements, and legal costs. Currently, institutional administration costs of western arbitral institutions are significantly higher than those of arbitral centres in emerging countries. In addition to the above, travelling and accommodation costs of the parties, their witnesses (lay and expert), their local lawyers and their lawyer at the seat of the arbitration ought to be considered. Cost, therefore, is a significant differentiator which renders the BRICS Centres competitive.

In this regard it behoves emphasis that statistically, a large portion of the cost of international arbitration is occasioned by the parties' legal representatives as opposed to the arbitral institution and the arbitrator(s).

Speed

The Rules must provide for strict timeframes for the conclusion of arbitration proceedings. In this regard, arbitrators who delay the publication of their awards, without good cause, should be censured. The BRICS Centres must expressly state a commitment to the expeditious and cost-effective resolution of disputes.

BRICS Arbitration Jurisprudence

Lack of judicial precedent is a major challenge that results in conflicting decisions and a lack of consistency and predictability. It is for this reason that we propose that the BRICS Centre must cause the arbitral awards

19. https://theconversation.com/the-brics-summit-important-small-steps-but-little-to-show-on-big-issues-100847
20. https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf
21. Law and Practice of International Commercial Arbitration, 6rd Edition.

to be published in a redacted format for consistency and predictability.

Legitimacy

Abroad range of stakeholders, as stated above, must be consulted for credibility and legitimacy gains.

Appointment of arbitrators from the BRICS countries

Arbitrators from developing states are rarely appointed to international arbitration references, as can be seen from recent ICSID statistics.[22] For example, a mere 25 arbitrators handle more than half of all known investor-state arbitration cases.[23]

There is consensus that international arbitrators from emerging countries in general and, female arbitrators hardly get appointed as arbitrators in international arbitration disputes of all types.

The BRICS Centres provide an opportunity for their appointment. Furthermore, neutral arbitrators may be sourced from the BRICS countries thereby strengthening expertise intra-BRICS.

3. CONCLUSION

The 2018 International Arbitration Survey conducted by the School of International Arbitration of the University of London found that:[24]

- 97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%).
- **"Enforceability of awards"** continues to be perceived as arbitration's most valuable characteristic, followed by **"avoiding specific legal systems/national courts"**, **"flexibility"** and **"ability of parties to select arbitrators"**.
- **"Cost"** continues to be seen as arbitration's worst feature, followed by **"lack of effective sanctions during the arbitral process"**, **"lack of power in relation to third parties"** and **"lack of speed"**.
- An overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future.

The BRICS Centres should aspire to the highest standard of international dispute resolution. This project is ground-breaking and presents the BRICS countries with a unique opportunity to create a bespoke and standardised dispute resolution mechanism for intra-BRICS and emerging countries' disputes.

It is respectfully hoped that the steps suggested in this article shall be implemented to ensure a lasting success of this initiative.

22. See for example ICSID Caseload Statistics 2018-2 at 20-22.
23. See Langford M, Behn D and Lie RH Journal of International Economic Law.
24. 2017 (20) 301–331.
25. http://www.arbitration.qmul.ac.uk/research/2018/#

"Inevitably, as intra-BRICS trade and investment continues to rise, so will commercial and investment disputes.

It was in recognition of this reality that the BRICS legal Forum issued the V Moscow Declaration, 2017, calling upon the BRICS member states to establish BRICS Dispute Resolution Centres, within their respective jurisdictions, to create a shared dispute resolution mechanism for the BRICS trading bloc."

Lindi Nkosi-Thomas SC

Alex Kamath

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SETTING THE BRICS DISPUTE RESOLUTION CENTERS INITIATIVE ON THE PATH TO SUCCESS: OVERCOMING STARTUP CHALLENGES

By Alex Kamath[1]

ABSTRACT

At the Sixth BRICS Legal Forum in October of 2019, the BRICS member states – Brazil, Russia, India, China, and South Africa – issued the Rio de Janeiro Declaration. The Declaration recognized the "urgent need to complete the project for the establishment of BRICS Dispute Resolution Centers within BRICS member states." The goal of the project is to create a dispute resolution network that resolves disputes among BRICS states through arbitrations conducted by BRICS arbitrators seated in BRICS jurisdictions. Ultimately, such a network of dispute resolution would be opened up to other states that might be interested in joining. The focus of this paper is to analyze issues that might present challenges to the successful launch of this initiative and how these initiatives might be addressed. The paper identifies the needed characteristics for a successful arbitration center, using the Singapore International Arbitration Centre (SIAC) as a touchstone. Through interviews with dispute and corporate partners in the various BRICS jurisdictions, it identifies what traits such users of international arbitration would need to see in order to convince clients to use a BRICS based system vis-à-vis competition from existing players such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The paper considers what advantages the BRICS member state governments might be able to leverage to support the launch of the initiative. It also deals with the question of how to recruit a strong bench of BRICS arbitrators for the initiative and how to field a strong staff for the BRICS centers. Finally, it deals with issues relating to investment arbitration, which is included as part of the initiative along with international commercial arbitration.

Key Words

BRICS dispute resolution; emerging economies international arbitration; arbitration center creation

INTRODUCTION

The BRICS member states – Brazil, Russia, India, China, and South Africa – comprise one of the most important economic blocs in the world. Currently, the BRICS "brings together five major world economies, comprising 43 percent of the world population, 30 percent of the world GDP and a 17 percent share of the world trade."[2] The importance of the BRICS bloc of countries is only expected to increase, with projections anticipating that "their collective clout will account for over 50% of global GDP by 2030."[3] The growth of developing and emerging economies, led by the BRICS, raises its own sets of issues with relation to dispute resolution. According to the United Nations Conference on Trade and Development (UNCTAD), as the emerging economies continue to experience growth, the number of disputes stemming from this growth will increase. As a result, on the investor-state side of the equation, "since developing countries are hugely under-represented in existing arbitration institutions, which are dominated by experts and

1. Alex Kamath is J.D. graduate from Harvard Law School. He is a law clerk with Debevoise & Plimpton in New York.
2. Dias Simões, Fernando. "A Dispute Resolution Centre for the BRICS?." The BRICS-Lawyers' Guide to Global Cooperation (Cambridge University Press, 2017, pp. 287-308 (2017) at p. 295.
3. BRICS Nations Look at Establishing A Common Arbitration Centre, (2019), https://www.silkroadbriefing.com/news/2019/10/16/brics-nations-look-establishing-common-arbitration-centre/.

practitioners from the West," negative implications "for ensuring inclusive and sustainable growth in developing countries" could result "since the structural bias of the current mechanism could pose trouble in solving disputes involving countries' socio-economic and public interests."[4] While the ICSID system for solving these disputes have been adopted by 152 of 192 nations in the world, "the hostility of Brazil, Russia, India and South Africa towards ICSID is a critical concern."[5] The BRICS Legal Forum, through the Rio de Janeiro Declaration of 2019, has now presented an alternative forum for the resolution of international commercial and investment arbitration disputes through the BRICS Dispute Resolution Centers Initiative. The goal is to implement a plan to establish a Governing Board of the BRICS Dispute Resolution Centers "to provide at the earliest policy direction to the five (5) BRICS Dispute Resolution Centers, to formulate the BRICS Arbitration and Mediation Rules and to create a uniform criteria for the establishment of the BRICS Arbitrators and Mediators Panel and to further expand the institutional network by admitting dispute resolution centers from emerging markets and developing countries which subscribe to the BRICS network and to develop affiliation and admission criterion for the same."[6] More broadly, the committee on the BRICS Dispute Resolution Centers aims to study the "trends faced by the development of arbitration in the BRICS countries as well, continuously build expert resources, and improve the internationally accepted arbitration rules of independence, fairness, professionalism and efficiency."[7] However, "the existence of other reputed and well-trusted arbitration forums" pose a "major challenge" to the BRICS Centers, when they are all established.[8] The goal of this paper is to identify challenges that the Governing Board and the BRICS Expert Committee on Arbitration will need to resolve if the new BRICS Dispute Resolution Centers system is to gain traction against existing arbitral institutions, including the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre of the Settlement of Investment Disputes (ICSID), and others. The paper identifies challenges regarding finding and recruiting high quality staff members to run the centers, drafting rules that are attractive to potential users of the system, addressing harmonization issues stemming from differences in legal systems between the BRICS member states, and meeting the goal of making sure that the centers have a roster of BRICS-origin arbitrators to resolve the disputes. An examination of the traits of a successful arbitration center, situated in a robust and arbitration friendly seat is examined. Finally, specific challenges relating to the investor-state arbitration context are addressed.

CHARACTERISTICS OF SUCCESSFUL ARBITRATION CENTERS

In order to understand how the BRICS Dispute Resolution Centers initiative can be a success, it is important to look to existing centers and seats of arbitration to understand the traits underlying these centers and locations. A key factor that underlies a successful seat of arbitration is a "supportive legal environment that favors and protects international commercial arbitration as well as the enforceability of the final award."[9] As discussed later in the section on perceived needs of potential users of the BRICS Dispute Resolution Center system, the foundation for any successful arbitral institution is the law of the seat that supports arbitrations conducted in that jurisdiction. The ICC and the LCIA are located in France and the United Kingdom, respectively. Both jurisdictions are well known for being arbitration friendly and their procedural laws in support of international arbitration conducted in those countries are considered among the most sophisticated in the world. SIAC's rise to prominence as a regional arbitration hub for Asia, and, increasingly, a major player globally has been in large part due to the investment that the Singaporean government has made in both updating Singapore's arbitration law as well as investing in the judiciary's ability to provide effective support to arbitration. In addition to being a contracting state to the New York Convention and to adopting the UNCITRAL Model Law, Singapore "has attracted arbitration largely by ensuring that its courts have a strong tradition of the rule of law and a policy of non-intervention in arbitral decisions, supporting the continuing growth of SIAC,

4. Katarzyna Kaszubska, "A BRICS-Only Arbitration Forum Will Not Be the Panacea Imagined," accessible at: https://thewire.in/world/a-brics-only-arbitration-forum-will-not-be-the-panacea-they-are-hoping-for
5. "BRICS: Investing in Dispute Redressal," BRICS Information Portal, (2017), accessible at: http://infobrics.org/post/25926
6. Rio de Janeiro Declaration, Paragraph 7.
7. Rules of Procedure of BRICS Expert Committee
8. Katarzyna Kaszubska, "A BRICS-Only Arbitration Forum Will Not Be the Panacea Imagined," accessible at: https://thewire.in/world/a-brics-only-arbitration-forum-will-not-be-the-panacea-they-are-hoping-for
9. Vial, Gonzalo, and Francisco Blavi. "Santiago as a Seat for International Commercial Arbitration." Or. Rev. Int'l L. 18 (2016): 25 at pg. 32.

and offering Asia's largest fully-integrated dispute resolution complex."[10] Specifically, the traits of a supportive legal environment include limited revision of awards, recognition of the binding force of arbitration agreements, the availability of interim measures, and the recognition of the right of arbitral tribunals to rule on their own jurisdiction.[11] Arbitral institutions that attract significant user flow tend to be located in places where it is economical to conduct an arbitration, there exist good transport and other physical infrastructure, and there is access to a pool of experienced arbitrators and local lawyers. The jurisdiction where the center is located needs to be able to convince users of its neutrality as a seat, have a sufficient level of political and economic stability, and permit the use of foreign lawyers in arbitral proceedings.[12] Users of the international arbitration system take these factors into account with the choices that they make among the existing players in the arbitral institution market. "Arbitration hubs revolve around a large city that has the infrastructure to provide it [quality arbitration services]. The reason why London and Singapore are so dominant [in the Indian context] is that they provide the overall ecosystem: not just physical infrastructure but also the specialist arbitration ecosystem that includes the arbitrators, the lawyers, and the internationally acclaimed administration that would be involved in the procedural aspects of conducting an arbitration. These cities also provide the technological capabilities in terms of expert witnesses as well as a good judicial system for interim challenges and other legal necessities."[13] These are perhaps some of the reasons why, despite China's push to create its own dispute resolution mechanisms for its One Belt One Road Initiative, the ICC currently "manages a significant proportion of arbitrations involving Chinese and African parties."[14] Another reason why SIAC has been successful is that it first focused on excelling as an arbitral institution for the Asian region. It saw itself as well placed to take advantage of the synergies of the Asian market because "regional markets are united by economic links, and, in some cases, by a common language. Regional arbitral institutions are designed to address better the cultural, linguistic and economic specificities of such commercial relations."[15] Through its facilities located in Singapore, in the heart of Asia, as well as its diverse panel of arbitrators and members of the secretariat staff, SIAC was well positioned to address the need for a regional Asian arbitration center. From there, it has worked to expand its brand globally and also develop a set of rules for the international investment arbitration space. The method that SIAC has employed to launch its center could be a helpful paradigm for the framers of the new network of BRICS Dispute Resolution Centers to consider.

DIFFERENCES BETWEEN THE BRICS COUNTRIES AS SEATS

The BRICS countries as legal seats of arbitration differ greatly from each other. One major difference between the BRICS legal systems is that they do not stem from the same legal traditions. India and South Africa are common law systems, in which the application of *stare decisis* applies and the role of judge made law takes on outsize importance. Contrarily, Brazil, China, and Russia are civil law systems. Additionally, Russia and China have major influences from socialist legal traditions within their legal systems. Based on this fact alone, any form of harmonization across the common and civil law tradition divide will be a big hurdle that the BRICS Dispute Resolution Center initiative will have to overcome when addressing the legal harmonization issues necessary for the creation of a standard set of rules and the procedural law to support the implementation of those arbitral rules. "Based on the differences in legal tradition, it might be difficult for potential users to even agree on what would be the BRICS seat that would be best for the dispute, assuming that you have an enforcement mechanism in place among the BRICS countries. There might be some difficulties getting to the award itself."[16] Beyond these legal tradition differences, the BRICS countries also differ in the amount of support that they provide for arbitrations conducted in their jurisdictions. In India, for example, local courts will only recognize a foreign award under the New York Convention if the other state has ratified the convention and if the central government of India has recognized that the other territory falls under the coverage of the convention. While all BRICS countries have ratified the convention,

10. Elizabeth MacArthur: 23 Appeal: Rev. Current L. & L. Reform 165 (2018) Regulatory Competition and the Growth of International Arbitration in Singapore
11. Vial, Gonzalo, and Francisco Blavi. "Santiago as a Seat for International Commercial Arbitration." Or. Rev. Int'l L. 18 (2016): 25 at pg. 35-37; Blackaby, Nigel, et al. Redfern and Hunter on international arbitration. Oxford Univ Pr, 2009.
12. Vial, Gonzalo, and Francisco Blavi. "Santiago as a Seat for International Commercial Arbitration." Or. Rev. Int'l L. 18 (2016): 25 at pg. 39-41.
13. Telephone Interview with Partner #1, India (Feb. 25, 2020).
14. Chinas Maritime Silk Road 2018 p 743
15. Dias Simões, Fernando. "A Dispute Resolution Centre for the BRICS?." The BRICS-Lawyers' Guide to Global Cooperation (Cambridge University Press, 2017, pp. 287-308 (2017) at p. 291.
16. Telephone Interview with Partner #1, India (Feb. 25, 2020).

