BOOK OF ABSTRACTS 2018

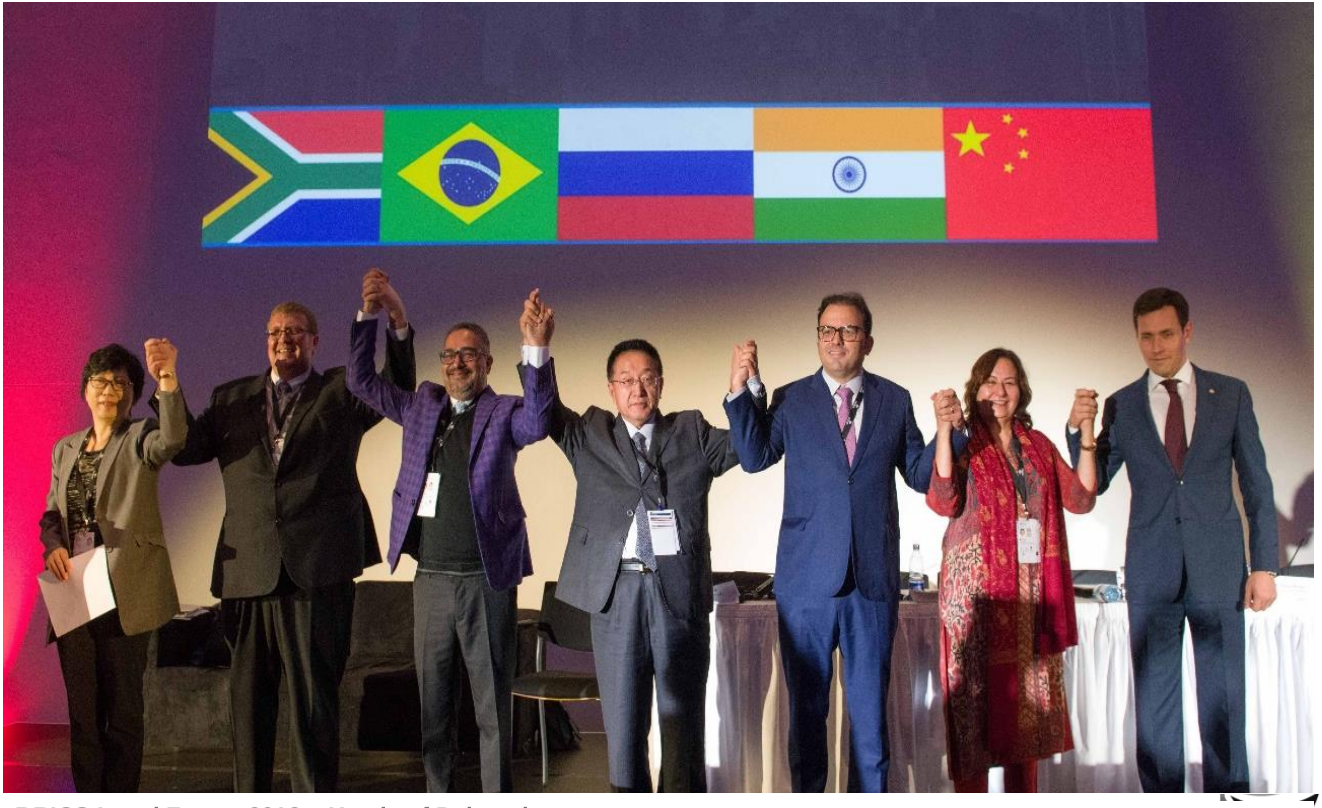
V BRICS LEGAL FORUM

Cape Town, South Africa

23 – 24 August 2018

BRICS
V LEGAL FORUM 2018
SOUTH AFRICA

LAW SOCIETY
OF SOUTH AFRICA



BRICS Legal Forum 2018 – Heads of Delegations
From left to right
Lin Yanping (East China University of Political Science and Law); Ettienne Barnard (Law Society of South Africa); Prashant Kuma (Bar Association of India); Zhang Mingqi (China Law Society); Marcus Vinicius F Coêlho (Brazil Bar Association); Pinky Anand (Bar Association of India); Stanislav Alexandrov (Association of Lawyers of Russia)

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The articles and presentations have been published as received due to the foreign language and technical nature of the content.

The PowerPoint presentations from the BRICS Legal Forum conference can be found on the website: www.bricslegalforum2018.org

I. CAPE TOWN SOUTH AFRICA DECLARATIONS

1 We, the representatives of the legal communities of BRICS member states, steeped in the values and principles encapsulated in the concept of the Rule of Law and giving highest value to the fundamental guarantees of human dignity, liberty and equality, having met in Cape Town from 23 to 24 August 2018 and deliberated on various legal issues that impact on socio-economic activities, trade and dispute resolution.

2 Acknowledging and supporting the objectives in the declarations signed by the BRICS heads of states, including the 10th BRICS Summit Johannesburg Declaration under the theme BRICS in Africa: Collaboration for Inclusive Growth and Shared Prosperity in the Fourth Industrial Revolution, we reaffirm our commitment to work towards realisation of these objectives by helping to create legal and policy frameworks having their basis in fairness, equality, inclusion, respect for social and human rights and the rule of law.

3 We acknowledge Law Society of South Africa for hosting the 5th BRICS Legal Forum in which implementation of our declarations, creation of BRICS Legal Forum institutions and setting up of networks of emerging nations took a center stage.

4 We considered and reaffirmed our commitment for helping create a rule based, fair, just and equitable democratic international trade and economic order based on principles of multilaterism and the rule of law that provides for sustainable development and inclusive growth and in order to achieve that, help create commercial and investment disputes resolution mechanisms and institutions which are fair, efficient, representative and inclusive in their character and cater to the needs and requirements of BRICS and emerging markets and developing economies.

5 We will endeavour, wherever possible, to leverage existing dispute resolution institutions in member states and between member states to quickly establish BRICS dispute resolution centres within the shortest reasonable time in order to have institutions ready to handle disputes that may arise, provided such institutions adhere to the Rules and Procedures set by the relevant expert committee of BRICS Legal Forum.

6 We, endorse in principle the approach paper presented by the Bar Association of India which builds upon the resolution adopted in the Moscow declaration of the Legal Forum to create a network of commercial dispute resolution institutions in the BRICS and emerging markets and developing economies and to build professional capacity and required expertise in the BRICS countries and emerging markets and developing economies by collaborating with existing institutions and dispute resolution centres in the emerging world and to collaborate with new multilateral institutions created by

BRICS, i.e. the New Development Bank and those anchored and supported by BRICS member states like the Asia Infrastructure Investment Bank, decided to take further steps to refine and to prepare a road map to implement the initiative through active and collaborative participation of all member states. We resolve to develop and promote effective mechanisms of dispute resolution through the process of commercial mediation.

7 We recognise the need to setup an ecosystem and networks to advance our objective of developing a just and fair world order in socio-economic activities of emerging economies.

8 Considering that the BRICS Legal Forum in Cape Town has been included in the official and sectoral meetings mentioned in the X BRICS summit Johannesburg declaration 2018, we will approach the Governments of our countries with the purpose to seek representation

and participation of the BRICS Legal Forum representatives of the BRICS summit meetings.

9 We recognise the importance of enhancing high level professional exchange for further development of the BRICS Legal Forum effectiveness. This will be achieved through discussions and making decision on consensus. Further, we will conduct BRICS Legal Forum activities through various established committees of the BRICS Legal Forum based on rules and procedures adopted.

10 We are aware of the need to establish institutions and capacitating them in order to be able to implement our declarations and promoting annual legal talents program for young lawyers and exchange of students and experts among BRICS member states. We acknowledge the contribution of the Moscow State Institute of International Relations of the Ministry of Foreign Affairs of the Russian Federation and the Association of Lawyers of Russia; for hosting the

BRICS Legal Talent program as part of the IV BRICS Legal Forum.

11. Having agreed to set up BRICS Legal Forum institutions and their operating principles and mechanisms, we are poised to build upon and implement more effectively the resolutions passed in each declaration in member state, do hereby resolve to establish the Evaluation and Coordination Committee of the BRICS Legal Forum. A Committee that will promote that the adopted declarations are implemented by all member states. For this purpose, a terms of reference will be developed by a working group to be appointed and later approved by the heads of delegations.

12. We recognise the imperative of sustainable development, conducive trade environment including commercial environment free from corrupt tendencies in carrying out our mandate. Accordingly, we support initiatives aimed at dealing with crimes such as

corruption, tax evasion, money laundering and drug trafficking.

13. We resolve to constitute a working group to help develop a mechanism within BRICS to cooperate in anti-corruption and money laundering law enforcement, extradition of fugitives, economic and corruption offenders and repatriation in matters relating to assets recovery and other related criminal and non-criminal matters involving corruption to ensure a robust Implementation of the United Nation Convention against Corruption in the BRICS countries.

14. We resolve to constitute working groups: -

14.1 to help develop a mechanism within BRICS for effective implementation and enforcement of laws relating to drugs trafficking and drug induced violence and crime.

14.2 to develop legal cooperation and approaches in relation to custody and welfare of children in cross border family disputes and crimes against women and children

15. We resolve to further strengthen our collaboration to help implementation aspects of Johannesburg declaration having a bearing to our role as lawyers in society and trade, particularly in relation to

(i) Artificial Intelligence and Information and Communication Technology which are integral to the fourth industrial revolution but require constant legal cooperation and development of legal frameworks to prevent cybercrimes and to address security related implications and threats that arise from misuse of ICT and

(ii) For implementation of the UN 2030 Agenda of Sustainable Development and Sustainable Development Goals (SDGs) by helping strengthen the institutions and legal and policy mechanisms that

promote and sustain the rule of law in order to pave the way for equitable, inclusive, open, all round innovation driven development, encapsulating concerns of environmental and ecologically balanced economic growth to achieve the ultimate goal of eradication of poverty.

16. We will take steps to achieve better coordination and integration in the BRICS activities framework and to ensure collaboration and interaction with other stakeholders and participation in meetings and events organised by them each year, such as BRICS Business Forum etc.

17. Participants of the V BRICS Legal Forum (South Africa) express gratitude to the host party, the Law Society of South Africa, and highly appreciate its efforts in organising a very high-quality Forum both in terms of content and hospitality.

18. We unanimously accept and endorse the proposal of OAB to host the VI Legal Forum in Brazil in 2019 to take forward the spirit and objectives of the BRICS Legal Forum to structure a new world order based on the principles of fairness, justice, equality and inclusiveness and thank them for this gesture.

Signed at Cape Town, South Africa on the 24 August 2018 by the following representatives

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Stanislav Alexandrov
Association of Lawyers of Russia

Prashant Kuma
Bar Association of India

Pinky Anand
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Ettienne Barnard
Law Society of South Africa

II. WELCOME BY LSSA CO-CHAIRS & KEY SPEAKERS

Extracts of Welcome by LSSA Co-Chairs: Mvuzo Notyesi and Ettienne Barnard

As Co-chairpersons, we ascribe great importance to the development of mutual understanding and dialogue amongst the legal community of the BRICS member states. Thereby promoting the rule of law through equitable and inclusive social, economic, political and cultural development.

The interesting thing about the BRICS Legal Forum is that it encompasses the cultural, economic, social, political, and legal diversity of cooperating member states. Therefore, it manifests itself through the interactions of both unity and diversity. It is significant that the diversity is not necessarily a barrier to collaboration but can present a situation that favours constant development of adjusted cooperation. This requires effective and flexible approaches to manage these differences and diversities through constant attention.

BRICS cooperation is built upon core areas of collaboration and not general harmonisation.

The focus themes of this conference will be (i) Arbitration, (II) Contracts and Company Law, (iii) Financial and Tax Law, and (iv) The processes for the establishment of an effective arbitration centre (Guided by the experiences of China and India).

Having different legal systems, traditions and practices, the BRICS countries require generalised rules and regulations to sustain their joint projects.

Going forward the BRICS countries will need a systematised and coherent legal framework for effective coordination in different areas of cooperation. Law, therefore, acts as the guarantor for the stability and the efficient development of BRICS.

This requires the BRICS Legal Forum to ensure the development of a legal framework to provide harmonised and empowering rules and regulations to support the economic and social programmes.

An inevitable part of creating a fundamental basis for BRICS cooperation is a harmonised system of legal education. Academic institutions in the BRICS countries are increasingly requested by government authorities and practitioners to step up their BRICS-related legal research and education.

An academic conference was held on 22 August 2018 to expand the involvement of South African universities in the Legal Forum and join the international academic research, development and legal education at the BRICS countries level.

At this conference, we hope to establish a more effective and enhanced cooperation mechanism within the BRICS countries, based on the principles of equality, respect for sovereignty and mutual benefit.

WELCOME BY LSSA CO-CHAIRS & KEY SPEAKERS

South Africa has proposed a new committee comprising of heads of delegations to review and monitor implementation of BRICS declarations, via the institutional and organisational framework within each BRICS country.

Thereafter being able to monitor and evaluate the implementation of the Declarations through the creation of an implementation and monitoring committee comprising of representatives from the member states based on declarations adopted.

Extract of presentation of Chief Justice Mogoeng Mogoeng, Chief Justice of the Republic of South Africa

Chief Justice Mogoeng Mogoeng described the role of the BRICS Legal Forum at the Cape Town Conference as follows:

"a legal framework to develop social, cultural and for the economic benefit to redound to its people."

" ..the law exists to facilitate the attainment of objectives to be achieved to ensure: peace, stability, freedom, justice , equity and shared prosperity."

" lawyers have to provide the ethical leadership, to ensure democratic principles and the rights of the ordinary people are enshrined and protected in the BRICS framework."

Extract from presentation of Tito Mboweni, International Advisor, Goldman Sachs International, South Africa (Former Governor of the South African Reserve Bank)

The key developments recent by BRICS has been the establishment of the BRICS Bank and the creation of a Contingency Reserve to assist central banks in times of crises.

The key challenges include

- Change in political governance in members states
- Poor economic performance and state capture in some member states
- Ethical standards and a defined nature of democracy

BRICS will only succeed if some of the following is studied, understood and implemented:

- Macro-economic stability
- Stable economic background

- Technology progress and sharing to move all the members states to participate in the 4th industrial revolution
- Human capital; development
- Openness of trade policies and policy convergence.

Extract from presentation of the Hon Adv Tshililo Michael Masutha, Minister of Justice and Correctional Services of the Republic of South Africa

BRICS will need a compact model of procedures and laws to raise levels of development of its entire people.

The BRICS family should promote its position and perspectives to influence the global governance, including the following:

- Peace and security
- Sustainable developmental goals
- International governance systems (reformed)
- Conflict prevention and resolution; post conflict reconstruction and enhancement of multilateralism.

WELCOME BY LSSA CO-CHAIRS & KEY SPEAKERS

The legal profession should provide a solid legal base for-

- The Rule of Law
- Protection of socio-economic rights and social justice to our common people.
- Expectations of the legal profession:
- It should consider a specific intervention for the free movement of its people and not only capital
- Laws to be a model of international relations and cooperation (multilateralism)
- Cooperation programme to share national experience to enhance and harmonise jurisprudence

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VI. ABSTRACTS AND PRESENTATIONS

In alphabetical order

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International Arbitration in BRICS

ABSTRACT

1. Introduction

Brazil, Russia, India, China and South Africa (BRICS) are leading emerging economies and political powers. Due to their geographic and demographic dimensions, BRICS economies are influencing global development, especially in Low Income Countries. They are promoting stability in trade and investment and cushioning global recession in the current financial crisis. Over the years BRICS has emerged as a very important group. BRICS account for almost three billion people, or just under half of the world's total population. Their increasing share in GDP, FDI, and trends in economically active population might have a huge impact in shaping future economic and political world dynamics.

Trade is one of the most important indicators of how co-operation between BRICS countries is evolving. Analysis of trading patterns within BRICS countries reveals that levels of intra-BRICS trade are quite diverse, mainly reflecting comparative sizes of the economies. Over the past decade, intra-BRICS trade has increased by nearly threefold, supported by increase in intra-regional trade for all the member countries.

Over the past decade, there has been a shift in BRICS export interdependence. In 2006, with a share of 46.9 per cent in BRICS intra-exports, China was the dominant exporter to the rest of BRICS countries, followed by Russia (accounting for 20.9 per cent of intra-BRICS exports in 2006), Brazil, India and South Africa. By 2015, while China remained the largest supplier to the rest of the BRICS countries, with an increased share of 56.3 per cent in the intra-BRICS exports, Brazil became the second largest intra-BRICS exporter (17.8 per cent), followed by Russia (14.5 per cent), India (7.5 per cent) and South Africa (4 per cent).

China has also registered the fastest growth in intra BRICS exports, with a Compounded Annual Growth Rate of 13.5 per cent during 2006-2015.

2. Establishing A New World Economic Order

BRICS nations are committed to advance the reform of international financial institutions, so as to reflect changes in the global economy. The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. BRICS nations also believe that there is a strong need for a stable, predictable and more diversified international monetary system.

BRICS was established with the objective of enhancing the role of these five developing economies, which have displayed higher growth rates than most developed economies over the last few years.

At the foundation of BRICS lies the idea of an enhanced cooperation in trade and commerce.

The recognition and enforcement of a foreign arbitral award or a non-domestic award is important for the promotion of trade and investment amongst states. The importance lies in parties to an international commercial transaction having peace of mind that an arbitral award rendered in one state against one of the parties to the transaction will be recognized and enforced by the courts of another state where enforcement is sought. This is especially important among economic groupings such as BRICS.

In order to achieve this new world economic order, it is important to remove hurdles which exist in resolution of commercial trade disputes. Speedy, effective and efficient resolution of trade disputes by a dedicated forum that will take note of the peculiarities of the BRICS nations will ensure better cohesion in the BRICS grouping.

3. Establishment of BRICS Arbitration Centre.

Finance Minister of India Mr.Arun Jaitley speaking at a conference on **'International arbitration in BRICS'**, organized by the finance ministry, industry chamber FICCI and Indian Council of Arbitration said that the BRICS nations should develop their own arbitration mechanism to cut reliance on dispute redressal centers in the developed nations. Such a mechanism will be needed as trade among these economies of Brazil, Russia, India, China and South Africa grows. The BRICS nations are uniquely placed in the economic timeline and have to deal with their very own peculiar features while interacting with the international economy.

The following are the pressing reasons why the BRICS grouping should establish a dedicated dispute resolution mechanism.

3.1. Economic Philosophy

All five BRICS nations are different from the established world economic order. While, the leaders of the economic world essentially follow the same economic philosophy which can be characterized as ***"West"***, the economic policies of the BRICS nations are geared to meet the need economic growth with focus on the following:

- to promote mutual trade and investment and create a business-friendly environment for investors and entrepreneurs in all BRICS countries;
- to enhance and diversify trade and investment cooperation that support value addition among the BRICS countries;
- to strengthen macroeconomic policy coordination and build resilience to external economic shocks;
- to strive for inclusive economic growth, in order to eradicate poverty, address unemployment and promote social inclusion;

- to consolidate efforts in order to ensure a better quality of growth by fostering innovative economic development based on advanced technologies and skills development with a view to build knowledge economies;
- To seek further interaction and cooperation with non-BRICS countries and international organizations and forums.

3.2. Developing stage of Economy with focus on sustainable development.

BRICS has treated sustainable development as one of its cooperation priorities since its creation. The growing contribution of the BRICS to the world economy and the rising importance of the economic relations between the BRICS and other Emerging Markets Developing Countries create an opportunity for new initiatives that would better help to support sustainable and inclusive development. For example, measures to strengthen alternative reserve currencies are made possible by the increased economic ties.

BRICS offers a new multilateralism that can help to advance global economic and social development. Cooperation to achieve common goals, both among the BRICS and between the BRICS and others, is likely to be a key feature of international development in the coming decades.