"India has not officially notified Brazil or South Africa yet" and so "arbitral awards issued in these two countries are not enforceable under India's Arbitration Act."[17] Russia has unique limitations regarding the requirements for an adequately filed arbitration agreement. In addition, "there is the problem of determining 'public order' in the Russian legislation, and therefore there is a negative practice of not recognizing and enforcing foreign arbitral awards by the violation of 'public order' in the Russian Federation."[18] In China, the legal system has been criticized for not properly applying the principle of independence in practice to arbitrations conducted in the jurisdiction.[19] These examples of procedural hurdles to the successful implementation of arbitral proceedings in BRICS jurisdictions need to be addressed by the creators of the BRICS Dispute Resolution Centers initiative. This is especially heightened, given the importance of the seat in international arbitration. With that in mind, the BRICS Expert Committee on Arbitration has identified one of the problems it needs to come is to "bridge the gap of economic and trade exchanges between the parties due to differences in language, culture, and legal systems."[20]

NEEDS OF POTENTIAL USERS OF THE BRICS DISPUTE RESOLUTION CENTERS

In order to better understand what potential users of the BRICS Dispute Resolution Centers are looking for in the new system, the author conducted interviews with corporate and dispute resolution partners located in the BRICS jurisdictions as well as in other emerging economy jurisdictions. The results of these interviews shed light on the factors that users of the international dispute resolution system value in existing arbitral institutions and what competitive factors the BRICS Dispute Resolution Centers need to focus on in order to offer a viable competing product to the existing players in the international arbitration ecosystem as it is currently structured.

One factor that is common across the interviews conducted is that potential users of the BRICS Dispute Resolution Centers would want to know how established the new centers are. Establishment can be defined as looking at who the secretariat is of the respective centers, who is behind the funding, and what is the volume of cases being handled by a specific dispute resolution center. According to a dispute resolution partner at a major South African law firm, "when we look to other African arbitration centers for clients, we want to know all we can about the new proposed center. Specifically, we are looking at the volume of cases that are flowing through the proposed center. We want to know of the track record and the likelihood that the center will be around when a dispute arises in the future."[21] In the Indian context, a dispute resolution partner notes that "clients are multinationals and so have a preference for institutions that they are familiar with. That means that these clients have a certain history and experience with international arbitration and arbitral institutions. Clients need to justify internally to their corporate constituencies why they have chosen a particular dispute resolution mechanism if it differs from the one that they normally push for in their contracts around the world. In order to justify such a choice internally, you need to convince the client that an institution has the experience, depth, and administrative ability to administer the arbitration properly."[22]

Quality control, specifically with regards to the scrutiny of the final awards, was another big consideration among potential users. Scrutiny of the award is when an arbitral institution reviews a draft of an arbitral award to see if there are any manifest errors that would lead to the award being set aside or refused enforcement in line with the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The ICC was one of the first arbitral institutions to institute scrutiny of awards. In accordance with Article 34 of the ICC Rules, "[t]he Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by

17. Katarzyna Kaszubska, "A BRICS-Only Arbitration Forum Will Not Be the Panacea Imagined," accessible at: https://thewire.in/world/a-brics-only-arbitration-forum-will-not-be-the-panacea-they-are-hoping-for
18. Rusakova, E. P., et al. "Problems of Implementation of Leadership in Dispute Resolution of the BRICS Countries (On the Examples of the Russian Federation, China, India)." (2019) at pg. 757.
19. Rusakova, E. P., et al. "Problems of Implementation of Leadership in Dispute Resolution of the BRICS Countries (On the Examples of the Russian Federation, China, India)." (2019) at pg. 758.
20. Rules of Procedure of BRICS Expert Committee
21. Telephone Interview with Partner #2, South Africa (Feb. 25, 2020).
22. Telephone Interview with Partner #3, India (Feb. 26, 2020).
23. Article 34 of ICC Rules

the Court as to its form."[23] Other arbitral institutions, such as the Singapore International Arbitration Centre (SIAC) have begun to offer similar services to parties using their rules. As a Brazilian dispute resolution partner notes, "some form of a review mechanism of arbitral awards is very important. Sometimes we see absurd and off market arbitral decisions because the institution did not have review mechanisms, similar to what you have at the ICC. Having a robust, protective, and clear regulatory framework within the rules of an arbitral institution is very important to us."[24] "The rules of the institution are critical, especially in the Indian context. You would want to see that the rules conform to generally accepted international rule standards with provisions for things such as confidentiality, conflicts of interest, and arbitrator neutrality. Emergency arbitrator awards are not enforceable in India – if I were to consider such a factor, it would be for non-India seated arbitrations."[25] As with all innovations offered by arbitral institutions, the scrutiny function does have to be evaluated in terms of potential downsides. "There is no doubt that when it comes to choosing the ICC, the major factor to consider is the scrutiny role that the ICC plays. It is both an advantage and a disadvantage however. Most users would accept that the scrutiny function has had a positive effect on the quality of awards that are issued under the ICC Rules. But the concern that some practitioners and users have is that the scrutiny function can lead to delays and add another layer of expense to the arbitration process."[26]

Another key factor that potential users of new international arbitration centers look at is the structure of the rules and procedures put in place by the institution. "When considering an arbitral institution, especially in the Brazilian context, a reliable framework and clear rules is essential. We are looking to make sure that the rules as written allow for an arbitration to be started and an arbitral tribunal to be formed. We want to make sure that the rules are not written in such a way that encourages delaying tactics that can derail an arbitration."[27] Considerations of rules and procedures of institutions are important factors to lawyers and users of international arbitration that hail from outside of the BRICS countries (and will comprise the BRICS+ users that the BRICS Arbitration Committee envisions opening the BRICS Dispute Resolution Centers to in the future). As a project finance firm partner adds, "[w]hat it comes down to, for our clients, is cost, convenience, and a track record. The suitability of the rules of an arbitral institution is a good proxy for all of these factors because the rules inform the cost that will be put on the parties, the usefulness of the procedures as implemented by the secretariat, and, ultimately, the track record that an arbitral institution will have. This is the area that we have seen new arbitration centers in Africa struggle and could be an area in which the new BRICS Dispute Resolution Centers initiative could also struggle."[28]

Third party considerations are also important to consider when looking at the interests and needs of future potential users of the BRICS Dispute Resolution Centers system. Many international contracts, especially for the long term financing of capital intensive projects that often occur in emerging economies, involve many third parties beyond just the two parties to a contract. For example, in a project finance deal, there might be a consortium of lenders and financing entities that are providing some of the essential capital to finance the project. These entities will have a major impact on the dispute resolution clause that is ultimately inserted into the project financing documents. "In the work that we do, a lot of the dispute resolution provisions are driven by both the lender and the bankability requirements. Oftentimes, for projects in Kenya, South African banks or development institutions in Europe are providing the capital for the projects that are being carried out. The requirements that these institutions have is typically for ICC arbitrations seated in Paris or LCIA arbitrations seated in London. While the sponsors in the project finance deals tend to be a bit more flexible, what we see in practice is that the lenders' requirements is what is ultimately driving the dispute resolution clause that is inserted into the final contract documents."[29]

For emerging economy users of international arbitration (and for users of international commercial arbitration in general), cost is an important consideration when analyzing the viability of one arbitral institution over

24. Telephone Interview with Partner #4, Brazil (March 5, 2020).
25. Telephone Interview with Partner #3, India (Feb. 26, 2020).
26. Telephone Interview with Partner #2, South Africa (Feb. 25, 2020).
27. Telephone Interview with Partner #4, Brazil (March 5, 2020).
28. Telephone Interview with Partner #6, Kenya (Feb. 27, 2020).
29. Telephone Interview with Partner #6, Kenya (Feb. 27, 2020).

the other. As a dispute resolution partner in Brazil notes, "[i]f it were not for the costs involved, the ICC would be the go to arbitral chamber for virtually every dispute that arises in Brazil in which the parties agreed to go to arbitration. It is still the go-to reference standard for analyzing arbitration quality in Brazil. The only limitation to resorting to ICC arbitration, as far as Brazilian parties are concerned would be the costs involved and the existence of local arbitral institutions that can provide services at a better cost point for certain disputes. Sometimes, parties even elect to have a Brazilian arbitration institution administer an arbitration in accordance with the ICC Rules in order to lower the overall cost of the arbitration."[30] Cost is a reason that there has been a shift in the market for Indian commercial arbitration. "In the past, for international commercial arbitration involving Indian parties, the ICC and the LCIA were the dominant players for the Indian commercial arbitration market. Many Indian parties thought that London would be favorable to host the arbitration and to have neutral arbitrators. However, there was a shift about six years ago when Singapore and the SIAC made a big push in the Indian commercial arbitration market, given that a lot of cross border banking work had shifted to Singapore. Given the excessive costs of arbitrations in London [under the LCIA Rules], Singapore was seen as being more efficient and rendering a result with half the costs. Today, 80-90% of the contracts I am seeing involve SIAC, which indicates a move away from LCIA which had cannibalized ICC's share of the Indian commercial arbitration market."[31]

The BRICS Legal Forum as well as the Expert Committee on Arbitration has placed an emphasis on having BRICS arbitrators resolving BRICS disputes. Of the lawyers contacted for the project, the response to this goal was nuanced. "If I had to choose between someone who came from Brazil [or another BRICS country] or someone who is well known and specialized, I would choose the latter option. But, it is possible to have both of those qualities in a Brazilian arbitrator. I would be looking to the panel of arbitrators that are given for a particular institution and see how that would compare to the ICC. Yet, having a BRICS person on the tribunal would give the impression that arbitrator would know what is happening in the market which is important to clients."[32] "More than nationality, the competence of the arbitrator is our key consideration."[33] Knowledge of the context of a particular market, especially emerging economies, is a trait that was important to interviewees, even more so than the nationality of a particular arbitrator. "In addition to competence as an arbitrator, there are other practical considerations to look at, including language skills and familiarity with how things are done in Brazil. If the BRICS centers are able to field arbitrators that have awareness of how things are done in emerging markets, that could lead to good synergies."[34] Of course, perceived neutrality of arbitrators is important to potential users, and nationality can be used as a proxy for neutrality. "The appointment of arbitrators is an important issue that has arisen in the CAJAC (China-Africa Joint Arbitration Centre) as well. The big challenge that CAJAC has faced is a level of reluctance on the Chinese side to have independent neutrals without the nationality of either party. What the BRICS model presents is that you can get your neutrals from other BRICS countries. In South Africa, lawyers would never support a tribunal in which one arbitrator was South African and the other two were from the BRICS counterparty's jurisdiction. What South African lawyers would want, at a minimum, would be an independent chair, whether that be from within the BRICS or outside of them."[35]

Even if an arbitral institution has strong infrastructure behind it in terms of its rules and secretariat, potential users of arbitral institutions also take into consideration the law of the seat of the arbitration. This analysis extends beyond not only the substantive provisions of the international arbitration law but also to the perceived effectiveness of the judiciary of the seat of the arbitration. "When looking at a seat, it is important to pick a jurisdiction that has developed a presence in the international arena in terms of its arbitration law. Additionally, a seat should not have unnecessary judicial interference in the arbitration process. This is something we would consider when looking at the seat in which an arbitration center is located in."[36] The effect of the seat also extends into enforcement stage considerations as well. "Foreign counterparties doing business in Brazil oftentimes push for institutions such as the ICC and the LCIA but they usually end up agreeing to an arbitration seated in Brazil and subject to the local rules of a Brazilian institution for practical reasons. The main reason is that if you have an award

30. Telephone Interview with Partner #4, Brazil (March 5, 2020).
31. Telephone Interview with Partner #1, India (Feb. 25, 2020).
32. Telephone Interview with Partner #5, Brazil (Feb. 17, 2020).
33. Telephone Interview with Partner #6, Kenya (Feb. 27, 2020).
34. Telephone Interview with Partner #4, Brazil (March 5, 2020).
35. Telephone Interview with Partner #2, South Africa (Feb. 25, 2020).
36. Telephone Interview with Partner #3, India (Feb. 26, 2020).

issued in Brazil, the enforcement of that award by Brazilian counsel is much simpler in comparison to the process of recognizing a foreign arbitral award issued outside of Brazil. When foreign counterparties hear this, they are much more amenable to including a local arbitral institution, with Brazil as the seat, into the contract."[37]

Other factors that potential users of an arbitral institution consider include the vibrancy of the location of an arbitration hub as well as the key actors that are backing a particular institution. "In my opinion, if you are going to be setting up a new arbitral institutions, you need to show me who is behind it. Because if I am going to pitch the center to a client, I know that you do not have 100 years of administering cases behind you. Who do you have in terms of bench strength and administrative skill? And – apart from the institutional rules – who is setting up the center? If it is the government, will the government be lending support? Who will run it? These are the questions I need to be answered."[38] It is not enough for the city in which the an arbitration center is located to have the legal and other resources in the ecosystem to support the growth of a new center. Potential clients are looking to the experience of the center vis-à-vis its competitors as well as the quality of the administrative staff that performs key support functions for the arbitration center and its users.