International investment law and arbitration are increasingly the source of major decisions about national and regional development policies and practices. Consequentially, emerging institutions in this field can enable activities that have impacts on the economic, social, political, and environmental wellbeing of communities around the world. Not surprisingly, developing countries and emerging economies, because of their circumstances and needs, tend to experience the greatest amount and intensity of these impacts.

3.3. Economic system aims to satisfy the needs of Employment:

The BRICS countries have achieved progress in several labour and social areas while still facing a number of arduous tasks, including improving labour force participation rates, and reducing inequality. At the same time, ongoing structural transformation is leading to strong employment creation in services and increased demand for high-skilled labour, raising both opportunities and challenges for BRICS labour markets. Despite significant progress in our countries, sizeable gaps in coverage and level of benefits as well as sustaining social security systems remain challenges for economic development and social justice. These are likely to pose additional challenges in the future due to profound socio-demographic, economic and technological changes. It is particularly important to ensure adequate social security coverage for workers across different contractual arrangements including non-standard forms of employment, supporting the mobility of workers.

3.4. Bias in International Commercial Arbitration

Bias in investment arbitration has always been an area of grave concern. The manner in which rules of international trade, commerce and investment are crafted applied and adjudicated between the developing countries and developed countries and the interest of international capital have been termed by some scholars as ***Regime Bias***. Regime bias therefore refers to examining the choices made between alternative ways of crafting legal rules, meaning ascribed to the particular rule whether in its application by an administrative agency or at the adjudication by a domestic judicial body, or an international tribunal.

It is not the plain reading or formation of rules per se which determines that the outcomes are averse to the interest of the developing countries but its application and interpretation which would expose the double standards of the world economic order.

The Indian experience in ***Dabhol Arbitration case*** (year 2005) and the ***White Industries Arbitration case*** (year 2010) are cases in point to indicate that the investment arbitration system is still dominated by the First World.

The Dabhol Arbitration

Dabhol Power Project was a $ 2.8 billion project involving the construction of a natural gas-powered electricity plants. It was one of the several projects approved by the Government of India in the 1990s for encouraging foreign investment and privatization of energy sector. The project remained controversial since its inception due to the lack of transparency and environmental concerns. A high-level committee was constituted to review the viability of the Dabhol Project and based on the report of the said committee the government decided to cancel the project. In response to the steps taken by the government, Enron initiated arbitration proceedings in London.

The following anomalies in the arbitral award make a clear case for putting forth the argument of bias in investment arbitration:

A. Structure of the Tribunal:

The arbitration clause provided for the procedure of the appointment of arbitrators and the constitution of the tribunal. Once the Indian parties did not participate in the standard procedure of appointment the alternative procedure prescribed in the clause ensured that the make-up of the tribunal was such that the tribunal had a greater affinity towards the US corporate interests. The structure of the tribunal is a basic indication of the fact that it lacked impartial and neutral elements.

B. Seat of Arbitration and rules:

New York was designated as the seat of arbitration and hence, as per Article V of the New York Convention, the courts of New York would decide upon the matter if the award is liable to be set aside.

Also, it is worth noting that it was an institutional arbitration conducted as per the ICC Arbitration Rules and most of the US firms who were a party to the dispute were either a member of the ICC or the US Council of International Business, the National Committee of the ICC. Hence, it is a reasonable presumption that the proceedings were more inclined to the tune of the interests of the firms than the Indian parties.

C. Interpretation and construction of the facts:

The characterization and interpretation of the facts leading to the dispute was clearly to the prejudice of the Indian parties. The entire failure and breakdown of the ***Dabhol Project*** was attributed to the political turmoil in the State of Maharashtra and the changes in the energy policies. The tribunal mentions that the foreign investment was made upon the confidence of the 'assurances' provided by the government entities in India.

The tribunal made no mention of the economic shortcomings of the project or any of the other substantial ancillary concerns as a result of which the project was always surrounded by a cobweb of controversies. The manner in which the facts were construed enabled the Tribunal to exercise jurisdiction over the regulatory sphere of Government.

Given the nature and consequences of the project, the decision of the new government was legitimate. The decision of the tribunal shakes the foundation of representation of people and democracy. It forces the developing countries to subjugate themselves to the social and economic goals determined by the dominating countries despite its effect upon their own development.

D. Abhorrent exercise of Jurisdiction:

A tribunal must not go beyond the scope of the agreement under which it is constituted.

This is an established practice of arbitration. However, here the tribunal allowed claims against MSEB and the State of Maharashtra which were not the parties to the dispute. By expanding the various sources of law the tribunal assumed the authority to adjudge the policy decisions associated to the project.

The investment agreement provided ample clarity to the fact that arbitration can only be brought against or by a Shareholder. MSEB and the State of Maharashtra were not a party to the Shareholding Agreement and hence, not a Shareholder within the meaning of the Agreement. However, the tribunal sought to induct them as parties in the capacity of '**affiliates'**.

To summarize, the tribunal had made a decision in favour of the claimants in the issues of fact, jurisdiction, and merits and also to a certain extent in the issue of damages. The award failed to account for or even state the unfair nature of the Power Purchase Agreement.

The tribunal should have also considered the negative review of the World Bank and Human Rights Watch and the detailed host of problems with the project.

Dabhol Arbitration metes out as a clear-cut case where contractual arbitrations are used to discipline governments which respond to the interests of developing countries.

***White Industries Arbitration*:**

In 1989, a Public-Sector Undertaking of Government of India i.e. Coal India entered into a contractual agreement with White Industries, an Australia based Company for the supply of technology related to coal mining development. Dispute arose soon, which lead to ICC arbitration as prescribed according in the contract and the award was given in the favour of White Industries Australia Limited in 2002.

Both sides proceeded to the Indian Judiciary for the respective actions: Coal India moved Calcutta High Court for the setting aside of the award and White Industries moved Delhi High Court for the enforcement of the same. The enforcement procedure had taken almost a whole decade as the matter got referred to a constitution bench. But in the end, without waiting for the constitution bench to decide the matter, White Industries approached the issue via a violation of the Bilateral Investment Treaty and made the Government of India a party, implicating the Public-Sector Undertaking of Coal India.

A. Admissibility and Jurisdiction:

The principal question before the tribunal was whether White Industries was an investor or whether the manufacturing agreement constituted an investment within the meaning of Bilateral Investment Treaty. India contended that since there is no sovereign interference, there cannot be any treaty violations.

The tribunal ruled that since there is nothing on record to show any direct or indirect influence of Government of India on Coal India Limited, Coal India Limited is not amenable to the jurisdiction of the tribunal.

B. Denial of Justice and the breach of Fair and Equitable standards:

White Industries contented that the exercise of jurisdiction for setting aside the arbitral award was improper which amounted to denial of Justice and breach of Fair and Equitable standards. Also, the award passed by the ICC tribunal remained due for enforcement for a period of 9 years in the India courts and India, being a party to the New York Convention, is obliged to enforce the award without timely delay, failing which it has not fulfilled the Legitimate Expectations of the investors. The tribunal held that as far as setting aside of awards and enforcement is concerned, these contentions do not form a concrete basis for the violation of Fair and Equitable standards.

C. India's Liability under MFN clause:

The Most Favored Nation clause allows the claimants to borrow provisions from other treaties, if those provisions are more favorable. Accordingly, White Industries sought to incorporate and extend the application of Article 4(5) of India-Kuwait BIT in the India-Australia BIT by the virtue of the MFN clause.

The relevant clause of the India-Kuwait BIT read as under: *"Each Contracting State shall maintain a favorable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State the right of access to its courts of justice administrative tribunals and agencies and all other bodies exercising adjudicatory authority,*

> *and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments."*
>
> India contented that there is no effective denial or differential of "treatment" in comparison to any investor of other country as most of the delay was caused by the faulty litigation tactics of White Industries itself. The Tribunal held that, the delay in the Courts was a failure which served to violation of the obligations, concluding that India is in Breach of Article 4(2). Essentially, the White Tribunal used the MFN route to incorporate a treaty which India did not have with Australia. Then the incorporated treaty provision was interpreted ignoring the difference in language in the treaty provisions and the prior precedents on the point.

From the above discussion it is clear the White Industries is an example of regime bias in the administration of Investment Arbitration involving the Developed nations and developing nations.

The aforementioned cases illustrate the point that the Low-Income Countries from the global South seem to have fared poorly in the international Arbitration. Preconceived notions, prejudices and opinions of an arbitrator will always threaten to color his impartiality and ability to see any matter at issue in a clear and balanced manner. We seem to be seeing this more and more where western arbitrators sit to adjudicate disputes between western and “third-world” parties. There is, unfortunately, still a widespread prejudice on the part of many westerners who perceive that third world cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. A western arbitrator may pay greater credence to a western witness than to an Asian one, even where the local witness may be a recognized expert in his or her field.

The western witness not only speaks the same, or a similar language, as the western arbitrator, but also approaches his analysis from the western point of view, even though this may be completely irrelevant to the project or contract at hand. Western arbitrators, in their arrogance, hold no respect for the laws of non-western countries and often tend simply to ignore entirely the law chosen by the parties or, worse, opine it to be meaningless. This is unforgivable and, unfortunately, not often recognized as a valid ground to set aside their awards. The courts of any country are often suspected of being nationalistically biased. But court judgments will be subject to review by a higher court, whereas an international arbitral award will not be subjected to such scrutiny.

The current international framework, particularly in investment treaty arbitrations, is extremely unfavorable for developing countries.

There is inequitable representation of arbitrators from developing countries on such panels, resulting in a level of obliviousness regarding the socio-economic conditions prevailing in developing countries.

3.5 Cost of Arbitration.

Party costs (including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration) make up the bulk (83% on average according to some studies) of the overall costs of the proceedings**.** The bulk of International Arbitration involves Investor and State as contesting parties. The investors are cash rich conglomerates. High cost of International Arbitration puts a huge stress on the public money in developing and emerging nations where the per capita income is low. The BRICS nations have now emerged as the new age development partners for Low Income Countries.