MECHANISMS TO CONSIDER IN THE BRICS DISPUTE RESOLUTION CENTERS

If the creators of the BRICS Dispute Resolution Centers ensure that the network of arbitral centers meet the needs of their potential users, it will ensure the success of a "credible international dispute resolution mechanism among the BRICS countries to resolve all the trade-related issues among them and for an effective system to implement the arbitration awards quickly."[39] There is no doubt that the initiative already has a number of positives going for it. Foremost among these is the scale that the BRICS countries would be able to exercise in favor of the new centers. As stated in the introduction, the BRICS countries make up a significant bloc in the world economy that will only increase in importance. With that increasing economic heft, the governments would have potential tools at their disposal to help launch the new network. "There are a lot of opportunities to consider, especially with state owned enterprises that exist in South Africa and a lot of the BRICS jurisdictions. This is a natural starting place for the inclusion of BRICS Dispute Resolution Center clauses. If one is able to get support at the state level to push for these SOEs, for example, in the power generation utility space coupled with an external lender from another BRICS country, the governments on both sides can put pressure on the parties to choose the BRICS network over existing players. Once these types of arbitrations start happening, there should be positive spillover effects into the broader commercial arbitration space."[40]

The question of whether the initiative succeeds will be decided largely upon the performance of the arbitral centers as compared to their competitors globally. As author Fernando Dias Simões notes, "an institution's role in moving proceedings along can be highly constructive and efficient . . . the administrative support provided by the arbitral institution allows the arbitrators to devote their full attention to deciding the dispute, avoiding the waste of time and resources that could result [from an ad-hoc process]."[41] If the BRICS Centers are to provide a meaningful and useful alternative for potential users of traditional players such as the ICC, the LCIA, and SIAC, the centers need to consider the features that these institutions will offer. What follows is an analysis of some key issues, with suggestions that the BRICS Dispute Resolution Centers might consider incorporating, based upon the feedback received from potential users of the system as part of this study.

1. Scrutiny

As identified by the potential users of the BRICS Dispute Resolution Center system interviewed for this project, scrutiny of arbitral awards is a major factor for users when considering whether to use a new arbitral center. Scrutiny allows for a measure of quality control and is a reason why users often opt for ICC arbitrations, despite the higher costs of the ICC. The

37. Telephone Interview with Partner #4, Brazil (March 5, 2020).
38. Telephone Interview with Partner #3, India (Feb. 26, 2020).
39. Dias Simões, Fernando. "A Dispute Resolution Centre for the BRICS?." The BRICS-Lawyers' Guide to Global Cooperation (Cambridge University Press, 2017, pp. 287-308 (2017) at p. 293.
40. Telephone Interview with Partner #2, South Africa (Feb. 25, 2020).
41. Dias Simões, Fernando. "A Dispute Resolution Centre for the BRICS?." The BRICS-Lawyers' Guide to Global Cooperation (Cambridge University Press, 2017, pp. 287-308 (2017) at p. 289.

BRICS initiative should consider the use of scrutiny of awards in its rules in order to provide lawyers and representatives within potential user companies of the BRICS system to have an item through which they can convince internal stakeholders of the robustness of the BRICS rules. If these internal stakeholders are aware that there is a mechanism of review of awards to eliminate clear errors that might reduce the risk of non-enforcement, it eliminates one of the reasons as to why many new arbitration centers are rejected when compared to existing players in the dispute resolution space.

2. Cost and Innovative Rules

Users of the international arbitration system conduct an internal calculus when they are deciding the procedural mechanisms that they will utilize to conduct their arbitrations. The first level analysis that contracting parties will do is whether or not to conduct an *ad hoc* or an administered arbitration. While *ad hoc* arbitrations do not have the overhead cost associated with administering institutions,[42] they bring with them the uncertainty of possible delays in deciding on the arbitral process as well as the lack of a secretariat to administer the case. As a result, the majority of arbitrations[43] in international commercial arbitrations are administered. It is within this space that the BRICS Dispute Resolution Centers will be competing. Already there is fierce competition in the market with arbitral institutions "regularly updating their arbitration rules to make them more market-oriented and thereby more attractive to foreign investors."[44] As a baseline, the BRICS Arbitration and Mediation Rules need to be on par with the world leaders including the ICC and the LCIA. The rules should provide for what has become accepted practice at leading institutions, including the appointment of emergency arbitrators, the ability to grant effective interim measures, and the option for expedited procedures as necessary. At the same time, the BRICS Dispute Resolution Centers, through the rules as well as the management of the administrative staff, should be aiming to come in at a lower cost point than the ICC or the LCIA. As revealed in the interviews conducted in the Indian market as well as other BRICS countries and emerging economies more broadly, one of the key factors, after the track record and the quality of an institution have been ascertained (through proxies such as track record and ability to have scrutiny of awards), is the price point. If the BRICS Dispute Resolution Centers are able to deliver comprehensive and effective service at significantly lower costs than the ICC or the LCIA, this can be a draw not only for users from BRICS countries but also to users from developed economies as well as the other emerging economy users that the BRICS arbitration committee aspires to include in the expanded BRICS+ dispute resolution regime of the future.

3. Quality of the Secretariat

The secretariat or staff members of an arbitral institution play a key role[45] in the expeditious resolution of an arbitral dispute. Due to the cost considerations covered above, the BRICS Dispute Resolution Centers should ensure that the staff they are hiring are adding value to the management of cases,[46] especially in the emerging economy context.[47] The staff that the BRICS centers should hire should have experience with the cultural, market, and linguistic conditions associated with the different BRICS countries in which the respective institutions are located. With the growth of international arbitration programs and opportunities around the world, the BRICS centers should endeavor to recruit staff members that hail from parts of the developing world not traditionally represented in arbitral institutions today. That being said, the BRICS centers should recruit talent aggressively from existing players, such as the ICC and LCIA, to bring in institutional knowledge and best practices to the fledgling initiative. As covered in the interviews for this project, the track record of an arbitral institution is of extreme importance to potential users of the new BRICS dispute resolution system and the recruiting and retaining the highest quality arbitral secretariat will be a major component of establishing that success.

One area where the secretariat of the BRICS Dispute Resolution Centers could add value would be in the maintenance of an online repository of past arbitral

42. Blackaby, Nigel, et al. Redfern and Hunter on international arbitration. Oxford Univ Pr, 2009; Born, Gary. International commercial arbitration. Vol. 1. Kluwer Law International, 2009.
43. Blackaby, Nigel, et al. Redfern and Hunter on international arbitration. Oxford Univ Pr, 2009; Born, Gary. International commercial arbitration. Vol. 1. Kluwer Law International, 2009.
44. Reyes, Anselmo, and Weixia Gu. "Introduction: Towards a Model of Arbitration Reform in the Asia Pacific." Reyes, Anselmo, and Gu, Weixia." Introduction: Towards a Model of Arbitration Reform in Asia Pacific". In The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific, edited by Anselmo Reyes, and Weixia Gu (2018): 1-16 at p. 5.
45. Schütze, Rolf A., ed. Institutional Arbitration: A Commentary. Bloomsbury Publishing, 2013
46. Slate, William K. "International arbitration: Do institutions make a difference." Wake Forest L. Rev. 31 (1996): 41.
47. Shah, Namrata, and Niyati Gandhi. "Arbitration: One size does not fit all: Necessity of developing institutional arbitration in developing countries." J. Int'l Com. L. & Tech. 6 (2011): 232.

awards rendered at the various centers in accordance with the BRICS Arbitration and Mediation Rules. The Governing Board would need to determine the specifics of how and in what form these decisions would be published. Issues to be addressed include to what extent commercial awards would need to be redacted and whether parties would be able to opt-out – and to what degree this opt-out would entail in the awards were anonymized – from the publication of awards rendered under the rules. Leading international arbitral institutions, including the ICC, which announced in December of 2018 that awards rendered by the institution would be published after two years of notification to the parties, have opened a debate towards establishing publication of awards as being the default position in international commercial arbitration. The BRICS Dispute Resolution Centers should consider this option very carefully as it would meet potential users' needs to understand the quality and effectiveness of awards administered by the institution. Given that the BRICS centers will lack a meaningful track record when they first launch, if the secretariat of the centers ensure that awards are published in a timely fashion and are of high quality, potential users of the BRICS system will be able to provide assurances to internal stakeholders that submitting their disputes to the BRICS network will yield results that are on par with existing players in the international commercial arbitration market.

4. Roster of Arbitrators

Potential users of the BRICS Dispute Resolution Centers network have highlighted the importance of the quality of the arbitrators that will be adjudicating the disputes in the network. While the designers of the BRICS Dispute Resolution Centers network have been pushing to have BRICS arbitrators decide BRICS disputes, the wishes of potential users have added a layer of nuance to those expectations. What is important to these potential users, from the interviews conducted, is the experience and the competence that the arbitrators bring to the table. The parties are concerned, first and foremost, with getting an award that will be enforceable in as quick a time as possible. It is essential that the arbitrators on the roster for the BRICS Arbitrators and Mediators Panel have extensive experience in case management and award drafting. Furthermore, potential users of the system are interested in having arbitrators that have the regional, cultural, and linguistic familiarity with the different BRICS jurisdictions. While having arbitrators that share the nationalities of the BRICS parties or hail from BRICS countries would be a plus, what really concerns the potential users of the parties is the competence of the arbitral tribunal that is selected. Currently, a majority of the arbitrators appointed at major arbitral institutions are from developed, Western countries. It is foreseeable, at least for the inception of the project, that the arbitrators that will be appointed to decide cases at the BRICS Dispute Resolution Centers will be drawn from these ranks, barring explicit rules to the contrary. The framers of the network need to be careful with regard to who is eligible to be a member of the BRICS Arbitrators and Mediators Panel. It would be recommendable to address the question of arbitrator identity in two phases. In the first phase, associated with the launch of the network, the BRICS Dispute Resolution Centers should compromise on the BRICS identity aspect of their goals. The secretariat should provide, if the parties cannot decide, lists of potential arbitrators that include both non-BRICS and BRICS arbitrators. Ultimately, it is the parties that will have the deciding say over who the arbitral tribunal will be composed of. As the centers begin to establish a track record, the centers could consider ideas such as mandating in the rules that the chair of the tribunal should hail from a BRICS jurisdiction. Due to the key role of arbitrators to potential users of the system, however, it is not advisable to push for strict quotas or limitations on non-BRICS arbitrators that form part of the BRICS Arbitrators and Mediators Panel. Instead, the BRICS centers should provide training and opportunities to allow BRICS arbitrators to gain experience and to enter into the ranks of the most sought after arbitrators around the world. In this manner, the BRICS centers can assist in the rise of BRICS arbitrators to international prominence in a more organic manner. "The idea of a BRICS dispute resolution network is great because there are common problems with these countries and it provides an opportunity for those people who know the business environment in these countries and are able to give better decisions based on this context. However, what it will come down to for clients is the experience and the competence of the arbitrators that are available or associated with a given institution."[48]

5. Specialized Dispute Resolution Support

One idea for how the BRICS network could distinguish itself from existing players is to provide specialized

48. Telephone Interview with Partner #5, Brazil (Feb. 17, 2020).

support staff for repeat types of disputes that might be common across the BRICS countries and emerging economies more generally. For example, the different centers could create specialized case staff and rosters of arbitrators that have experience with international infrastructure contracts or energy production contracts. These could be reflected in special subdivisions in the BRICS Arbitrators and Mediators Panel. Coupling this specialized knowledge with the BRICS countries scale as well as the regional expertise that their arbitrators bring to the table, the BRICS Dispute Resolution Centers could use this as a selling point compared to other arbitral players in the market. As the legal integration of the BRICS members grow in areas such as coordination on legal regimes for the regulation of public-private partnerships and as funding increases for projects disbursed across the BRICS bloc, the BRICS Dispute Resolution Centers could be well placed to address users' needs in the specialized areas where potential disputes might arise.

6. Legal Harmonization and Law of the Seat

As identified in the earlier sections, a major issue facing the new network of dispute resolution centers for the BRICS is the lack of cohesion in the legal systems between the countries as well as shortcomings in the procedural laws of the different BRICS jurisdictions. While the network of BRICS Dispute Resolution Centers has not even been completely established yet, it is important that the BRICS Arbitration Committee, as well as the BRICS Legal Forum as a whole, continue to push forward on legal harmonization issues across the jurisdictions. It is important to bring the procedural laws governing arbitrations across the BRICS countries into alignment. One method through which this could be achieved is to consider building upon the UNCITRAL Model Law and creating one with "BRICS characteristics" for the five countries. This could be an opportunity to show to the rest of the world that the BRICS legal regime not only recognizes the unique needs of emerging economies but is also in line with the best practices internationally for the law of the seat underlying the arbitrations. This harmonization across common and civil law systems would ensure that no one seat would be viewed as disadvantageous by potential users as compared to other top seats internationally. "If we look at all five seats today, can we safely say that there is full court support of arbitration? I think, if we look honestly, there is a lot of progress to be made. But is still early days for the BRICS dispute resolution network and these issues need to be addressed by the different governments."[49]

ADDRESSING THE ISSUE OF INVESTMENT ARBITRATION

Realistically, the first area that the BRICS Dispute Resolution Centers will be best positioned to address will be in the international arbitration space. While this space has been dominated by Western countries and institutions, similarly to the investment arbitration space, it will be easier to bring the BRICS member countries to a consensus over legal harmonization of procedural law and rules relating to commercial arbitration space. Investment arbitration, on the other hand, raises to conflicting goals. BRICS countries want to have their investment disputes decided by BRICS arbitrators in BRICS jurisdictions. The creation of a successful international commercial arbitration dispute resolution network would arguably lay the foundation for the creation of an investment arbitration regime. Yet, investment arbitration raises controversial issues relating to state sovereignty as well as the conceptions of fairness to the investment substantive treaties that will be more difficult for the BRICS member states to come to a consensus on. As one commentator notes, "it is doubtful at this stage whether a uniform approach to dispute resolution can be achieved, but a way needs to be found for all investors to be treated equally and fairly through the application of the same legal principles to the extent possible"[50] across the BRICS jurisdictions.

The issues that the BRICS countries will need to agree upon are clear. First of all, if equal treatment of investors in the BRICS bloc is what the members are aspiring to, "the diverse approaches to investor protection and dispute resolution now followed by the different members should be replaced by a uniform or harmonized approach."[51] BRICS countries need to reach an agreement on issues such as reciprocity in recognition of investment protection, potential conflicts with the constitutional law of the different jurisdictions, definitions of the types of protection that will be afforded to investors, a definition of what will be considered as a covered investment, and the procedural mechanisms necessary to resolve investment related disputes.[52]

49. Telephone Interview with Partner #2, South Africa (Feb. 25, 2020).
50. Schlemmer, Engela C. "Dispute Settlement in Investment-Related Matters: South Africa and the BRICS." AJIL Unbound 112 (2018): 212-216 at p. 216.
51. Schlemmer, Engela C. "Dispute Settlement in Investment-Related Matters: South Africa and the BRICS." AJIL Unbound 112 (2018): 212-216 at p. 216.
52. Schlemmer, Engela C. "Dispute Settlement in Investment-Related Matters: South Africa and the BRICS." AJIL Unbound 112 (2018): 212-216 at p. 216.

Only once these issues are dealt with, across the BRICS countries, can the BRICS Legal Forum begin to address the goal of reforming "existing investor state mechanisms under ICSID and under bilateral treaties to account for the unique circumstances and challenges of emerging economies."[53]

CONCLUSION

The goal of the BRICS Dispute Resolution Centers initiative is an ambitious one: to create a network of dispute resolution centers, operating under a common set of rules and against a backdrop of harmonized procedural law, across the BRICS jurisdictions to address international commercial and investment disputes between the BRICS member states. The goal is to start with the creation of a network including the BRICS member states only and then to expand the scope of the network to include other emerging economies, when the project has achieved a certain measure of success. The economic clout of the BRICS countries, as well as the effects of scale that they can bring to bear through their state-owned enterprises, are important factors that point to the potential success of the initiative. There are, however, challenges that the BRICS Dispute Resolution Centers must overcome if it is to succeed vis-à-vis existing leaders in the international arbitration market from institutions such as the ICC, LCIA, SIAC, and ICSID. A first key issue for the BRICS members to resolve is the legal harmonization across differing legal traditions for an effective and robust underlying procedural law regime to support the BRICS centers to be established in the different countries. Interviews conducted with potential users of the new dispute resolution regime have identified issues that these users would consider to be important factors when deciding to opt for a BRICS clause as oppose to an ICC or LCIA clause. These factors include: the track record of a new center, the strength of the rules created, quality of awards, third party limitations on arbitration agreement choice, cost, competent arbitrators, quality of the administrative staff, the law of the seat, and the presence of a supportive infrastructure for arbitration in the jurisdiction. From these factors, a series of suggestions has been provided for how the BRICS Dispute Resolution Centers can address the needs of potential users. These include the inclusion of a scrutiny mechanism, innovative rules, reduction of costs, recruiting quality secretariat staff, taking a two phase approach to the recruitment of arbitrators and mediators to form the BRICS Arbitrators and Mediators Panel, providing specialized disputes support, and to ensuring that the legal harmonization efforts provide synergistic benefits for the launch of the new network. Some of the challenges identified will be magnified in the investment arbitration space, given the competing sovereign interests and conceptions of investment involved. As the new initiative progresses, hopefully this paper can be of use to members of the BRICS Arbitration Committee and for future meetings of the BRICS Legal Forum.

53. Dias Simões, Fernando. "A Dispute Resolution Centre for the BRICS?." The BRICS-Lawyers' Guide to Global Cooperation (Cambridge University Press, 2017, pp. 287-308 (2017) at p. 296.

Icho Kealotswe-Matlou

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APPROPRIATE ARBITRATION MECHANISM FOR THE BRICS COUNTRIES

By Icho Kealotswe-Matlou

1. My task is to provide an assessment as to how a BRICS arbitral mechanism could be made to work in practice. In doing so, I am requested to consider the following:

   1.1. Whether the New York Convention is an adequate foundation for such a mechanism or whether, in the light of reservations made by certain BRICS countries, a different treaty arrangement should be concluded between BRICS countries;

   1.2. Whether the arbitral mechanism should follow the New York Convention model (i.e. reliant in part on national law and national courts) or whether it should be constructed on a de-nationalised basis, such as ICSID;

   1.3. What part; if any, existing arbitral institutions in BRICS countries should play in the formation of a BRICS arbitral mechanism;

   1.4. The Rules which will be appropriate;

   1.5. Any other matters I deem important.

INTRODUCTION

Despite the advantages of arbitration, it is valuable only to the extent that the agreement to arbitrate and the resulting award can be enforced against a recalcitrant party.[1] Consistent with this view, the enforceability of the award or at least some form of verification of the award is paramount to building confidence between parties. Both enforceability and verification of the award when linked to cooperative obligations, serve to demonstrate good faith and ongoing compliance with the rules.

Indeed arbitration would be an integral aspect of a comprehensive and robust legal framework that ensures that the rule of law governs relations between the BRICS countries. The question is whether the New York Convention of 1958 ("the Convention") is an adequate foundation for such a mechanism or whether, in the light of reservations made by certain BRICS countries, a different treaty arrangement should be concluded between BRICS countries.

The Convention is the most important and successful United Nations treaty in the area of international trade law, and "the cornerstone of the international arbitration system".[2]

The Convention remains the preferred framework for providing an enforceable outcome in the context of cross border commercial disputes. It creates a uniform international framework, which enables parties to international commercial arbitration agreements to enforce foreign arbitral awards with relative ease.[3] It achieves this by:

1. Requiring the courts of a signatory State (referred to as a "Contracting State") to recognise and enforce an award rendered in another Contracting State.

2. Limiting the grounds upon which the courts in Contracting States may refuse recognition and enforcement of foreign arbitral awards.

At Article 1(3) the Convention provides for member states to make reservations. Article I establishes the limitations of the Convention's scope. The Convention applies only to foreign (international) commercial

1. Richard A. Cole, The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards 370. (1986).
2. Renaud Sorieul, The Secretary of UNCITRAL
3. Amanda Davidson, The New York Convention 1958 half a century on: is it still effective? International Arbitration Quarterly, December 2014. Page 8.

agreements to arbitrate. Article I also permits States to limit their obligation to enforce only awards made in reciprocating nations. Interestingly all BRICS countries ratified the Convention. Most of these countries have entered reservations in relation to article I above limiting the application of the Convention only to disputes arising out of legal relationships considered commercial under their national law and limiting their obligation to enforce only the awards made in reciprocating nations and if a non-contracting state is concerned, only to the extent that the non-contracting state provides reciprocity. Clearly one might say that these reservations fly in the face of a uniform and harmonized regime for enforcement of domestic and foreign awards. However, although ideally reservations ought to be discouraged, it is evident that permissions for such reservations encourage states to ratify the Convention.

Article II provides that the arbitration clause must be in writing, and requires the subject matter to be capable of arbitration.[4] Article III requires each contracting State to recognize and enforce arbitral awards fairly. Article IV provides that a party may obtain recognition and enforcement of an arbitral award by merely supplying a certified copy of the contract containing the agreement to arbitrate and a certified copy of the arbitrator's award.

Article V(1) details the allowable defences that may be raised by the parties to the recognition and enforcement of the award, while Article V(2) states the grounds on which the court itself may ex officio deny enforcement. The grounds for refusal of enforcement under Article V are listed as following:

1. Incapacity of the parties to the arbitration agreement.

3. Invalidity of the arbitration agreement.

4. Failure to give proper notice of the appointment of an arbitrator to the party against whom the award is invoked.

5. Natural justice grounds - where the party against whom the award is invoked is not able to present its case.

6. The Foreign Award is outside the scope of the terms of submission to arbitration.

7. The arbitral authority or procedure was not in accordance with the agreement of the parties.

8. The Foreign Award is not yet binding on the parties or has been set aside or suspended.

9. The subject matter of the arbitration is not capable of being referred to arbitration under the law of the enforcing country.

10. The recognition or enforcement of the Foreign Award is contrary to public policy of the enforcing country.

LIMITATIONS

Although generally, the courts have applied the grounds from the Convention correctly and the grounds for refusal are broadly accepted and also inserted in many national laws, some courts consider that grounds for refusal of enforcement are not exhaustive, while some courts consider that they may enforce an award even if there is a ground for refusal. For example, in Kenya in 2002 in Christ For All Nations v Apollo Insurance Co LTD [2002] 2 E.A 366, the High Court set a high bar for refusal to enforce final arbitral decisions when it rejected a public policy defence, and held that parties to arbitrations should, in general, accept awards "warts and all".

At the same time some grounds are ambiguous and open to different interpretations and there are no rules on waiver of the grounds for refusal. An important point for consideration here is whether it is possible to validly waive or contract out of the grounds for refusal. An analysis of authorities would suggest, broadly, that defences under Article V(1) could be waived by agreement, but defences of public policy and arbitrability under Article V(2) could not.[5]

Furthermore, assuming it is possible to contract out of, or waive, the Article V(1) defences, then the next issue would be whether, as a matter of contractual construction, provisions in institutional rules could reasonably be understood as having that effect. There is general doubt as to whether the provisions in institutional rules are sufficiently clear enough to waive accrued legal rights. For example: Article 12(10) of the AFSA Rules gives the parties the right to choose to waive an appeal or not; Article 35(6) of the ICC rules

4. It has been argued that an arbitral award that cannot be enforced because of public policy is also a matter that is not capable of arbitration. The overlap between Article V(2)(a) and Article II has been well noted elsewhere and is not covered in this paper. See generally Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 723 F.2d 155, 164 (1st Cir. 1983).

5. Karen Maxwell http://arbitrationblog.practicallaw.com/breaking-the-waivers-defences-to-enforcement/ 30 November 2017 page last visited on 30 November 2019.

waives "recourse" against awards. Similarly, Article 26.8 of the London Court of International Arbitration (LCIA) Arbitration Rules (2014) waives "appeal, review or recourse". It is doubtful whether these formulations are sufficiently broad to exclude the raising of defences to enforcement: much clearer words, probably including an express reference to enforcement, would be required to achieve this result.[6]

PUBLIC POLICY

The accomplishment of the Convention, however, is marred by the public policy exception of Article V. Article V permits the courts to refuse to recognize or enforce an award if the appropriate court of that nation finds that such recognition or enforcement of the award would be contrary to the public policy of that country.[7]

Article V(2)(a) states that recognition may be refused if the dispute is not capable of settlement by arbitration under the laws of that country. Both commentators and courts have seen this provision as parallel to Article II or subsumed by the term "public policy".[8] Article V(2)(b) deals with the public policy issue directly when it states that recognition and enforcement of an arbitral award may be refused if it would be "contrary to the public policy of that country". This public policy defence to the enforcement of foreign arbitral awards has been considered the greatest single threat to the use of arbitration in commercial disputes.[9] Courts and commentators alike have worried that the expansion of this loophole could negate the effectiveness of the Convention.[10] Yet, it appears that while the defence is often raised, it is rarely successful.[11]

The International Bar Association's 'Report on the Public Policy Exception in the Convention confirms no uniformity in the extent of review of an award by the enforcing courts.[12] Notwithstanding the localised nature of the public policy exception, many jurisdictions define it narrowly, in line with the Convention pro-enforcement approach.[13] The violation concerned must therefore be considered sufficiently serious to warrant the refusal of enforcement. A noteworthy example of this trend can be observed in *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd*.[14] In this case, the English Commercial Court held that the public interest in the finality of arbitration awards outweighed an objection to enforcement on the grounds that the transaction was 'tainted' by fraud.

However, certain countries continue to maintain parochial approaches to the public policy exception. In those jurisdictions, public policy can be used opportunistically by award debtors as a gateway to review the merits of the award. However, a reassuring trend can be observed towards a more curtailed application of the public policy exception in those jurisdictions that have traditionally displayed idiosyncratic approaches to the interpretation of the Convention.[15] A notable example is the Indian judiciary which once endorsed an expansive definition of public policy to include even a mere error of law, but has now aligned its application of this ground with the generally accepted view that the public policy exception must be interpreted narrowly.[16]

The other limitations include but not limited to: procedure; state immunity; and interim and final awards. Some of these limitations will be discussed below.

PROCEDURE AND LIMITATION PERIODS

Under the Convention the procedure of enforcement is regulated by national law. Since jurisdiction and legal remedies depend on constitutional specificities and national legal culture and tradition, it is difficult to expect harmonization in matters inherent to national procedural laws.

For instance under the English authority in *Dallah Real Estate and Tourism Holding Company v. The Ministry*

6. Ibid.
7. New York Convention Article V(2)(b).
8. Supra note 4
9. Richard A. Cole, supra note 1 at page 373.
10. G. Haight, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS-SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE MAY/JUNE 67 (1958).
11. A. Sanders, Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 INT'L LAW. 269, 270 (1979).
12. See International Bar Association, 'Report on the Public Policy Exception in the New York Convention', October 2015, p. 18, https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_ Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx (accessed 30 November 2019)
13. Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement - The Guide to Challenging and Enforcing Arbitration Awards, first published in June 2019
14. [2017] EWHC 251 (Comm), per Phillips J. See also Westacre Investments Inc v. Jugoimport SDPR Holding Co Ltd [2000] QB 288.
15. P Stothard, A Biscarro, 'Public policy as bar to enforcement', International Arbitration Report (Issue 10, May 2018), pages 23, 24
16. Cruz City 1 Mauritius Holdings v. Unitech Limited, 11 April 2017, EX.P.132/2014 & EA(OS) Nos. 316/2015, 1058/2015, 151/2016, 670/2016

of Religious Affairs, Government of Pakistan,[17] a party is not precluded from relying on a given defence in the enforcement proceedings even if it failed to bring the same defence in an action to set aside the award at the seat. A different conclusion has been reached in other jurisdictions, where the courts held that a party who failed to bring certain defects by way of an action to set aside an award may not rely on the same defects in the enforcement procedure.[18]

Regulation by national law can be problematic for it means different time-limits for enforcement as jurisdiction and legal remedies are vastly different, as well as the timeframes needed for enforcement.

The imposition of local limitation periods on enforcement actions under the New York Convention has given rise to surprisingly little debate, given the dire consequences for unfortunate award creditors.[19] It is often assumed without discussion that limitation periods are among the local "rules of procedure" contemplated in Article III of the Convention.[20] This is possibly so because a majority of jurisdictions apply some sort of limitation period to proceedings under the Convention.[21]

But, even if a state practice relevant to the interpretation of the Convention could be established, the question remains whether the application of local limitation periods – diverging widely from jurisdiction to jurisdiction and at times much shorter than those applicable to the enforcement of judgments – is desirable and consistent with the object and purpose of the Convention.

INTERIM MEASURES

The Convention does not contain clear rules on the enforceability of arbitrators' decisions on interim measures. There are no rules on the enforcement of specific types of awards (partial, interlocutory etc.) hence no harmonized approach to the enforcement of interim measures.

NECESSITY FOR ALTERNATIVE ARBITRAL MECHANISM

Undeniably, the efficacy of the Convention is a significant factor in the continuing popularity of international commercial arbitration as a means of dispute resolution in international commerce. However, as discussed above the Convention has limitations.

It would appear that the main limitation though, stems from the fact that under the Convention, the awards must be enforced by national courts. To find a way around this obstacle, the BRICS countries may have to ensure an automatic enforcement of the awards in their arbitral mechanism and to achieve this, an alternative mechanism might be called for.