Resolution of trade disputes that arise between BRICS and low-Income Countries in a cost-effective manner

will boost and bolster the position of BRICS as a leader of the new age economic order.

3.6 A dedicated arbitration framework with predictable set of rules will boost south – south cooperation.

The arbitral landscape across the global South continues to mature. Governments have grown wise to the fact that arbitration can be a profitable economic activity, with conference centers, hotels and local lawyers all set to benefit. For the entire spectrum of emerging economies and developing countries, particularly the BRICS a recognized arbitral centre is also a great show of 'soft power', helping to underline broader messages about political and legal stability. The establishment of a separate arbitral infrastructure will boost the presence of BRICS as a champion of the developing economies.

The Way Forward:

The BRICS nations, since the inception of the grouping have shown tremendous growth in fostering trade and investment in the low-income countries. The BRICS Legal Forum has very proactively discussed legal cooperation towards establishing a dispute resolution mechanism.

The 2nd Forum resulted in the establishment of the Shanghai Center of BRICS Dispute Resolution to deal with all arbitration cases among Commercial Parties from BRICS Countries.

The 3rd BRICS Legal Forum was organized in New Delhi, India in September 2016. The participants of the Forum discussed development of new forms of international cooperation; participation of lawyers in the integration processes in different regions of the world; legal protection of foreign investment, new tendencies in international commercial and civil law.

The discussions during the 3rd BRICS Legal Forum led to the establishment of the New Delhi International Center of Dispute Resolution of BRICS countries and other developing economies.

Establishing a BRICS centric dispute resolution forum will strengthen the position of the grouping in the global south and amongst emerging economies. In order to cement the progress made to date, three key evolutions are needed. The first is the modernization of domestic arbitration laws, which is one of the key factors influencing a party's choice of the arbitral seat. The second is that local judges and lawyers must acquire deeper knowledge of arbitration. The third is to ensure that states and government lawyers in particular, are fully aware of the upsides – as well as the downsides – of arbitration as an effective means of dispute resolution. The BRICS Legal Forum will play a major role in the field of international arbitration in developing rules or guidelines on a number of features of the international arbitration procedure focused on the investment arbitration intra BRICS and between middle income countries and low-income countries.

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Suggestions on the Establishing Dispute Resolution Mechanism in BRICS Countries

ABSTRACT

Introduction

In the past decade, the achievements of the BRICS cooperation have been remarkable, and the future of the new BRICS cooperation is bright. However, it is a common phenomenon to have disputes in the process of BRICS cooperation. The key to this question is not to discuss whether there will be disputes, but how to resolve the disputes that may arise, and how to ensure the healthy growth of BRICS cooperation for the benefit of the relevant countries and the rest of the world.

History has demonstrated that negotiation, consultation, mediation, arbitration and litigation are peaceful dispute resolution mechanisms (DRM). By nature, except arbitration and litigation, other dispute settlement methods rely on the

parties' voluntary compliance with the agreed solutions.

Therefore, discussions about DRM pay more attention to arbitration and litigation. Since the non-litigation multiple DRM is increasingly recognized by the international community, and has been implemented in the BRICS, this paper also focuses on arbitration DRM.

The first BRICS Legal Forum proposed the establishment of the BRICS commercial arbitration mechanism. Through the efforts of the BRICS legal community, the BRICS dispute resolution Shanghai Center and New Delhi Center opened in 2015 and 2016, and the centers in Brazil and South Africa are currently under construction. We have reason to believe that the establishment of these centers will greatly promote the resolution of international commercial disputes in the BRICS countries. This paper will discuss one agreement and four unified rules: institution construction rule, procedural rule, legal application rule and the recognition and implementation rule, in order to contribute to the further development and perfection of the DRM in the BRICS countries.

I. Conclusion of the Agreement on the Establishment of Dispute Resolution Mechanism for the BRICS Countries

The past four BRICS legal forums have reached a consensus that a "unified international arbitration institution, a common dispute settlement platform, and a common solution" should be established. Since then, the BRICS DRM has been a vital part and the BRICS Dispute Resolution centers have been or are being constructed. Moscow Declaration, adopted by the BRICS Legal Forum in 2017, proposed that the formation of the BRICS Dispute Resolution Council, which is responsible for implementing the roster of arbitrators, drafting common arbitration rules, and integrating the functions of national centers and establishing the executive committees of the dispute resolution and mediation, such as the "Professional Committee" working group. Efforts over the past few years have begun to bear fruit.

However, it is far from enough to achieve the desired goal efficiently, if only relying on the BRICS legal forum to promote the formation of the BRICS DRM. Therefore, I suggest that a legally binding treaty should be concluded at the national level to promote and guarantee the smooth construction of the BRICS DRM. The reasons are as follows:

First of all, BRICS cooperation is an excellent example in contemporary international relations. The decade of BRICS cooperation have been carried out with the direct participation and promotion of the head of states. The BRICS cooperation has achieved fruitful diplomatic results at the national level in many aspects. Therefore, in order to ensure dispute resolution of specific cooperation projects, the national treaty on the establishment of the BRICS DRM Agreement at the national level is conducive to the smooth development of the BRICS DRM.

Second, although the BRICS DRM has the characteristic of private law on international commercial mediation and arbitration, this mechanism also has the strong characteristic of public law. In order to ensure the smooth implementation of dispute resolution, it often relies on the support and cooperation of the national judiciary. To this end, it is recommended that the BRIC countries conclude an "Agreement on Building a Dispute Resolution Mechanism for the BRICS Countries" to help the resolution of commercial disputes in the BRICS countries to be recognized and protected by the states.

Third, the establishment of the international commercial dispute resolution body and the acquisition of the authority need to be approved by the state, and the generation and operation of its power make it dependent on the state's guarantee. The conclusion of a treaty at the national level guarantees the legitimacy of the establishment of a dispute resolution centre established in the BRICS countries.

Fourth, the conclusion of a special treaty is a contribution to enrich and improve the governance of BRICS in the international community. Objectively, there are already many mechanisms to deal with international commercial disputes. The reason to build an international commercial DRM with BRICS characteristics is to guide BRICS countries' problems and devote to the resolution of BRICS international commercial disputes, especially in the new era. In this historical era, BRICS should take actions and make contributions.

Finally, the conclusion of this special treaty can provide programmatic and principled norms for dispute resolution in the BRICS countries, and provide the basis and conditions for the relevant departments of the BRICS to negotiate and introduce relevant unified rules. We must realize that, although the current consensus reached by the BRICS Law Forum reflects the perceptions and expectations of the legal community in the BRICS countries, there is still a lack of institutional

arrangements at the national level to be recognized and to be effective.

II. Unifying the Institution Building Rules of the BRICS Dispute Resolution Country Center

We know that the BRICS regulations on the establishment and approval of international commercial dispute settlement bodies are various. At the same time, there is a big difference between institutional arbitration and *ad hoc* arbitration. At present, the BRICS National Center for Dispute Resolution discussed by the BRICS legal community is in fact institutional arbitration, not *ad hoc* arbitration. Therefore, in order to unify the standards of the BRICS Dispute Resolution Center, it is necessary to unify the rules of institution building, so that the dispute settlement centers established in the five BRICS countries will form a unified new international commercial dispute settlement agency. No matter which center the parties choose as the place of dispute settlement, they can get the same level of service.

In terms of coordinating and unifying the National Centers for dispute settlement, China has a unified Arbitration Law, so the establishment of any arbitration institution must conform to the legal conditions and procedures, which can serve as a reference for the conditions and procedures for the establishment of BRICS dispute settlement institutions. Of course, although only five countries are involved, there are still huge differences among countries on the establishment of arbitration institutions, which require BRICS experts to study and discuss the ultimate unification of standards.

Although the China International Economic and Trade Arbitration Commission (CITIC) is not an arbitration institution established after the implementation of the Arbitration Law, Russia's International Commercial Arbitration Court (ICAC) also has a long history, as far as the BRICS dispute settlement center has been or intends to be built, it should be based on the needs of present and future.

The basis and conditions for the future will be to create a new type of dispute resolution agency that meets the requirements of the times, rather than simply copying the institutions and mechanisms already in place in the BRICS countries. After all, the times are changing. In the era of globalization, informatization, digitization and intelligence, the construction of BRICS dispute resolution institutions should respond to the requirements of the times and adopt the advanced concepts, knowledge, technology and equipment that the times may provide. We should recognize that the parties involved in international commercial disputes are the first to try to promote the use of advanced knowledge and equipment. For this reason, the BRICS dispute resolution body should of course respond to this.

III. Unifying the procedural rules for the BRICS dispute resolution centers

The harmonization of procedural rules in the BRICS Dispute Resolution Center is much easier than the unification of institutional settings. The reason is that the rules of the arbitral procedure of the BRICS countries have borrowed a lot from the reference to the UN rules of arbitration. Despite this, the rules of the arbitral procedures of the BRICS countries are not completely unified, and they still have the characteristics and differences of each country. It is reasonable to say that the degree of internationalization of international business rules is very high, but there is no pure commercial behavior in the world. No commercial activity can be avoided to be integrated into a country's civil, economic, administrative, and political relations systems. Therefore, in dealing with a common business activity, it will inevitably infiltrate many other factors, thus complicating the commercial activities.

In addition, UNCTAD's Model Law does not fully define all matters of procedural rules. For example, the Model Law does not provide guidance for "arbitrability" matters. The reason why it is not stipulated is that "arbitrability" is closely related to the public policy of the state and is not suitable for regulation in the Model Law. There are also other provisions of the Model Law that deal with the exclusive jurisdiction of domestic law.

Therefore, the procedural rules in the BRICS DRM must be designed, coordinated, unified and adhered to in the needs of the BRICS countries. Based on the existing procedural rules for diversified DRM in the BRICS, the framework and principles for determining procedural rules by finding the maximum common number are used as the basis for negotiation, and the outline of procedural rules for rules that may reach compromise is necessary for BRICS countries. Adhering to the exceptions as a special rule of the country center, the result is a system of procedural rules that is "unified and differentiated".