In this regard, the BRICS countries could consider an alternative process such as the use of investment treaty arbitrations under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which created the International Centre for Settlement of Investment Disputes (ICSID).

These arbitrations have significant enforcement advantages in that ICSID awards are not subject to any review process by a Local Court and may be automatically enforced against assets as if they are final judgments of the Local Court. However, investment treaty arbitrations are only available for investment disputes where one party is a State and it is asserted that either an investment has been expropriated or an investor treated unfairly.

With this backdrop in mind, perhaps a unique BRICS arbitral mechanism ought to be considered for purposes of the BRICS association. This mechanism should be able to provide not only an alternative dispute resolution mechanism for the BRICS countries but also a mechanism tailored specifically for the BRICS nations. Specifically because in arriving at a mechanism for

17. [2010] UKSC 46.
18. See P Nacimiento, in H Kronke (et. al), Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer 2010) p. 214 in relation to German judiciary.
19. The draft of a revised "New York Convention" presented by Professor van den Berg at the last ICCA Congress is silent on the issue of limitation periods. The only explanation offered by the accompanying explanatory note is that limitation periods vary considerably, from six month in the People's Republic of China to 20 years in the Netherlands. Albert van den Berg, Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards in Albert J. van den Berg, ed., 50 YEARS OF THE NEW YORK CONVENTION 649, 658 (2009).
20. Albert J. van den Berg, The New York Convention of 1958: An Overview in Emmanuel Gaillard & Domenico Di Pietro, eds., ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION IN PRACTICE 39, 54 (2008); see also Jean-François Poudret & Sébastien Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 869 (2d ed. 2007). Note that in many jurisdictions statutes of limitations are considered substantive.
21. A recent study conducted by the ICC found that 53 out of the 66 countries surveyed imposed such a limitation period. Guide to the National Rules of Procedure for Recognition and Enforcement of New York Convention Awards, ICC Bulletin 343-46 (Special Supplement 2008).

arbitration, the BRICS countries have to comprehend concepts familiar in one State that have no counterpart in others and to compromise entrenched and differing national commercial interests.

In addition, to avoid discrepancies in interpretation, and a disregard of the provisions of the "Treaty" by the BRICS countries, perhaps a supreme body could be established to exercise adjudicative powers over arbitration processes of the BRICS countries.

A supreme body (along the lines of CAJAC) may be necessary to coordinate efforts: for developing an international legal mechanism capable of dispensing alternative dispute resolution for the BRICS countries; to understand the interrelation between the different BRICS countries' arbitral laws that would apply; and develop the relevant applicable legal framework for the BRICS arbitral purposes.

Needless to say the arbitral institutions in BRICS countries will play a crucial role in the development, administration and management of the arbitral mechanism. This includes ensuring an effective enforcement mechanism; standard procedures, which could be developed by including commercial entities along with the countries; and administrative funding provided by member countries. The interest that the BRICS countries have in continued access to international commercial arbitration over cross-border litigation should provide sufficient impetus for establishing and funding such an arbitral mechanism.

What is frightening perhaps is that without the cooperation of all the arbitration institutions of the BRICS countries to properly regulate arbitration and enforce the arbitration awards, there will be little to stop violations of the "Treaty" standards.

CONCLUSION

As the existing BRICS institutions continue to engage, efforts must be made to forge an international cooperative structure/mechanism that aims to foster collaboration in the effort to develop the Rules which would be appropriate in the arbitral mechanism. In this regard, the "Treaty" must deal specifically with the limitations of the New York Convention vis-à-vis public policy; state immunity; interim and final awards; and limitation periods; and must address the issue of reservations). The "Treaty" must define arbitration agreements to which it relates and provide clear rules on mandatory referral to arbitration.

Most importantly, awards that are automatically enforced would be more or less equal to contracting out of, or a waiver of Article V(1) and V(2) defences under the Convention which correspond substantially with grounds that, would entitle the award debtor to challenge the award under general institutional rules. Hence this one aspect will have to be considered with even more caution because in the end, should the BRICS countries choose to conclude a different treaty arrangement, it is imperative that the "Treaty" must supersede domestic law concerning the enforcement of foreign awards and should be applied directly (or, as the case may be, by way of reference to the implementing act), leaving no room for the application of *lex fori* of the enforcing court.[22]

22. A J van den Berg, The New York Arbitration Convention of 1958 (Kluwer Law International, 1981), pp. 268 to 270.

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INTERNATIONAL COMERCIAL ARBITRATION MODULE
A BRICS ARBITRAL MECHANISM

By Sarel van Vuuren

INTRODUCTION

BRICS is an association formed by the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa. It is not a formal alliance between these countries, but rather an informal group based on the ideals of support for emerging and developing countries and their co-operation with the developed nations of the world and world institutions

The Delhi Declaration of 2012 set out that the BRICS countries *"stand ready to work with others, developed and developing countries together, on the basis of universally recognized norms of international law and multilateral decision making, to deal with the challenges and the opportunities before the world today"* (paragraph 4 of the document). The 2015 Strategy for BRICS Economic Partnership indicates that BRICS is a dialogue and cooperation platform among member states that *"aims to promote peace, security, prosperity and development in multipolar, interconnected and globalized world"* and *"is aimed at complementing and strengthening existing bilateral and multilateral relations between Member States"* (Under the preamble and item I.1 of the document).

An arbitral mechanism for and by BRICS-countries will have to function under these principles. This assessment focusses on practical issues of how such a mechanism may be established.

THE CURRENT SITUATION

All five of the BRICS nations are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). However, the specifics of the implementation of this convention differs between BRICS Countries.

- Brazil and South Africa have both made no reservations under article 1(3).
- Russia has declared that it will apply the convention only to awards made in non-contracting states if the state in question also grants reciprocal treatment.
- China only applies the convention to the recognition and enforcement of awards made in other contracting states, and only to disputes arising out of relationships considered as commercial.
- India applies the convention only to the recognition and enforcement of awards made in contracting states that have specifically been notified by India as a reciprocating territory. Currently neither South Africa nor Brazil have received such a notification. India also only applies the convention to disputes that are considered commercial.

As regards the situation in terms of the national legislation pertaining to international arbitration of the BRICS countries, the following is pertinent:

- South Africa has adopted the UNCITRAL Model Law by incorporating it into the International Arbitration Act, 2017.
- Russia has also adopted the Model Law by largely copying its contents into the Law of the Russian Federation on International Commercial Arbitration of 1993.
- Brazil's Law No 9.307, 1996 is not based on the Model Law, but it is described as having been "inspired" by the Model law. It includes key elements of the Model Law such as the voluntary nature of arbitration (articles 1 & 2), the requirements of a written arbitration agreement (articles 3 & 4), the severability of an arbitration agreement (article 8), the competence of a tribunal to rule on its own jurisdiction (articles 15 & 20) and limited grounds for refusing to recognise "foreign" arbitral awards (articles 38 & 39).
- Arbitration in India is regulated by the Arbitration & Conciliation Act, 1996 and the Arbitration and Conciliation (Amendment) Act, 2015. This dispensation is based on the Model Law and contains most of its fundamental features. However, crucially, the appointment of arbitrators is an administrative decision of the Indian Supreme Court or High Court.
- China's Arbitration Law of the People's Republic of China, is not based on the Model Law. This law does not make provision for *ad hoc* arbitrations (article 9 & 21 to 25), nor does it allow an arbitration tribunal to decide on its own jurisdiction (article 20,

35 & 36). The law also appears to be incompatible with the UNCITRAL Rules and other international arbitration rules (article 75). However, the law is currently under review in order to address *inter alia* these concerns. It does provide for voluntary arbitration (articles 2 & 4) based on a written arbitration agreement (articles 16), the severability of the arbitration agreement (article 19), an impartial tribunal of the parties' choice (articles 30 – 34), a fair hearing (articles 39 to 48), a legally enforceable award (articles 57 & 62) and limited grounds for the courts' interference with arbitral awards (article 58).

Therefore, it appears that there does exist a commonality between the five BRICS nations inasmuch as the basic principles of private arbitration are concerned – keeping in mind the peculiarities indicated above regarding the institutional (court) appointment of arbitrators India and the lack of *ad hoc* arbitrations and incompatibility with international rules in China (which are being addressed). It is also clear that the New York Convention is, in principle, applicable by and between all the BRICS countries, with the exception of India's lack of recognition of South Africa and Brazil.

IS THE NEW YORK CONVENTION AN ACCEPTABLE FOUNDATION?

When deciding whether the New York Convention can serve as a foundation for a BRICS arbitral mechanism, it is important to note that this convention is widely accepted with 161 state parties, including the five BRICS nations. The convention is clearly a tried and tested mechanism through which the resolution of disputes between parties from differing nations can be enforced. This means that the NEW York Convention (together with the UNCITRAL Model Law) serves as an encouragement and safeguard to international trade and business – something which is central to the philosophy of BRICS.

The fact that the five BRICS nations are already all party to the convention means that as an association of nations, arbitration of disputes between individuals and entities within the BRICS nations themselves and with those outside of BRICS, are already underpinned by the convention. However, there are some issues in this regard.

- The first is the issue of China and India applying the New York Convention's enforcement and recognition mechanism only to disputes emanating from what the two countries consider commercial relationships. When regard is had to traditional international trade, such a reservation does not present a problem. But there are instances where such a reservation may prove a stumbling block, such as international agreements for joint training and education relationships between institutions such as universities, or co-operation in the fields of art and culture.

- The second issue pertains to the reservations of Russia and China regarding reciprocity. The Russian reservation only applies to non-New York Convention states who do not also have a separate reciprocity deal with it (Russia). China's reservation excludes non-contracting states. Given the wide acceptance of the New York Convention, and the fact that all BRICS nations are party to the convention, this is not a big issue.

- The third issue is India's insistence on applying the New York Convention only to a select (small) number of party states of its own choosing. The fact that South Africa and Brazil have not been chosen by India constitutes a big stumbling block when the convention is considered as a foundation for a BRICS arbitral mechanism.

The central motivation of the New York Convention, and of any postulated BRICS arbitral mechanism, is the enforceability of arbitration awards that reach beyond national borders. It is also important to remember that the New York Convention expressly permits other multilateral agreements between contracting states concerning the recognition of arbitral awards.

If the issues above are not capable of resolution, it would logically follow that the BRICS nations should develop their own mutual foundation, in the form of a new multinational treaty, or convention, applicable only between the five nations. Such a new instrument will be able to address not only the issue of acceptance by India and China of awards pertaining to disputes not a non-commercial character, but also to acceptance by India of South African and Brazilian awards.

However, such a BRICS-only arbitration instrument is not recommended. Because the national arbitration regimes in all of the BRICS national are already aligned with, or lean towards, arbitration as encompassed by the New York Convention, a BRICS arbitration instrument would inevitably be largely a duplication of that convention. Such a duplication is unnecessary. In addition, a BRICS-only arbitration instrument would be exclusionary of other nations, something which runs contrary to the philosophy underpinning BRICS itself. Even if other nations are invited to join such a BRICS instrument, that would not address the unnecessary duplication.

It would be a far more desirable outcome for BRICS to address the issues indicated above in order to facilitate acceptance of the New York Convention as underpinning a BRICS arbitral mechanism. India should eliminate the exclusion of South Africa and Brazil (as well as other New York Convention states), whilst it and China should address the recognition of non-commercial disputes.

Accepting the New York Convention as the foundation for a BRICS arbitral mechanism is, therefore, recommended.

THE NEW YORK CONVENTION MODEL OR A DE-NATIONALISED INSTITUTION?

When discussing the form which a BRICS arbitral mechanism will take, it is important to understand what exactly is being contemplated. It appears that the desire for a BRICS arbitral mechanism points towards an arbitration institution, or body, shared amongst the five nations. Such an institution should be able to function in and between all five nations.

- One example of an institution which provides for, and administers, international arbitrations is the International Court of Arbitration of the International Chamber of Commerce (ICC). The ICC does not prescribe the mechanism by which arbitral awards issued under its auspices may be enforced, but it does provide a widely accepted arbitral procedure under its own rules (article 1(2) of the ICC Arbitration Rules) which the parties agree will be binding upon them (article 35). However, the ICC is an independent organisation not linked to any state or number of states.

- Another example is the Common Court of Justice and Arbitration (CCJA) of the Organisation for the Harmonization of Business Law in Africa (OHADA). The CCJA is specifically linked to the seventeen OHADA member-states and their intention to *inter alia* encourage the resolution of contractual disputes by arbitration (first article and article 3 of the OHADA Treaty). Similar to the ICC's International Court of Arbitration, the CCJA does not decide disputes, but rather administers the arbitration process (article 21, 22 and 24), but those awards are binding on and enforceable in all OHADA member states (articles 23 and 25).

It seems that the CCJA-model of a shared common arbitral institution based on a multilateral treaty would be the logical choice for the establishment of a BRICS arbitral mechanism. As indicated, it would be logical and advantageous for such a body to utilise the New York Convention as a means of securing the recognition of its awards – relating to parties from more than one state – in BRICS nations (with the caveats discussed above), and in other states party to the convention. Therefore, apart from a multinational agreement regarding the setting up of the body, no further agreements are necessary as the recognition of awards of the body will be based on the obligations the BRICS nations already have under the New York Convention. An added advantage would be that such awards would also be enforceable in non-BRICS nations (provided of course that those other nations are signatories to the New York Convention).

There is a complication, though. Insofar as BRICS as an organisation of nations is concerned with the development not only of its own members, but also of other developing nations around the world, investment relationships are and will be formed between private entities (such as companies) and states. When disputes arise and are settled between such contracting parties (states and private entities), the New York Convention does not provide an appropriate mechanism for enforcement. This is a logical conclusion when considering that, in the event that a specific state is the losing party in an arbitration between itself and a private party or parties, that very state would be required under the New York Convention to recognise and enforce such an award against itself. It is also clear that this convention is intended to apply to a contracting state's recognition of the outcome of arbitrations between private parties (see, for example, articles I(1), II(1) & (3), V(2) and XIV).

In order to address this problem, a mechanism is needed that would bind the BRICS nations (and other nations that would wish to join such an arrangement) to an authority that falls outside of the individual nations' domestic legal systems.

- Whilst the arbitral awards under the auspices of the CCJA does bind the OHADA member-states, it does not pertain to investment disputes (articles 2 of the OHADA Treaty).

- The International Centre for Settlement of Investment Disputes (ICSID) set up under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention) is set up specifically for the conciliation (facilitated negotiation or mediation) and arbitration of disputes between states and nationals of other states (articles 1(2) and 25(1) of the Washington Convention). It provides for the exclusion of any other remedy regarding such a dispute (article 26) and the recognition and enforcement of awards (articles 27, 53 and 54).

The difficulty with the Washington Convention is that South Africa, Brazil and India are not party to it, and Russia – whilst a signatory – has not yet ratified the convention. Therefore, the Washington Convention (and ICSID) cannot serve as a BRICS mechanism for the settlement of investment disputes. But it could serve as a model for a similar inter-BRICS mechanism for the settlement of investment disputes.

Both the CCJA and the ICSID are linked to multinational organisations – CCJA to OHADA and ICSID to the International Bank for Reconstruction and Development. The BRICS nations have already established the New Development Bank as a joint financial institution for developmental purposes.

From all of the above, it would appear that a BRICS arbitral mechanism will have to actually be in the form of two separate bodies – one for international disputes between private persons or legal entities, and one for investment disputes. However, it bears mentioning that ICSID, whilst having 154 contracting states, has only handled 491 cases in the 47 years since 1972 – for an average of just over 10 cases per year. It is reasonable to assume that a specialist BRICS investment dispute body (with only five members) will have a very small number of disputes do deal with.

For all of the reasons above, it is suggested that the BRICS nations set up a mechanism similar to the CCJA, and linked to the New Development Bank. Such a mechanism, or body, would serve as a common arbitral body for international arbitration based on the principles of the New York Convention. But it should also serve, taking the form of ICSID and provided the necessary inter-BRICS agreement similar to the Washington Convention, as an arbitral mechanism for investment disputes. This will allow for the pooling of resources as well as the development of arbitral knowledge and expertise amongst BRICS nations.

THE ROLE OF EXISTING ARBITRAL INSTITUTIONS IN BRICS NATIONS

All of the BRICS nations already have well-established arbitration institutions. The question is whether these institutions will be marginalised or even fall way when faced with a common arbitral institution for all BRICS nations – at least in as far as international arbitration is concerned. It is suggested that the various arbitration institutions within BRICS nations should rather be utilised by either being incorporated into or in support of a BRICS arbitration institution.

An example of how this might work is the China-Africa Joint Arbitration Centre (CAJAC). CAJAC in a joint venture by several arbitral and legal institutions in China and Africa and is administered by the Arbitration Foundation of Southern Africa, the Association of Arbitrators of South Africa, Africa ADR and the Shanghai International Arbitration Centre. In addition, there are two CAJAC centres, one in Johannesburg and one in Shanghai, that co-operate with each other.

It is suggested that a similar BRICS centre could be established based on the CAJAC model, taking into account the suggestions already indicated above. Therefore, instead of a BRICS arbitral body having a single seat, such a centre could utilise the infrastructure, services, knowledge and expertise of various national arbitration institutions within BRICS nations and have centres in all of the BRICS nations cooperating with one another. This will ensure a uniformity of alternative dispute resolution, especially arbitration, between the BRICS nations as well as universal availability of such an institution.

The only difficulties regarding such an arrangement is the requirement in India for the appointment of arbitrators by the Supreme Court of High Court and the lack of recognition of *ad hoc* arbitration in China.

- The Indian requirement may be addressed by India itself or it may simply remain as a peculiarity present in that country. It appears as though this is not such a departure from the normal principle of parties being able to chose the arbitrator of their dispute themselves, since arbitrators are still nominated by the parties or by an institution chosen by them for that purpose in India and then administratively appointed by the court (see the Indian Council of Arbitration's Rules of International Commercial Arbitration, rules 3(1)(v), 5(1)(vi), 9, 10, 11 and 12).
- The fact that *ad hoc* arbitration is not recognised in China is also currently being addressed by that country (as already indicated).

There is also a further role for the arbitral institutions already existing within the BRICS nations. That role is regarding the development of arbitration capacity as well as the training of arbitrators (as well as adjudicators and mediators) to ensure that the standard of arbitration and other forms of alterative dispute resolution keeps improving.

WHAT RULES SHOULD APPLY TO A BRICS ARBITRATION CENTRE?

There exists a multiplicity of rules under which international arbitrations can and do take place around the world. It is a fundamental principle of private arbitration that the parties to the dispute may decide on the rules and procedure for the resolution of their dispute (provided, of course, that no national or international laws or principles of law are violated).

With the regard to arbitral institutions, it is the norm for such institutions to draft their own rules and for arbitrations administered or facilitated by them to be done under those rules. For example:

- The International Court of Arbitration administers the resolution of disputes under ICC Arbitration Rules and that court is the only body authorised to do so (ICC Arbitration Rules article 1(2)), although it is permissible for parties to modify the rules (article 1(4)).
- The Arbitration Foundation of Southern Africa's "Rules for the Conduct of an administered Arbitration" requires that a dispute submitted to that institution be determined in accordance with those rules (rule 5.1), but again the rules may be varied (rule 5.2).
- The Arbitration Rules of the CCJA (OHADA) requires that institution to administer arbitrations in accordance with those rules (article 2.1).

As argued above, it would be desirable to accept the New York Convention as the foundation for a BRICS arbitral institution. In addition, the BRICS nations all have laws regulating international arbitration that either incorporate the UNCITRAL Model Law, or are based on or compatible with the Model Law. It would therefore be logical to accept the UNCITRAL Arbitration Rules as a foundation for the rules that would be appropriate for such a BRICS arbitral institution.

With regards to the settlement of investment disputes, it is instructive to note that ICSID has adopted its own "Rules of Procedure for Arbitration Proceedings" which are specifically tailored to investment disputes. It is also interesting to note that the Indian Council of Arbitration's Rules of International Commercial Arbitration includes *"[t]he Government of a foreign country"* as one of the possible parties to an *"International Commercial Arbitration"* (rule 2(i)(iv)) – indicating that it is possible to make provision for the settlement of investment disputes within the broader rules of general international arbitration. It would be recommended that a BRICS arbitral institution, for the purposes of settling investment disputes, use the ICSID arbitration rules as a model or foundation, and possibly to incorporate those into its broader rules. This would simplify those rules to a single volume.

As regards the laws applicable to arbitration, it is generally accepted that the seat of an arbitration (the country of the institution under whose auspices it is being held, or the place chosen as seat in *ad hoc* arbitrations) determines the law applicable to the hearing. Given the compatibility with, or close resemblance of, the Model Law regarding all the BRICS nations' internal arbitration laws, there will be a large degree of uniformity of law regardless of which centre is used in the proposed BRICS arbitration institution.

With regard to the law applicable specifically to the resolution of the dispute, it is generally accepted that the parties are able to choose such law themselves. A BRICS arbitration institution should allow for this freedom of choice in order to facilitate wide acceptance of its processes.

CONCLUSION

When contemplating an arbitral institution for BRICS nations, it is important to take cognisance of the fact that there are many similar institutions already the world over. The BRICS nations should not attempt to re-invent the wheel. Rather, it would be advisable to take advantage of the developments that have already taken place and tailor it to suit BRICS's needs, goals and aspirations.

It is also important to not create a mechanism or institution that isolates the BRICS countries from the rest of the world in as far as the resolution of disputes through arbitration (and adjudication and mediation) is concerned.

It is recommended that an arbitral institution with centres in all the BRICS nations be established, linked to the New Development Bank. Such an institution should be able to administer the arbitration of disputes between private parties from two or more states and investment disputes involving states as well as private parties. Using the already existing obligations between BRICS nations themselves and towards other nations in terms of the NEW York Convention, will ensure a wide acceptance of such an arbitral institution and the awards issued under its auspices.

Sybil Lyons-Grootboom

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Sybil has a keen interest on international commercial arbitration and believes that the employment of this mechanism in government litigious matters will result in savings on expenditure that is so much required at this time.

ADEQUACY OF NEW YORK CONVENTION AS FOUNDATION FOR BRICS ARBITRAL MECHANISM

By Sybil Lyons-Grootboom

PURPOSE OF THE ASSIGNMENT

The paper seeks to respond to questions posed on whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'),[1] 1958 provides an adequate foundation for an arbitral mechanism for BRICS countries in light of reservations entered by members states, whether a denationalised basis will better serve the interest of the BRICS countries, and what role should existing arbitral institutions play in the formation of a BRICS arbitral mechanism.

EXECUTIVE SUMMARY

The New York Convention is viewed as the foundation of current international commercial arbitration and established a single set of international legal standards for the enforcement of arbitration agreements and arbitral awards. Article V of the New York Convention contains a comprehensive list of grounds that member countries may rely on to justify their refusal to recognise and enforce foreign arbitral awards.[2] Member states may also refuse to recognise and enforce foreign arbitral awards where, upon ratification or accession, the member states expressly restricted the application of the New York Convention by entering reservations. To this end, Brazil and South Africa entered no reservations, while Russia, India and China entered reservations.

Affording member states the right to enter reservations brings with it challenges such as disparities in the implementation and enforcement of arbitral awards, resulting in inequitable enforcement at domestic or national level. The question whether a different treaty is required considering the reservation entered, must be found in the objectives the BRICS countries set for itself to achieve. Is there a deep and genuine political commitment for harmonisation of domestic laws or not? I conclude that the New York Convention is an adequate foundation for a BRICS arbitral mechanism provided all countries align their respective domestic legislation to ensure uniformity in the recognition and enforcement of arbitral awards.

As a supporter of harmonisation, coupled with an element of flexibility, I hold the view that the New York Convention, read with the UNICITRAL Model Law, implemented in a uniformed manner in BRICS countries, will result in amendments of national laws to ensure alignment to have the desired outcome. Lastly, I submit that it is not only prudent but also in the best interest of the BRICS countries to ensure that they build on the efficiencies of existing arbitration institutions located in BRICS countries.

1. **Whether the New York Convention is an adequate foundation for the BRICS arbitral mechanism or whether, in light of the reservations made by certain BRICS countries, a different treaty arrangement should be concluded between BRICS countries?**

    1.1. The New York Convention is viewed as the foundation of current international commercial arbitration. The purpose of the Convention is to harmonise the application and implementation of international commercial arbitration, through the establishment of a single set of international legal standards for the enforcement of arbitration agreements.

    1.2. An article on the Recognition and enforcement of international arbitral awards states the following:[3]

    "… the Convention presumes the validity of awards and places the burden of proving

1. United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).
2. Article V of n1.
3. Law Expert "Recognition and enforcement of international arbitral awards" (2019), Business Law.

invalidity on the party opposing enforcement.[4] *Moreover, …awards are not subject to "double exequatur" and need not be confirmed in the arbitral seat before recognition can be sought abroad. In addition, as Article III provides, Contracting States may not impose procedural requirements that are more onerous than those applicable to domestic awards."*

1.3. Article V of the New York Convention contains a comprehensive list of grounds,[4] which member states may rely on to justify the refusal to recognise and enforce foreign arbitral awards. These grounds are the following:

1.3.1. *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

a. *The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

b. *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*

c. *The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

d. *The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

e. *The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

1.3.2. *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

a. *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*

b. *The recognition or enforcement of the award would be contrary to the public policy of that country.*

1.4. It must be noted that Brazil and South Africa entered no reservations to the implementation of the New York Convention on accession thereof on 3 May 1976 and 7 June 2002, respectively.

1.4.1. The Russian Federation ("Russia") was a signatory to the New York Convention on 29 December 1958 and ratified it on 24 August 1960. Russia entered a reciprocity reservation, which means that Russia will recognise and enforce an arbitral award made in the territory of another contracting state, where such contracting state impose a reciprocity reservation;

1.4.2. India was a signatory to the New York Convention on 10 June 1958 and ratified same on 13 July 1960. India elected to apply the New York Convention to the recognition and enforcement of awards made only in the territory of a state party to this Convention and declared that India will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India; and

1.4.3. China acceded to the New York Convention on 22 January 1987 and entered two

4. Article V of n1.

reservations, namely, a reciprocity reservation, which means that China will only recognise and enforce awards, made in the territory of another contracting state and a commercial reservation, meaning China will apply the New York Convention only to awards where the underlying dispute arises out of a contractual or commercial legal relationship. China further declared that in the situation of any discrepancy between the stipulations of the New York Convention and those of the Chinese law, the New York Convention shall prevail.

1.5. It is submitted that the impact of these reservations, whether reciprocity or commercial, entered by the BRICS countries, bring with them disparities in the implementation of arbitral awards which limits the effectiveness of the New York Convention.

1.6. In an article published by the Law Society of South Africa entitled "BRICS Legal Forum:[5] An opportunity for legal cooperation through unity and diversity" Chief Justice of South Africa, Justice Mogoeng stated that the BRICS member states need to acknowledge that laws or regulatory frameworks do not just exist, they exist with an objective in mind. He further said the following:

"Let that regulatory framework not be favourable to some members of BRICS, but let it be favourable to all of us".

1.7. The question whether a different treaty is required considering the reservation entered must be found in the objectives the BRICS countries set for themselves to achieve. Is there a deep and genuine political commitment for harmonisation of domestic laws or not? Is there a deep and genuine political commitment to ensure that the international arbitral mechanism for BRICS nations is favourable to all?

1.8. If the political will or desire of the BRICS countries is to afford equal protection to their citizenry and ensuring that the implementation of the BRICS arbitral mechanism will be favourable to all countries than the alignment of their respective domestic legislation to ensure uniformity, is vital.

1.9. It is submitted that the New York Convention serve as a solid foundation for the BRICS arbitral mechanism provided the BRICS countries reach agreement and commit themselves to amend their national laws to align same in order to ensure uniformity.

1.10. However, if there is no commitment from all the BRICS countries to align their national laws to ensure uniformity of its legislation regulating international arbitration, a different treaty arrangement must be considered and will be best suited, which treaty must state that all awards are final and binding and in doing so guarantee the execution of arbitral awards in BRICS countries.

1.11. I am however not an advocate of any legal systems that seeks to usurp the right of states to govern the affairs of its people.

1.12. I therefore conclude that the New York Convention is suited as a foundation for BRICS arbitral mechanism, as it allows for a measure of autonomy as far as domestic laws are concerned as each state must be afforded the right to govern, on its own initiative, the affairs of its people.

2. **Whether the arbitral mechanism should follow the New York Convention model (i.e. reliant in part on the national law and national courts) or whether it should be constructed on a de-nationalised basis, such as** Convention on the Recognition on Settlement of Investment disputes between States and Nationals of Other States ("the ICSID Convention")?[6]

2.1. This questions must be answered bearing in mind that countries are independent.

2.2. Wikipedia defines **sovereignty** as *"the full right and power of a governing body over itself, without any interference from outside sources or bodies".*[7]

2.3. To this end, governments are seized with the task of, amongst others, making laws to regulate matters such as the conduct of their people.