IV. Unifying the legal application rules for Dispute Resolution in the BRICS countries

Since the rules governing the application of laws in the BRICS countries are different, it is difficult to unify the laws applicable to these countries. However, there is a possibility that the certain degree of unifying legal application of disputes in international business disputes exists. As we know, the most important purpose of the law-applicable rules is to resolve the conflicts in which law applies. Throughout modern commercial law, the degree of internationalization of commercial law is the highest in various departmental laws. There should be not much debate about this. It is because that the differentiation of commercial law or the specialization does not meet the essential requirements of commercial transactions. The characteristics of commercial transactions determine the unification of commercial rules; at the same time, economic globalization will inevitably lead to unified commercial law.

Globalization and the globalization of production factors are historical factors that promote the unification of commercial legal rules. Therefore, in terms of reason, to some extent, the application of the substantive law of any country of the BRIC countries to solve the legal conflict of law conflict may produce the same or similar conclusions.

However, after all, the substantive law that gives the parties to disputes the choice of dispute resolution in the field of commercial law reflects the spirit and requirements of respecting the autonomy of the parties. When the parties have no choice, they choose the law applicable rules that best meet the disputes and find the most appropriate applicable law. It is also the most essential requirement for dispute resolution. Therefore, if possible, unifying the legal application of the conflicts of commercial disputes in the BRICS countries and raising the reasonable expectations of the parties and the society for the resolution of disputes should be a direction for the efforts of the BRICS.

V. Unifying the recognition and enforcement rules for BRICS dispute resolution decisions

We know that the BRICS countries have successively acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, to a certain extent, the recognition and enforcement of arbitral awards among BRICS countries have a good foundation and conditions. However, it must be acknowledged that the member states of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards still have great differences in the specific implementation of the recognition and enforcement of foreign arbitral awards. Such differences directly affect the immediate realization and protection of the rights and interests of the parties. Indirectly it damaged the effectiveness of the arbitral award and the development of the arbitration.

The ultimate goal of international commercial dispute resolution is to resolve disputes, whether through mediation, arbitration, or any other forms of resolution. The purpose of the system design of the diversified DRM is that the disputes are resolved by the parties to the dispute, and all the results are aimed at making the final realization of the dispute resolution through mandatory means or methods. However, it is disturbing that even if there are institutional arrangements for enforcement, these arrangements will eventually lead to a large number of deadlocks in recognition and enforcement because of the different understanding of the judicial system of different countries, resulting in the loss of confidence and recognition of the parties to the DRM.

Therefore, the BRICS countries should coordinate their position on the recognition and enforcement of foreign arbitral awards between the five countries, ensure the immediate, smooth and effective recognition and enforcement of arbitral awards made by the BRICS National Dispute Resolution Center, and foster the confidence and loyalty of the parties in choosing and using these national centers as dispute settlement agencies, to provide institutional arrangements for building the best BRIC DRM.

Conclusion

The establishment of the BRICS Dispute Resolution Center is a realistic need to innovate international governance of public goods, and it is an important institutional arrangement that should be considered as an innovation of BRICS cooperation.

At present, the BRICS legal community has reached a consensus on the establishment of the BRICS Dispute Resolution Country Center, but the implementation of the consensus requires concrete and meticulous work and efforts. We always believe that the establishment of a dispute resolution center institution among the BRICS countries, unified dispute resolution procedural rules, unified legal applications, unified ruling recognition and enforcement rules will greatly enhance the BRICS Dispute Resolution Center and play an active role in serving BRICS cooperation.

Although we know that there are some differences between BRICS countries in international commerce, arbitration, arbitrability, arbitration agreement, arbitrators, arbitral tribunals and their composition, the application of arbitration law, interim measures, arbitral awards, revocation of arbitration, recognition and enforcement of awards, these differences will be reduced or even eliminated eventually.

It is the BRICS countries that should realize the importance and to solve problems. The good operation of the BRICS dispute settlement mechanism should not only be benefit from the good legal norms formulated at the BRICS level, but also rely on the friendly treatment and moderate supervision of the BRICS dispute settlement mechanism by the BRICS judiciary.

At the current legislative level, the BRICS countries should adopt an open attitude to accept the legal rules that are conducive to the multiple DRM, reform and abolish the relevant domestic legislation, so that domestic legislation can meet the needs of the BRICS economic and trade development. At the judicial level, the BRICS judicial bodies should adopt a friendly and acceptable position on the multiple DRM, respect and support the development of the multiple DRM as much as possible, create a good judicial environment for the BRICS DRM, make due contributions to the cooperation of the BRICS countries, promote and improve the innovation and development of the BRICS DRM.

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Towards the Development of a Homogenous Regulatory Framework for Cross-Border Insolvency and Other Contractual Transactions in BRICS

ABSTRACT

This paper analyses the regulation of cross-border insolvency and contractual agreements in Brazil, Russia, India, China and South Africa (BRICS) member states. BRICS comprises emerging economies and its main objective is, *inter alia*, to promote mutual cooperation between the member states. Accordingly, member states are obliged to cooperate on various aspects such as infrastructural projects as well as political and socio-economic development. In light of this, the paper explores the challenges experienced by the debtors, creditors, multinational companies and other relevant persons that conduct their businesses or provide financial

services and other cross-border transactions in BRICS member states.

This follows the fact that there are no binding cross-border insolvency treaties, conventions or related instruments that are homogenously utilised in BRICS member states. Consequently, companies and individuals that have property or debtors in more than one-member state could struggle recover their debts and/or property during cross-border insolvency proceedings.

Put differently, although all BRICS member states have their own domestic insolvency laws, such laws usually do not have extra-territorial application across BRICS member states. For instance, although the Insolvency Act 24 of 1936 (Insolvency Act) and the Cross-Border Insolvency Act 42 of 2000 (Cross-Border Insolvency Act) were enacted to deal with domestic and cross-border insolvency matters in South Africa respectively, these laws are not directly enforceable in other BRICS countries. This poses a lot of challenges for both debtors and creditors since they are required to file their

sequestration proceedings in a country with a court with the relevant jurisdiction.

Likewise, no binding treaties, conventions or related instruments can be homogenously enforced by BRICS member states to ameliorate regulatory disputes and jurisdictional challenges that affects multinational companies and other relevant persons that run businesses, financial services and related cross-border contractual transactions. This has somewhat impeded the conclusion of some *bona fide* cross-border business agreements and contractual transactions for both companies and individuals in BRICS states. Given this *status quo*, it is submitted that BRICS member states must develop an adequate homogenous regulatory framework for cross-border businesses, insolvency proceedings and other contractual transactions.

This framework could enhance the conclusion of cross-border business contracts and timeous settlement of cross-border insolvency disputes across BRICS member states. BRICS member states should also adopt flexible

mechanisms to combat regulatory challenges in all cross-border transactions and proceedings.

Another option is to adopt a binding multilateral model law, convention or treaty that specifically deals with contractual agreements, company and business transactions as well as cross-border insolvency proceedings in BRICS. This could enhance cooperation, cross-border dispute resolution and curb double jeopardy on the part of the offenders.

Key Terms: cross-border insolvency, contractual transactions, homogenous, challenges, BRICS.

Marcus Vinicius Furtado Coêlho
Former National President of Brazil Bar Association (OAB)
President of the National Commission of Foreign Affairs of OAB

PRESENTATION

Dear Law Society of South Africa's Co-Chairpersons Mr Mvuzo Notyesi and Mr Ettienne Barnard, Mr. Chief Justice of the Republic of South Africa Mogoeng Mogoeng, Hon Lindiwe Nonceba Sisulu, Minister of International Relations and Cooperation of the Republic of South Africa, Hon Adv. Tshililo Michael Masutha, Minister of Justice and Correctional Services of the Republic of South Africa, colleagues representing the bar associations and other organizations part of this Forum.

Ladies and gentlemen,

“For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.”

Meditating on this quote of the illustrious Nelson Mandela I express my great pleasure to attend the V BRICS Legal Forum. The fifth edition of this event, now held at this south African nation, closes the first cycle of its realization, once it already took place, since 2014, in every Member-State, as it arrives at Cape Town.

It could not be more appropriate that we meet in South Africa during the celebration of the centenary of the lawyer and Nobel Prize Peace laureate, Nelson Mandela, an example in the fight for equality. The values of the beloved Madiba are also the same ones from legal profession, that is a sister of freedom, and that guide the activities that here begin.

The continuous frequency of realizations, alongside the ever-growing presence of participants shows the importance that the Forum has acquired in past years, bringing together the cooperative political bloc countries' legal community.

The BRICS Legal Forum is fundamental for that the bloc objectives are developed in accordance to the fundamental pillars of the Democratic Rule of Law, be them: the observance of individual and collective rights and of social and political rights.

The BRICS cooperation system, that gathers by its nations nearly 45% of the world's labor force, already covers more than 30 areas, such as science and technology, agriculture, energy, intellectual property and economy. Notably with the creation of BRICS New Development Bank (NDB) in 2014, it moves towards a real integration of its member states in a wide variety of areas, aiming at transforming the bloc into a new trade arena and promoting global development.

The meetings of the legal community cannot be ignored by the official diplomatic meetings of the Member-States. Therefore, we must work with the authorities of our countries for this Forum to integrate the official agenda of the bloc. This way we shall walk in a direction which the claims of lawyers and of the legal community are listened to and the discussions that are already happening be widened.

The natural development of the positioning of our group with governments must be conducted alongside the development of the themes here addressed. For this reason, I highlight the need to intensify the debate for conflict resolution through mediation and arbitration, using an interconnected system of countries and institutions. For that to happen, the already-proposed BRICS Dispute Resolution Centers must grow in an organic way aiming to be a reference organization for the law profession around the world, contributing for the swiftness of the processes, and, consequently, for the integration of lawyers in a model more and more internationally used.

In addition to the alternative mechanisms of conflict resolution, it is our duty to work for the approximation between the legal systems of our countries, mainly in relation to the respect of Human Rights, after all the cultural differences between our countries cannot be an obstacle for the natural and commercial flow of cooperation, respecting the good practices that respect the fundamental rights, society and environment.