2.4. Evident from the reservations entered to the implementation of the New York Convention by three of the BRICS countries, is that these countries hold dear their sovereignty.

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5. Mogoeng "BRICS Legal Forum: An opportunity for legal cooperation through unity and diversity" De Rebus (2018).
6. Convention on the Recognition on Settlement of Investment disputes between States and Nationals of Other States ("the ICSID Convention").

2.5. Again, the question turns on the political will of the BRICS countries and whether the attainment of the objective to ensure effective implementation and enforcement of BRICS arbitral awards justify denationalisation.

2.6. Under the ISCID Convention contracting states are placed under a duty to,[8] amongst others, comply with awards made and to recognise the awards as final and binding. The fundamental difference with the New York Convention, therefore, is that national courts do not play any role as far as the review of awards so furnished are concerned.

2.7. It must be noted that Article 53 (1)[9] of the ICSID Convention states that the ***award shall be binding on the parties*** and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. ***Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*** Article 54 (1)[10] of the ICSID Convention further states that ***each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.*** A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

2.8. Article II (1) of the New York Convention,[11] stipulates that ***each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship***, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Article II (2) further provides that the terms "agreement in writing" shall include an arbitral clause in a contract for an arbitration agreement, signed by the parties or contained in an exchange of letters of telegrams. Article II (3) stipulates that ***a court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, in operative or incapable of being performed.***

2.9. The United Nation Commission on International Trade Law Model Law,[12] (UNCITRAL Model Law), as amended, is considered, universally as the single most important legislative instrument in international arbitration. The Model Law brings with it, Article 34(2) of the Uncitral Arbitration Rules which stipulates that all awards shall be binding on the parties.[13] It therefore gives rise to the possibility that contracting states can adopt Art 34(2) which has a similar effect as Articles 53 and 54 of the ICSID Convention stating that awards are final and binding.

2.10. In an article entitled the enforcement of arbitral awards to ICSID or not to ICSID is not the question by Freya Baetens,[14] published in the Investment Treaty and Arbitration and International Journal, Baetens states the following:

i. that the ICSID and New York Convention enforcement system both contain forms of safeguards mechanisms against "blind" enforcement, the annulment procedure under the ICSID which resemble a form of a standard appeal making the process much longer and more costly and national review procedure under the New York Convention, where awards can actually benefit from the additional review.

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7. Wikipedia "Definition of sovereignty".
8. Article 53 of n6.
9. See Article 53 of n6.
10. Article 54 of n6.
11. Article II(1) of n1.
12. United Nations Commission on Trade Law (UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985, amended in 2006).
13. See Arbitration rules on n12.

ii. ***that the New York Convention's is broader as far as it relates to the refusal of enforcement as it does not require that the tribunal's excess of powers is manifest, or that the procedural laws are serious, On the other hand, she states, Article 52 of the ICSID Convention could equally be seen as broader as it provides for two grounds that are not listed in Article V(1) of the New York Convention, namely, annulment due to corruption of a tribunal member and failure to state the reasons on which the award was based.***

iii. ***On policy grounds, she indicates that the New York Convention seems a more acceptable option for member states.***

2.11. Having considered the article mentioned in paragraph 2.10 above, I hold the view that adopting the New York Convention or the ICSID Convention really boils down to what objectives the parties want to achieve. The ICSID Convention has some limitation to consider as it only caters for pecuniary obligation, whereas the New York Convention deals with both pecuniary and non-pecuniary awards.

2.12. In addition, as a proponent of harmonisation coupled with an element of flexibility, I hold the view that the New York Convention, read with the Model Law which is implemented in an uniformed manner in the BRICS countries, will result in the amendments of national laws to ensure alignment to have the desired outcome.

3. **What part, if any, existing arbitral institutions in BRICS countries should play in the formation of a BRICS arbitral mechanism:**

3.1. The Conference on international arbitration in BRICS, held in New Delhi on 27 August 2016, discussed challenges, opportunities and the road ahead raised the question whether there is a need to have another institution to add to the existing institutional framework for resolving disputes between BRICS nations.

3.2. Some of the existing arbitration institution found in China consist of China International Economic Trade Arbitration Commission which was established in 1956. In addition, the Hong Kong Arbitration Centre, the Singapore International Arbitration Centre and the International Commercial Court expanded their footprints by opening representative office in Shanghai to promote international arbitration in the region.

3.3. In an article entitled "towards a single BRICS arbitral mechanism" delivered during the IV BRICS Legal Forum 2017,[15] held in Russia, Advocate Lindi Nkosi-Thomas stated that the China-Africa Joint International Arbitration Centre (CAJAC) project is, in many ways, an important prototype for the BRICS arbitral mechanism. To this end, she added that there is a wealth of experience within the BRICS countries and there are highly efficient arbitration institutions; there is therefore no reason why we cannot harness the resources and the potential available to establish a BRICS arbitral mechanism.

3.4. CAJAC was created as a result of the agreement reached by AFSA, Africa ADR (AFSA's external arm), the Association of Arbitrators and the Shanghai International Trade Arbitration Centre after more than two years of negotiations and collaboration between the Chinese and South African delegations. What gave birth to the CAJAC was the increase of trade and investment between African and China, which demanded the creation of a neutral and cost-effective mechanism to resolve disputes.

3.5. It is submitted that it is not only prudent, but also in the best interest of the BRICS countries to ensure that they build on the efficiencies of the already existing arbitration institutions located in BRICS countries. In addition, it will be prudent to leverage on existing arbitral institutions in BRICS to play a critical role in the formation of a Brics arbitral mechanism for, amongst others, the following reasons:

i. These institutions are currently served by legal experts who understand both international commercial arbitration and the national laws in countries they

14. Beatens '' the enforcement of arbitral awards to ICSID or not to ICSID is not the question" (2012) Investment Treaty Arbitration and International Law, Vol 5
15. Nkosi-Thomas "Towards a single BRICS arbitral mechanism" (2017) IV BRICS Legal Forum, Russia.

operate in and have the ability to take into consideration, the unique conditions and challenges of developing countries with reference to the socio economic needs of each BRICS member country;

ii. Opportunity to develop legal professionals in international arbitration;

iii. Existing infrastructure with resources such as human resources in place;

iv. Standardised ethical consideration in the appointment of arbitrators.

3.6. It is submitted that existing arbitration institutions must be used to play a part in the BRICS Arbitration Mechanism. Lessons can be learnt from China which appears to be the forerunner with the speedy resolution of arbitral disputes.

3.7. It is further submitted that should the domestic legislation of the BRICS countries be aligned to ensure uniformity in the application and implementation of the awards, that it will provide comfort to contracting parties, that no matter where they are, the matter will be handled in the same manner in BRICS countries. This will lead to clarity and certainty which will, in turn, stimulate further investments in and amongst the BRICS countries.

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"The goal is to start with the creation of a network including the BRICS member states only and then to expand the scope of the network to include other emerging economies, when the project has achieved a certain measure of success. The economic clout of the BRICS countries, as well as the effects of scale that they can bring to bear through their state-owned enterprises are important factors that point to the success of the initiative".

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PUTTING IN PLACE AN INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MECHANISM WITHIN BRICS

By Tshiamo Maseko Poisson

CONTENTS

INTRODUCTION

In 2009, Brazil, Russia, India and China (BRIC) came together for their first formal summit. In the joint statement that ensued from the gathering, the goals of the collaboration were described as "to promote dialogue and cooperation among our countries in an incremental, proactive, pragmatic, open and transparent way. The dialogue and cooperation of the BRIC countries is conducive not only to serving common interests of emerging market economies and developing countries, but also to building a harmonious world of lasting peace and common prosperity." In 2010 South Africa was invited to join the bloc, becoming BRICS, as we know it in its current form.

In 2019, the five BRICS countries represented over 3.1 billion people, or about 41% of the world population; four out of five members (excluding South Africa at n° 24) are in the top 10 of the world by population. These five nations have a combined nominal GDP of US$19.9 trillion, about 23.2% of the gross world product, combined GDP (PPP) of around US$40.55 trillion (32% of World's GDP PPP)[1].

Globalization and an increased influence of developed countries enables BRICS to be a vocal representative of the developing world to change the present allocation of international governance[2]. One of the main objectives of BRICS nations is a joint improvement of the international trade and investment environment for the creation of a more equitable international economic order[3]. The BRICS cooperation is currently still organised more like a platform for dialogue and cooperation rather than an international organisation in a strictly legal sense. Within this framework however, BRICS have made considerable progress and widened as well as deepened their cooperation in many areas. BRICS has also championed the question of multilateralism. At its 11th Summit in Brazil in 2018, the BRICS countries reaffirmed to stay true to the grouping's original purpose of promoting solidarity and cooperation among emerging markets and developing countries based on multilateralism and representing their interests. This will need to include more efforts of a more structural framework to promote institutionalized practices of multilateralism.

BRICS is moving towards more institutionalized practices with the creation of the New Development Bank (NDB) in 2014 and the Contingent Reserve Arrangement framework established in 2015. At the 8th BRICS Summit in India in 2016, the establishment of an international arbitral mechanism for BRICS member

1. BRICS 2019 countryeconomy.com
2. By the developed superpowers author meant seven major advanced economies (G7) as reported by the International Monetary Fund: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States
3. Joint Statement of the BRIC Countries' Leaders Yekaterinburg, Russia, June 16, 2009. Para. 5. Available at: http://www.brics.utoronto.ca/docs/090616-leaders.html

states was high on the agenda, putting emphasis on the need for such a mechanism to resolve both commercial and investment disputes within the BRICS' economic collaboration. But how and on what basis would such an international arbitration mechanism be formed? How different would it be from the already existing BRICS Dispute Resolution Shanghai Centre?

This paper will look at the already existing regulatory framework for international arbitration and will explore in what manner such an existing framework could influence the BRICS mechanism. This paper will then go on to look at the more practical aspects of such a mechanism.

(I) THE REGULATORY FRAMEWORK OF INTERNATIONAL COMMERCIAL ARBITRATION

The regulatory framework of international commercial arbitration, mostly developed in the second half of the 20th century, was established to support international trade and investment by providing a stable, predictable and effective legal environment in which commercial activities can be conducted.

For international commercial arbitration to exist, a regulatory framework is required that ensures its effectiveness within the international legal landscape. This regulatory framework must give effect to the agreement to arbitrate, the organization of the arbitration process and the finality and enforceability of the arbitration award.

To do such, there are a number of key instruments within the framework that include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), the United Nations Commission of International Trade Law (UNCITRAL) Arbitration Rules and Model Law and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ("Washington Convention").

The New York Convention and the Washington Convention are the two international conventions upon which the system has functioned and flourished. This paper will look into their application to understand if they may provide an institutional basis, and if so to what extent, to the international arbitral mechanism within BRICS.

A) The New York Convention, the cornerstone of international commercial arbitration

This Convention has been described as the "most important international treaty relating to international commercial arbitration"[4]. It has been accepted by the global business community that international commercial arbitration is the most practical method of resolving disputes resulting from international commercial transactions. This has been accomplished by not prescribing hard and fast procedural rules that must be applied and adhered to by the parties to arbitration proceedings, but rather providing legal standards for enforcement and recognition of parties' arbitration agreements and arbitral awards by national courts in signatory states.

The New York Convention's primary objective is that foreign and non-domestic arbitral awards are recognized and generally enforceable as domestic awards. A secondary objective is to require local courts to give full affect to arbitration agreements by denying parties access to local courts and referring them to arbitral tribunals.

The material scope of the New York Convention provides in its Article 2 that it recognizes arbitration agreements in writing that the parties will submit and use for arbitration of all or any differences which have already arisen or which may arise in the future, in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The agreement that will not be recognized is one that is found to be null and void, inoperative or incapable of being performed.

The Convention also has a territorial scope in its Article 3 that provides that it only applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement are sought.

The limited grounds of refusal open to local courts is another reason for the supremacy of this Convention. They include:

- invalidity of incapacity with regards to the parties to the arbitral agreement;

4. Redfern et al. supra note 12, pg. 63.

- lack of notice or due process with regards to the respondent not given adequate notice of the proceedings, the appointment of an arbitrator or was not given the opportunity to present his case;
- lack of jurisdiction with regards to an award that is beyond the scope of submission to arbitration;
- procedural irregularity with regards to the composition of the arbitral tribunal or the procedure followed by the tribunal not being in accordance with the agreement of the parties or when there is no such agreement, when the procedure is not in accordance with the law of the country of the seat;
- not binding with regards to the award because it has been set aside or suspended at the seat of arbitration;
- arbitrability with regards to the subject matter of the arbitration and it not being arbitrable under the law where enforcement is sought; and
- public policy with regards to enforcement being contrary to the public policy of the country where enforcement is sought.

The large adoption of this Convention has meant that international arbitration has been able to flourish with the development of international commercial activity.

B) The limitations of the New York Convention

The New York Convention is hailed for its success of having developed the international arbitration regime and being one of the most widely adopted private law conventions, with 165 Contracting States, however it does have some limitations.

The first of these may be its reliance on national laws and courts for its application. And though there exists a number of safeguards, such as the ICCA Guide to the New York Convection, which includes a checklist for judges working with the New York Convention, the requirement of having to go through domestic proceedings can be regarded as an inadequacy.

Such inadequacy is observed in the differences in procedure of enforcement of the different national systems. These differences relate to the differences of time limits for enforcement, the different conditions to which the applicants are subject, the costs and fees and the submission of documents.

It can be noted that within BRICS these discrepancies exist. For example, Brazil does not have a limitation period applicable to the commencement of legal proceedings for the recognition and enforcement of foreign awards. On the other hand, both Russia and India have a limitation period of three years while China has a period of two years for the commencement of legal proceedings.

This highlights the discrepancies that may exist between two applications. Furthermore, the question of interpretation or rather formalism in interpretation, though quite limited by the guide mentioned above and the general will of Contracting State parties to be harmonized with the general rules of interpretation, can play a role. An example of such, is the USA's rule engendering from the court's interpretation of the Due Process Clause in the American Constitution. This rule of interpretation requires US courts to have personal jurisdiction over the award debtor or his or her property to be able to recognize and enforce an arbitral award under the New York Convention. This deforms the essence of the Convention.

The second limitation pertains to the two reservations that can be made to the application of the Convention. The first reservation is the reservation of reciprocity which allows Contracting States to declare their conditional application of the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. This precludes the principle that the Convention applies to all foreign or international arbitration agreements and to all foreign or non-domestic awards. Considering that almost two-thirds of the Contacting States have made this reservation, this reservation can have far-reaching consequences on international trade.

The second reservation is the commercial nature reservation which allows Contracting States to limit the application of the Convention only to differences arising out of relationships of a commercial nature, according to the law of the State making such declaration. This reservation has been made by one-third of Contracting States.

The reservations above are particularly significant within the context of putting in place an international arbitral mechanism within BRICS and considering the adequate regulatory foundation for such. In light of the reservations made by certain BRICS countries, we have had to ask the question as to whether the New York Convention would constitute such adequate foundation.

Firstly, all the BRICS countries are Contracting States of the New York Convention. Brazil, Russia and South Africa have acceded to the New York Convention

without any reservations. However, this is not the case of India and China.

India has made what can be called an extended reservation of reciprocity with regards to the Convention. Accordingly, India will only apply the Convention to recognize and enforce awards made in the territory of other Contracting states, which have been notified by the Central Government as a reciprocating territory, through a notification in the Gazette of India. Thus it is not enough to be a signatory of the New York Convention to be considered as a reciprocating territory. India also applies the commercial nature reservation, according to which it will only apply the Convention to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law.

China has also made a reciprocity reservation under the New York Convention. Accordingly, China will only apply the New York Convention to the recognition and enforcement of awards made in the territory of other Contracting States. Arbitral awards made in a non-Contracting State will be recognized and enforced according to the relevant provisions of the Civil Procedure Law. China has also made a commercial relationship reservation, and accordingly China will only apply the New York Convention to disputes arising out of legal relationships, whether contractual or not, which are considered as commercial under Chinese law.

It is especially important for an economic grouping like BRICS with the goal of furthering trade and investment among its members, to be able to ensure the recognition and enforcement of foreign arbitral awards by the courts of all its member countries. This has not been the case between India and South Africa and India and Brazil. India's Government Gazette does not indicate neither South Africa nor Brazil as Contracting States of the New York Convention. As a result, any arbitral award rendered in either country or arbitration clause submitting a dispute to arbitration in either country are currently unenforceable in India[5].

The above goes against the Indian government's intentional support of the establishment of an international arbitral mechanism within BRICS during the Conference on International Arbitration in BRICS: Challenges, Opportunities and Road Ahead held in New Delhi in August 2016.

An international agreement and arbitral award is of little value if their obligations cannot be enforced. An effective mechanism to settle disputes increases the practical value of the commitments undertaken in an international commercial context. In light of BRICS' objectives in general and in particular with regards to the establishment of an international arbitral mechanism, it appears that the New York Convention is not the adequate foundation for such mechanism. It is advised that a new treaty arrangement be concluded between the BRICS countries. The treaty may be very strongly influenced by the New York Convention which has proven its value however it will require modification in light of the BRICS context.

Having considered the New York Convention, we will now consider the Washington Convention and the different structural approach it offers.

C) The Washington Convention, a different approach to international arbitration

The Washington Convention is the second most important convention within the regulatory framework of international arbitration. It was established as a mechanism for the settlement of investment disputes between States and nationals of other States. Therefore, making it possible for investors to submit a difference with a host country for dispute resolution. The Convention also created an International Centre for Settlement of Investment Disputes (ICSID).

The main difference with the New York Convention that we are interested in is that this mechanism establishes an autonomous and self-contained arbitration system. This means that an ICSID arbitration is not reliant on any national system. It is what is referred to as a de-nationalised system.

At the 2016 BRICS Conference in India, it was expressed that a neutral forum that fosters an unbiased applicability of laws would be ideal for the settlement of disputes within BRICS. This could be done by applying a uniformity between domestic laws governing international arbitration to ensure a uniform approach between the respective jurisdictions. The idea here would also allow for the ease of enforcement of arbitral awards in any BRICS member state, as well as any other nations linked to the BRICS arbitral mechanism.

It is thought that it would be more effective if the awards rendered by the arbitral mechanism are enforceable without the added difficulty of getting entangled in domestic proceedings. Therefore, we

5. Matter of Swiss Singapore Overseas Enterprise (Pty) Ltd v M/V Africa Trader

would be looking at a treaty framework superseding the domestic arbitral laws.

A de-nationalised system such as ISCID is what has been expressed to be the best option. Regarding the Washington Convention, the curial law has no impact on the ICSID Convention which insulates arbitration from the law of the seat. This means that ICSID awards are final and binding and may not be appealed or challenged in national courts.

The gains of such a system are neutrality from politics and from business interests. Secondly, the finality and enforceability of the award, the saving of time and costs ensuring the ultimate effectiveness of the system and lastly the manageability or workability of the process compared to heavier permanent adjudicatory bodies requiring significant resources[6].

In light of the above, it appears that it would be better if the international arbitral mechanism within BRICS was constructed on a de-nationalised system such as the one put in place by the Washington Convention over that of the New York Convention based on the intervention of national laws and courts, the limitations of which have been discussed above.

(II) THE PRACTICAL ASPECTS OF AN ARBITRAL MECHANISM WITHIN BRICS

After having dissected the legal aspects of international arbitration, with the objective of showcasing the framework in which a BRICS mechanism could fall; our next section will be going into the practical and everyday aspects that would need to be put in place to have a functioning arbitral mechanism. This will encompass looking into the institutional framework, as well as the arbitration rules that would govern the dispute resolution process.

A) The institutional framework of an arbitral mechanism

The institutional framework of an arbitral mechanism refers to the institutions established to administer alternative dispute resolution. The question is what part, if any, existing arbitral institutions in BRICS countries should play in the formation of a BRICS arbitral mechanism?

To answer this question, it is important to find out what is the prevalence of arbitration in the five BRICS countries. This should give an idea as to the development of the infrastructure around arbitration.

In Brazil, arbitration is the most popular system for complex, dispute resolution involving a variety of subject matters, and international arbitration generally involves infrastructure, natural resources and corporate law matters.

Brazil is recognized as an important venue for international arbitration, for a number of reasons which include the size of its market, the favorable conditions for international arbitration that it offers, such as an arbitration-friendly legislation and a receptiveness to foreign arbitral awards.

In a survey conducted by the Court of Arbitration by the International Chamber of Commerce, Brazil is the second, after the USA, in terms of parties in arbitrations from the Americas, accounting for 37%. Very importantly, the survey also indicates that there has been an increase in the number of Brazilian arbitrators appointed, which indicates a growing level of confidence in local arbitrators. Furthermore, Brazilian Arbitration Law is often chosen to govern the settlement of disputes.

In Russia, from 2015 a number of reforms to modernize Russia's arbitration legal landscape have been carried out. These included reviewing arbitral laws and arbitral institutions to align them with the UNCITRAL Model Law on international commercial arbitration, in an effort to make Russia more arbitration-friendly.

The reforms overhauled the functioning of arbitral institutions, bringing in the requirement for arbitral institutions to obtain a government license to administer matters. This resulted in the reduction of arbitral institutions from more than one thousand institutions pre-reform to only five institutions currently.

In 2018 and 2019, the Hong Kong International Arbitration Centre and the Vienna International Arbitration Centre both obtained government permission to administer arbitrations seated in Russia, becoming permanent arbitral institutions. This is a noteworthy development because it expands the choice of eligible arbitral institutions for Russian-related commercial and corporate disputes, thus benefiting arbitration users.

Though the reform has been met with mixed-feelings within the Russian arbitration community regarding its success, it can be noted that the reform has definitely improved Russia's reputation as a place of arbitration.

6. CIDS Research Paper Mauritius

India's judicial system has been suffering from a systemic backlog of cases for many years and this has resulted in arbitration becoming the method of choice for complex commercial disputes. However, the trend is that most arbitrations have been conducted on an ad-hoc basis. A 2011 Ernest & Young survey confirmed this trend. In 2013 a PricewaterhouseCoopers' survey went further and showed that 47% of companies preferred ad-hoc arbitration. The survey also showed that companies preferred to refer their disputes to centers in Singapore, Hong Kong or London.

A number of factors have been identified as impeding the growth of institutional arbitration in India. These include fewer arbitral institutions, the general consensus that arbitral proceedings are tedious and lengthy and the high cost of proceedings. A number of reforms have been carried out since 2015 to make the arbitration process more user-friendly, cost-effective and efficient. Most recently, the New Delhi International Arbitration Centre Ordinance was enacted to promote institutional arbitration and the development of India as an international arbitration hub.

Arbitration in China has been on the rise, with the implementation of its Arbitration Law in 1994. The growth of China's economy over the decades has brought with it a need for arbitration. Up to 2018 a whopping 235 arbitration commissions had been established in the major cities[7]. Among these, the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission (BAC), the Shenzhen International Court of Arbitration (SCIA), the Shanghai International Economic and Trade Arbitration Commission (SHIAC) and the China Maritime Arbitration Commission (CMAC); have gained international repute and are among the leading arbitration institutions in the Asia – Pacific region.

Several international arbitration institutions, such as the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre and the International Court of Arbitration of the International Chamber of Commerce (ICC Court), have set up their representative offices to expand the service offering to arbitration users.

South Africa enacted its International Arbitration Act in 2017. This long awaited legislation is expected to assist in positioning South Africa in becoming a regional international arbitration hub. The Supreme Court of South Africa has stated that "the South African court not only have a legal, but socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations"[8].

The Arbitration Foundation of Southern Africa (AFSA), one of South Africa' s most reputable arbitration institutions recently launched AFSA International an international arbitration center, as well as the China Africa Joint Arbitration Centre (CAJAC), dedicated to the resolution of commercial disputes between Chinese and African parties.

Considering that the BRICS countries are the leading emerging economies of their regions, the economic and commercial activity of these countries is very developed and in progression. This supports the idea that there are already a number of existing arbitral institutions that may play a role in the formation of a BRICS arbitral mechanism. Using the already existing facilities would best serve the objectives of efficiency, economy, coherence and consistency.

B) The Rules to govern the arbitration process

Arbitration rules refer to the guidelines or rules of procedure that govern the process of arbitration.

The question is what rules would be most appropriate for the BRICS arbitral mechanism. Should a new set of rules be adopted or would an already existing set of rules suffice and on what basis can this choice be made?

Considering the fact that the BRICS arbitral mechanism will need to cover both commercial and investment arbitration, rules that are both flexible and innovative will be required. Having said such, it appears that the rules that best respond to the task at hand are the United Nations Commission on International Trade Law (UNCITRAL) Rules. These rules were adopted in 1976, 43 years ago, with the aim of being as widely distributed as possible.

The flexibility and innovativeness of these rules is evident in the fact that they have been chosen as the dispute settlement procedure of choice by a vast number of private and public parties. They have been able to cover commercial disputes between private parties, as well as investor – state matters and disputes between states.

7. Law Office of the State Council of the People's Republic of China
8. Zhongji Development Construction Engineering Co. Limited v Kamoto Copper Co. SARL 2015 (1) SA 345 (SA)

Though originally designed for and mainly associated with ad-hoc arbitrations, they have been used in disputes administered by arbitral institutions as well as served as a model upon which institutions have based their own rules.

In 2006 the UNCITRAL Working Group on International Arbitration and Conciliation undertook a four-year project of updating the 1976 Rules, resulting in the current 2010 Rules[9].

This new version of the Rules seeks to enhance the efficiency of arbitration without changing the structure of the original text. The main innovation was the adoption of UNCITRAL Rules on Transparency in Treaty-based Investor – State Arbitration. This responds to BRICS' concern of transparency, non-discrimination and predictability in investor-state disputes. Other updated features include but are not limited to multi-party arbitration and joinder, liability, cost of arbitration and interim measures.

A number of the arbitral institutions in the BRICS countries use the UNCITRAL rules, which is the case of Russia's Association for the Promotion of Arbitration (RAA) and India's Council of Arbitration – Apex Arbitral Institution of India when requested so by parties as well as South Africa's Association of Arbitrators whose 2018 rules are based on the current UNCITRAL Rules.

In light of the above, the UNCITRAL Rules are a great place to start with regards to the rules for the BRICS mechanism. They can be adopted as is or amended to facilitate their application within the specificities of a BRICS context.

C) Alternative dispute resolution, a more comprehensive approach

Arbitration is a means, among several, of alternatively resolving disputes. This is important to note because only speaking of an arbitral mechanism within BRICS limits the dispute resolution solutions whereas there are a number of other viable options available. The objective of any dispute resolution is to resolve the dispute in the most effective and appropriate way possible. Just as disputes differ, it is paramount to offer a range of options according to the situation at hand.

Accordingly, it is advisable to shift from the wording of an arbitral mechanism to an alternative dispute resolution (ADR) mechanism rather. For example, the ICSID offers a range of additional alternative dispute mechanisms beyond arbitration such as conciliation and fact finding provided by the ICSID Convention and Rules. Furthermore, in its additional facility parties may also select early neutral evaluation, facilitated negotiation and mediation. This provides a useful example of what is possible within an institutional framework.

These other ADR procedures have been found to foster early exchange of information, clarify issues at stake and facilitate dialogue between parties. This is noteworthy because not every misunderstanding or even dispute between parties requires arbitration, therefore these generally non-binding mechanisms may assist parties to reach an amical settlement through voluntary agreement. For example, the conciliation process is a cooperative, non-adversarial dispute resolution process with the goal of clarifying the issues in dispute to bring about agreement on mutually acceptable terms. A conciliation committee may reach this end by requesting documents, hearing witnesses and making site visits. The fact finding process on the other hand intervenes at the pre-dispute phase to avoid legal disputes. This is done by an impartial assessment of facts arising in a contractual or other business dispute between the parties.

ADR is a more complete offering that responds more comprehensively to the resolving of disputes in the objective of fostering greater international commercial and investment activity.

CONCLUSION

The putting in place of an effective ADR mechanism for BRICS can be based on a de-nationalized system such as the Washington Convention. However, it is important to note that the ICSID system has been challenged strongly in recent years and it is therefore important that BRICS goes beyond its shortfalls of a lack of transparency, predictability and conflict of interests. The New York Convention's flexible and practical aspects should not be forgotten, as these have largely contributed to its success. The UNCITRAL Rules' or any rules adopted by BRICS must be technology-friendly, so as to be able to respond to a post-Covid19 context.

9. The Expanded Role of the Appointing Party under the UNCITRAL Arbitration Rules 2010

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