Our debate, fellow lawyers, has the potential to break barriers in the legal world, once lawyers are, in the words of an important Brazilian legal expert, before all citizens, and the Brazilian Bar Association, as every other bars and law societies, a house for citizenship.

Accordingly, themes that are important to the societies of our countries must be addressed, as it is the case of drug enforcement and the damage caused by those substances. Brazil, for example, is suffering from the violence which is consequence of drug trafficking the lack of measures that protect society from its consequences.

So, I take the opportunity to propose, right now, that we elaborate a statement for drug enforcement in our nations, and that document must include practical measures, for example, a drug test requirement for those who exercise professions that might cause damages to others, mainly professional drivers and other professions that directly involve human lives.

The combat against those ills can and must be done together, sharing successful experiences and measures, so we can become truly developed societies. Thus, facing themes as causalities caused by traffic accident, which number of deaths was, according to the Mortality Information System of the Brazilian Ministry of Health, more than 32.000 in 2017, is of fundamental importance for us to grow together as societies and as nations.

Those brief considerations demonstrate that we are walking together the path of understanding through dialog, diplomacy and cooperation, by the craft of freedom, citizenship, justice and social rights that compose legal profession.

We walk under the light of hope for a fairer and equal society, aware of the importance of legal security and of the prevalence of the fundamental rights to the sedimentation of the Rule of Law and to the social and economic progresses of our nations.

I would like to thank you all who are present here, wishing a very successful event, expecting to receive all of you next year in the 6th BRICS Legal Forum to be held in Brazilian lands, in the city of Rio de Janeiro.

Thank you very much.

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Streamlining the Tax Treaty Mutual Agreement Procedure (MAP) between BRICS Member States

1 ABSTRACT

1.1 The BRICS Finance and Tax Expert Committee ("**BRICS FTEC**") of the BRICS Legal Forum has adopted the above topic for the BRICS Legal Forum Conference 2018, to be held in Cape Town on 23 and 24 August 2018. The topic is in conformance with the 2017 Russia Key Declaration Outcomes, in that it proposes the introduction of detailed uniform BRICS tax dispute resolution rules and mechanisms for the benefit of both taxpayers and the revenue authorities of the BRICS Member States.

Such detailed uniform rules will directly and indirectly encourage investment, trade and other business between the BRICS Member States by assisting in the application of the existing bilateral double taxation conventions ("**DTCs**" or "**tax treaties**") on a more certain basis. Such rules will also assist in the application of the multilateral taxation conventions to which the BRICS Member States are a party. The ultimate goal of uniform MAP rules and mechanisms is the harmonisation of the tax systems of the Member States in order to eliminate double taxation, double non-taxation, and inconsistencies in the tax treatment of cross-border tax issues, thereby enhancing the certainty of treatment of cross-border investments. Such harmonisation will benefit the BRICS tax authorities as well as create more certainty of application of international tax law for taxpayers, including for their lawyers and other tax advisers who represent multinational taxpayers within these Member States.

However, it is not intended that such harmonisation will negatively impact on the tax sovereignty of the separate BRICS Member States.

1.2 Unlike the position within the EU and elsewhere within the OECD, where compulsory arbitration is becoming the norm, developing countries like BRICS regard centralised arbitration as an encroachment or diminution of their tax sovereignty. Therefore, the proposal for the BRICS Legal Forum Conference 2018 is, instead of agreeing to or enhancing arbitration options, to rather propose and implement a pre-agreed efficient, voluntary, and transparent MAP process between the BRICS Member States. It is intended that this BRICS initiative should complement rather than replace the OECD BEPS Action 14 agreed initiatives.

1.3 The topic proposed by the BRICS FTEC for the BRICS Legal Forum Conference 2018 is therefore: "Streamlining the Tax Treaty Mutual Agreement Procedure ("**MAP**") between BRICS Member States". It is expected of each Member State's BRICS FTEC to propose practical, workable solutions for streamlining MAP, for bilateral tax treaty application purposes, and for purposes of implementing and applying the 2011 Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("**the 2011 MCMAATM**"), for purposes of implementing and applying the 2017 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**2017 MLI**"). These proposals will then be presented to the Ministers of Finance and the tax authorities of the BRICS Member States for further refinement and implementation.

2 INTRODUCTION

2.1 Consistent with other jurisdictions internationally, the BRICS Member States have concluded numerous bilateral International Tax Conventions with each other, as well as with non-Member States. The current list of bilateral tax treaties in force between BRICS Member States is set out in Annexure 1.

2.2 All of these bilateral tax treaties are substantially based on the OECD Model Tax Convention ("**OECD MTC**"). Art 25 of the OECD MTC provides for a MAP which applies when a taxpayer of one of the BRICS Member States considers that the actions of one or both of the Member States who have entered into the tax treaty, will result in taxation not in accordance with the provisions of the treaty. The MAP is available to such taxpayers in addition to any remedies which may be available under domestic law. Art 25 of the OECD MTC is reproduced as Annexure 2, for ease of reference.

2.3 In terms of Art 25(2) of the OECD MTC, the Competent Authorities of the Contracting States must "endeavour" to resolve the case. However, they are not obliged to do so. Historically, the efficacy of the MAP has been undermined by the absence of an obligation on the part of the contracting parties to resolve the dispute. While Art 25(5) of the OECD MTC provides for compulsory arbitration when a dispute has not been resolved within two years by means of MAP, the incorporation of this sub-article when negotiating a bilateral tax treaty is discretionary. In practice, it is not commonly adopted due to the perception that by adopting it, fiscal sovereignty will be relinquished (Duffy and Bailey: The Case for Mandatory Binding Arbitration in International Tax: 2016 Number 2 at 79). Annexure 3 sets out those BRICS Member States which have adopted Art 25(5) of the OECD MTC or an equivalent provision.

It is clear from Annexure 3 that none of the BRICS bilateral treaties have Art 25(5) or equivalent, and that in general, BRICS Member States are reluctant to incorporate it into their other bilateral tax treaties.

2.4 The 2011 MCMAATM, which is a multilateral international convention which deals *inter alia* with the exchange of information, the assistance in recovery of tax debts, and the service of documents, and under Art 6 of which the Common Reporting Standard ("**CRS**") was created, also contains an article setting out a MAP. The full text of Art 24, called "Implementation of the Convention", is attached as Annexure 4, for ease of reference. Art 24 contains a MAP which only applies for purposes of the application of the 2011 MCMAATM, it does not extend to other international conventions. Art 24(1) provides that the parties must communicate with each other regarding the implementation of the 2011 MCMAATM through their respective competent authorities, either directly or via authorised subordinate authorities.

Unfortunately, as is the case with Art 25 of the OECD MTC, if there is any dispute about the application of the 2011 MCMAATM, the Competent Authorities are not obliged to resolve the situation, they are only required to "endeavour to resolve" the situation (Art 24(2)). It is further specifically provided that the Competent Authorities of two or more parties "may mutually agree on the mode of application of the Convention among themselves". Art 24(1) therefore envisages that "sub-groups" of Parties to the 2011 MCMAATM, like BRICS, may mutually agree the mode of application of the 2011 MCMAATM.

2.5 The OECD Action Plan on Base Erosion and Profit Shifting ("**BEPS Action Plan**") identified 15 actions to address base erosion and profit sharing ("**BEPS**") in a comprehensive manner.

The BEPS Action Plan was the result of an initiative which commenced in September 2013, when the OECD and G20 leaders endorsed a comprehensive action plan to address weaknesses in international tax framework, in order to ensure that profits are taxed where economic activities take place and value is created. The result of the initiative was the agreement to implement 15 specific actions to prevent BEPS, including the implementation of a multilateral tax convention (namely the 2017 MLI) which would override all the bilateral tax treaties which contained clauses which were regarded as being used to facilitate base erosion. Due to the historical difficulties with the practical application of the MAP, and due to the concerns raised by multinational enterprises ("**MNEs**") about the increased potential for double taxation arising from the implementation of the BEPS proposals, BEPS Action 14:

Making Dispute Resolution Mechanisms More Effective, was agreed for insertion into the OECD BEPS Final Report. Action 14, which calls for more effective dispute resolution mechanisms, is therefore aimed at ensuring more certainty and predictability for MNE taxpayers. However, BEPS Action 14 did not include a proposal to adopt mandatory binding arbitration. The result was the inclusion of a MAP as Art 16 of the 2017 MLI which is substantially similar to that found in Art 25 of the OECD MTC. Being substantially similar, Art 16 gives rise to the same problems and inefficacies. It also contains the same 3-year application deadline limit. Annexure 5 sets out Art 16 of the 2017 MLI, which contains the MAP, for ease of reference.

2.6 This paper will analyse the main problems with MAP, including setting out a history of MAP and more details about the implementation of Action 14 of the BEPS Action Plan.

It will also set out the use of MAP in South Africa, including the recommendations of the Davis Tax Committee and a discussion of the draft SARS MAP Guide. Lastly, it will set out some practical recommendations for improving the MAP, specifically among BRICS Member States.

3 ANALYSIS OF ART 25 OF THE OECD MTC

3.1 Art 25 of the OECD MTC may be summarised as follows: In terms of Art 25(1) of the OECD MTC, taxpayers have the right to appeal (within three years) to the tax authorities in the State of residence in circumstances where taxation is not in accordance with a treaty. In terms of Art 25(2), where the objection appears to be justified, the Competent Authority must endeavour to solve the dispute.

Agreements reached by the Competent Authorities will be implemented notwithstanding any time limits under domestic law. In terms of Art 25(3), competent authorities may consult one another to solve the problems of treaty interpretation and application, as well as to resolve any problems of double taxation, whether or not dealt with in any treaty. In terms of Art 25(4), consultation between competent authorities may take any form, including joint meetings between them or their representatives. In terms of Art 25(5), provision is made for a mandatory arbitration of issues unresolved within two years at the request of the taxpayer.

3.2 In terms of the revenue rule, each jurisdiction has the right to levy taxes only within its own borders. The result is that, other than within the EU, there is no international tax court which has jurisdiction over the tax laws of multiple jurisdictions. As no international tax court exists, problems arising under a tax treaty have to be adjudicated by one of the Contracting States.

One of the avenues of adjudication is to make use of the MAP. Under the general definitions article, Art 3 of the two main Model Tax Conventions, namely the OECD MTC, and the United Nations Model Tax Convention ("**UN MTC**"), it is provided that a State will indicate in the treaty who will act as the Competent Authority. In a South African context, the Competent Authority is the Commissioner for the South African Revenue Service ("**SARS**") or his duly authorised representative (see Art 3 of most of the tax treaties entered into by South Africa).

3.3 Art 25(1) and 25(2) of both the UN and the OECD MTCs provide that the competent authorities of the two Contracting States must endeavour to resolve disputes leading to inconsistent taxation under the convention. This may occur, for example, when the Contracting States classify income differently and as a result attach different tax consequences to the same income.

Although one of the important aims of a treaty is to eliminate double taxation, the existence of double taxation or the potential for double taxation is not a requirement for the use of the MAP (see in general Rohatgi *Basic International Tax* (2002) 121-123).

3.4 It is specifically provided that the MAP exists irrespective of any domestic remedies (Art 25(1)). The result is that a taxpayer who makes use of the MAP may still want to or need to object and appeal against an assessment in terms of domestic law. Unlike under domestic legislation where a taxpayer has to wait for a formal assessment to make use of the objection procedure, the MAP may be initiated by a taxpayer once he or she is certain that a Contracting State will apply the treaty in a specific manner without a formal assessment having been received (Para 12 of the OECD Commentary on Art 25). Examples include practice notes, interpretation notes or published rulings containing views which the taxpayer argues are not in accordance with the tax treaty.

Further, the use of the MAP is not subject to domestic remedies first being exhausted. Under both the OECD and UN MTCs, a taxpayer has three years from the date of the first notification of an action resulting in a liability to make use of the procedure (Art 25(1)). An analysis of tax treaties entered into by South Africa indicates that the period within which a taxpayer has to make use of the MAP is generally three years (see for example, the treaties with Greece, New Zealand, Sweden and the USA). Some South African treaties contain a 2-year limitation, for example, Canada. Under some South African treaties no time period is specified (UK and the Netherlands).

3.4.1 Where a taxpayer has changed his or her residence, the Competent Authority of the State of residence at the time when the dispute arose, must be approached. In the absence of formal requirements for the use of the MAP, the procedure applicable to domestic dispute resolution may be used (Para 13 of the OECD Commentary on Art 25).

3.4.2 The OECD Commentary (Para 9) indicates that the most common cases for which the MAP is used are the following:

3.4.2.1 the attribution of profits and expenditure to a permanent establishment;

3.4.2.2 adjustments between associated enterprises;

3.4.2.3 the treatment of interest as dividend expenditure under thin capitalisation rules; and

3.4.2.4 the determination of residence due to a lack of information submitted by the taxpayer.

3.4.3 In addition, a Competent Authority may also use the procedure for:

3.4.3.1 resolving inconsistent tax treatment arising from the interpretation or application of the provisions of a treaty (Art 25(23));

3.4.3.2 determining the applicability of the treaty to taxes introduced after the treaty was entered into; and

3.4.3.3 determining the circumstances under which interest will be regarded as dividends under the thin capitalisation rules.

3.4.4 It will be noted that apart from disputes regarding dual residency (Art 4(2)(d)), the MAP is not mandatory. In addition, Art 9(2) provides that where a Contracting State makes a transfer pricing adjustment, if necessary the Contracting States shall consult with each other. It is presumed that where a dispute arises during an adjustment by one of the Contracting States, such dispute will be resolved by mutual agreement.

3.4.5 Once the request for the MAP has been made by a taxpayer and the Competent Authority is of the view that the complaint is justified, the Competent Authority first needs to attempt to resolve the dispute on its own (Para 25(2)). Only if the dispute cannot be solved unilaterally, must the Competent Authority of the other Contracting State be approached (Para 25(4)). In such circumstances, the authorities may communicate with each other directly, without making use of diplomatic channels. Communication may take place by letter, facsimile, telephone, direct meetings, joint commissions or any other convenient means, for example, e-mail (see Para 40 of OECD Commentary on Art 25).

3.4.6 The treaty does not place an obligation on the Competent Authority to solve the dispute, nor does it create a time limit within which the dispute has to be solved. An agreement reached under the MAP will be binding despite any time limits set under domestic legislation (Art 25(2)).

It is thus clear that the MAP involves two stages, i.e. the first stage being the taxpayer – competent authority stage and the second stage being competent authority – competent authority stage.

3.4.7 The question arises as to the binding effect of decisions reached under the MAP. Both the OECD MTC (see Art 25(2): 'Any agreement reached shall be implemented') and the OECD Commentary make it clear that a mutual agreement is binding on the tax authorities (Para 35). However, in *IRC v Commerzbank AG* [1991] *IRC v Bancodo Bazil SA* [1990] STC 2854 at 302b it was held that a MAP had no authority in the English courts as the decisions of the Competent Authority merely express the views of the tax authorities of the two Contracting States and can be either right or wrong.

3.4.8 The binding authority of the MAP on tax authorities can be understood in light of the fact that as a treaty is an agreement between the two Contracting States (including the MAP), the States have agreed in advance to be bound by the outcome of the procedure. However, the same does not hold true for the taxpayer. The result is that a resident or national who is aggrieved by the decision, can still approach domestic courts to settle the issue. In such circumstances the court will not be bound by the decision reached under a MAP (See Goris and Smit (1997) 20). In a South African context this means that notwithstanding a decision favourable to SARS under the MAP, the taxpayer can still approach a Court, which will not be bound by the ruling.

3.4.9 Although a taxpayer may set the MAP in motion, he or she does not have an automatic right to appear before the authorities to state his or her case or to be represented.

However, the OECD Commentary indicates that it is desirable that a taxpayer should have the right to make representation and to be assisted by counsel. In addition, although both competent authorities should endeavour to find a solution, they are under no obligation to do so (see Para 26 of the OECD Commentary on Art 25). Although the MAP has several limitations and provides no guarantees that the dispute will be resolved, it may still be beneficial for taxpayers to use the procedure. If the procedure is successfully implemented, it could save a taxpayer time as well as significant legal costs. However, due to the uncertain nature of the MAP, taxpayers will, in all likelihood, be in a better position if they make use of domestic remedies simultaneously with the MAP.

3.4.10 The usefulness of the mutual agreement procure has been questioned:

*"… It generally takes a long time and it is the tax authorities that control the procedure; the taxpayer enjoys no particular legal protection. The taxpayer has neither the right to demand a mutual agreement procedure nor to demand the elimination of taxation contravention principles. The taxpayer has no right to be heard or to otherwise be involved, and has no right to be informed of the decision itself or the grounds on which it was taken. Moreover, there is no obligation to disclose the agreement. The absence of mandatory problem resolution is the largest disadvantage of the procedure,' (*Runge *'Mutual Agreement Procedures and the Role of the Taxpayer' 2002 Internal Bureau of Fiscal Documentation 16 of 17)."*

3.4.11 No doubt due to the potential unsatisfactory results of the MAP, alternative dispute mechanisms have been considered.

One such mechanism is international arbitration. For a discussion of this topic, see Tilllinghast "The Choice of Issues to be Submitted to Arbitration under the Income Tax Conventions" in *Alpert and Van Raad 'Essays on International Taxation'* (1993) 349. On similar lines the treaty between Germany and Austria provides that if a tax dispute cannot be settled by the MAP within three years, it must, at the request of the taxpayers involved, be submitted to the European Court of Justice ("**ECJ**"). (For a discussion of the suitability of the ECJ to adjudicate a dispute arising from the application of tax treaties, see Zuger *Arbitration under Tax Treaties Improving Legal Protection in International Law* (2000) 101.

The Member States of the European Community had decided through their multilateral Arbitration Convention (signed on 23 July 1990) that certain cases of double taxation which cannot be solved through the MAP should be submitted for international arbitration.

(For a more in-depth discussion of this convention, see Schwarz *Schwartz on Tax Treaties* (2009) Chapter 19).

3.4.12 The OECD's Committee on Fiscal Affairs formed a working group to examine ways of improving the effectiveness of the MAP, including the consideration of other dispute techniques which might be used to supplement the operation of the MAP. As an initial step, this working group compiled Profiles of the Mutual Agreement Procedures in both OECD and non-OECD countries. A Progress Report was published for public comment in 2004. In this report a different number of proposals for improving the MAP process were discussed.

After reviewing comments received another Public Discussion Draft was published which formally recommended a number of specific proposals. In 2007 a final report, 'Improving the Resolution of Tax Treaty Disputes' was approved by the OECD's

Committee on Fiscal Affairs. This final report includes the following four key recommendations:

3.4.12.1 A supplementary dispute resolution mechanism on the form of a mandatory binding arbitration in addition to the OECD's MAP to settle issues that remain unresolved after two years of MAP considerations;

3.4.12.2 Changes to the Commentary of the MAP provision aimed at clarifying and improving various operational and substantial aspects of the MAP process;

3.4.12.3 The issuing of the MEMAP as an on-line resource to explain the MAP process and to describe 'best practices' to effective MAP; and

3.4.12.4 Annual reporting by OECD Member countries of key statistics regarding their MAP case load.

3.4.13 Since 2008 the OECD MTC also provides for compulsory arbitration. According to Ault and Sasseville '2008 OECD Model: The New Arbitration Provision' May/June 2009 *Bulletin for International Taxation* 208, three factors lead to the inclusion of a compulsory arbitration provision in the OECD MTC in 2008. First, competent authorities were increasingly called upon to adjudicate on transfer pricing issues. Due to the complexity of transfer pricing issues, the MAP often does not result in an agreement. Second, the entry into force on 1 January 1995 of the EU Arbitration Convention gave rise to the wide acceptance of arbitration. Third, the favourable change in attitude by the United States to arbitration in a tax treaty context.

3.4.14 Art 25(5) provides for mandatory arbitration of all issues unresolved under the MAP after two years.

The purpose of Art 25(5) is not to replace the MAP with an evaluation of the case by a body of arbitrators, but to supplement the procedure in cases where the competent authorities are unable to agree on the appropriate interpretation and application of a treaty. Once the outstanding issues have been settled by arbitration, the competent authorities will be held in a position to settle the case.

3.4.15 As with the MAP, under the compulsory arbitration procedure the taxpayer is not involved. It remains the relevant States who set out both their views and those of the taxpayer to the arbitrators. As taxpayers are not directly involved, no need exists to make provision for procedural rights for taxpayers similar to those that apply to private arbitrations. Consequently, unlike private arbitrations, the outcome of the arbitration is not binding on the taxpayer, only on the competent authorities.

4 THE OECD MANUAL ON MAP

4.1 In order to assist both taxpayers and tax administrators with the MAP, the Centre for Tax Policy and Administration ("**CTPA**") of the OECD issued the Manual on Effective Mutual Agreement Procedures ("**OECD MEMAP**"). The February 2007 version is the latest version. The OECD MEMAP provides basic information about how the MAP process is intended to function, including providing best practices for efficient MAP. However, it does not impose a set of binding rules. According to the OECD MEMAP itself, its status is as follows:

4.1.1 It is not intended to modify, restrict or expand any rights or obligations agreed to in any tax treaty;

4.1.2 It is intended to complement and not to supersede the OECD MTC Commentary and the OECD Transfer Pricing Guidelines. To the extent that there is any conflict, the latter must prevail;

4.1.3 The "best practices" identified in the OECD MEMAP are merely guidelines and may not always be appropriate.

4.2 The OECD MEMAP sets out, *inter alia* how to best make a MAP request, including what the general format of such request should look like, the role of taxpayers and their interaction with the competent authorities, the interaction between the two relevant competent authorities, the non-precedent value and non-binding status of agreements between competent authorities, recommended timelines, and internal guidelines for Competent Authority MAP operations.

4.3 The OECD MEMAP was issued many years prior to the 2011 MCMAATM and the 2017 MLI and as such, does not deal with the MAP processes in the context of the 2011 MCMAATM nor of the 2017 MLI. Nevertheless, the OECD MEMAP is regarded as an important practical guide as to how to conduct the MAP and should therefore apply to both the 2011 MCMAATM and the 2017 MLI.

5 ACTION 14 OF THE BEPS ACTION PLAN

5.1 In October 2016, the OECD commenced its MAP peer review and monitoring process under Action 14 of the BEPS Action Plan. This process is being conducted on an ongoing basis by the Steering Group of the Inclusive Framework on BEPS ("**the Steering Group**") under the supervision of OECD Forum on Tax Administration ("**MAP Forum**"). As of November 2017, the Steering Group included representatives from all BRICS Member States, with the exception of the Russian Federation, as follows:

5.1.1 Mr Flavio Antonio Araujo – Brazil;

5.1.2 Ms Pragya S. Saksena – India;

5.1.3 Mr Jianfan Wang – Peoples Republic of China (Deputy Chair);

5.1.4 Ms Yanga Mputa – South Africa.

5.2 The Action 14 Minimum Standard requires OECD Members and other participating jurisdictions to provide reporting of anonymised MAP statistics based on a uniform MAP statistics reporting framework. The Members of the Inclusive Framework of BEPS have committed to implement the Action 14 Minimum Standard, to ensure the effective implementation of the Minimum Standard, and to have their compliance with the Minimum Standard reviewed and monitored by their peers. They are also required to publish their MAP profiles in accordance with an agreed template. The MAP profiles have been published on the OECD website, and the following MAP Peer Reviews, which are taking place in groups of participating jurisdictions in accordance with their readiness, have already taken place:

5.2.1 First batch: September 2017

- Belgium;
- Canada;
- The Netherlands;
- Switzerland;
- The United Kingdom;
- The United States.

5.2.2 Second batch: December 2017

- Austria;
- France;
- Germany;
- Italy;
- Liechtenstein;
- Luxembourg;
- Sweden.

5.2.3 Third batch: March 2018

- Czech Republic;
- Denmark;
- Finland;
- Korea;
- Norway;
- Poland;
- Singapore;
- Spain.

5.3 The peer review process is conducted in two stages: Stage 1 entails the evaluation of the implementation by the relevant jurisdiction of the Action 14 minimum standard set out in a peer review report. This involves taxpayer participation in the form of a taxpayer input questionnaire. Stage 2 entails the monitoring of the implementation of the recommendations arising from the Stage 1 report.

5.4 In November 2017, the OECD announced that they were gathering input for the Fourth Batch peer review of Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal, by utilising the taxpayer input questionnaire.

5.5 The first BRICS Member States to participate in the BEPS Action 14 Peer Review and Monitoring Programme will be India and South Africa, scheduled to fall within the Sixth Batch, commentary August 2018. Brazil, China and Russia fall within the Seventh Batch, scheduled to commence by December 2018. The full peer review schedule is attached as Annexure 6.

6 ART 16 OF THE 2017 MLI

6.1 As stated above, in September 2013, the G20 Leaders endorsed the comprehensive BEPS Action Plan on BEPS to address weaknesses in the international tax framework, which culminated in the BEPS Action Plan. The 15 action points focus on addressing BEPS in a comprehensive manner through global tax coordination to ensure international tax rules fit for an increasingly globalised, digitized business world. Recognising that there would be a need to consider innovative ways to implement the measures resulting from the BEPS project, Action 15 entailed a multilateral tax treaty to deal with BEPS, called A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS.

6.2 The main objective of Action 15 was to create a multilateral instrument which would modify existing bilateral tax treaties in a synchronised and efficient manner to implement the tax treaty measures developed during the BEPS Project, without the need to expend resources individually renegotiating each treaty bilaterally. The result was the 2017 MLI, Art 16 of which contains the mutual agreement procedure for the Covered Tax Agreements impacted by the 2017 MLI, and for the 2017 MLI itself. The Covered Tax Agreements are those bilateral tax treaties which are impacted by the MLI.

6.3 Consistent with most international Conventions, participating jurisdictions are entitled to make reservations about the adoption of most of the provisions of the 2017 MLI. Art 16 is no exception and South Africa has made various reservations and notifications. Pursuant to Art 16 (5)(a) of the 2017 MLI, South Africa reserves the right for the first sentence of Art 16(1) of the 2017 MLI not to apply to its Covered

Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package. It intends to meet this minimum standard by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the Competent Authority of either Contracting State), where a person considers that the actions of one or both of the Contracting Jurisdictions will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting State, that person may present the case to the Competent Authority of the Contracting State of which the person is a resident. If the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, then the aggrieved person may present the case to the Competent Authority of the Contracting State of which that person is a national. The Competent Authority of that Contracting State will then

implement a bilateral notification or consultation process with the Competent Authority of the other Contracting State for cases in which the Competent Authority to which the MAP case was presented does not consider the taxpayer's objection to be justified.

6.4 Pursuant to Art 16(6)(b)(i) of the 2017 MLI, South Africa considers that certain agreements contain a provision that provides that a case referred to in the first sentence of Art 16(1) must be presented within a specific time period that is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement. The only relevant BRICS Members State tax treaty to which this notification applies, is that with Brazil.

6.5 Pursuant to Art 16(6)(b)(ii) of the 2017 MLI, South Africa considers that the certain agreements contain a provision that provides that a case referred to in the first sentence of Art 16(1) must be presented within a specific time period that is at least three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement. The only relevant BRICS Member State tax treaties to which this notification applies, are the tax treaties with the Peoples Republic of China, with India and with the Russian Federation.

6.6 Pursuant to Art 16(6)(c)(i) of the 2017 MLI, South Africa does not consider that any of the agreements with any other BRICS Member States contain the provision described in Art 16(4)(b)(i).

6.7 Pursuant to Art 16(6)(c)(ii) of the 2017 MLI, South Africa considers that the agreement with Brazil does not contain a provision described in Art 16(4)(b)(ii).

6.8 Pursuant to Art 16(6)(d)(ii) of the 2017 MLI, South Africa considers that none of the agreements with any other BRICS Member States, do not contain a provision described in Art 16(4)(c)(ii).

7 DTC RECOMMENDATIONS ON MAP FOR SOUTH AFRICA

7.1 In the February 2013 Annual Budget Speech, the South African Minister of Finance stated that government will initiate a tax review “to assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability”. It was decided at the inaugural meeting of the Committee on 25 July 2013 that the Committee will be known as The Davis Tax Committee ("**DTC**") as it was chaired by Judge Dennis Davis. The DTC's term ended on 27 March 2018, and it issued numerous reports, including reports on each of the BEPS Action Points.

7.2 The DTC was tasked with inquiring into the role of the tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability, by taking into account recent domestic and international developments and, particularly, the long-term objectives of the National Development Plan.

7.3 The DTC was not a creature of statute. It was formed and appointed by the Minister of Finance and, as such, advised and reported to the Minister directly. Accordingly, all of its reports were submitted to the Minister of Finance for consideration in the determination of tax policy, which is usually articulated in the annual national budget speech. The DTC only published its reports on its website after obtaining the necessary approval of the Minister of Finance.

7.4 The DTC operated on the basis of various sub-committees dealing with specific items in the Terms of Reference. Based on wide consultation and submissions received, each sub-committee prepared an interim report for the approval of the DTC as a whole and subsequent submission to the Minister of Finance. Not all of its recommendations were accepted by the Minister of Finance, and many are still under consideration by National Treasury.

7.5 As stated above, the DTC issued Reports on numerous topics, including on all the OECD BEPS Action Points. The Report on BEPS Action Point 14 was very comprehensive, and excellent recommendations were made, as set out more fully below. To date, the only action which has resulted from this Report, is the issuing by SARS of a Draft MAP Guide, for general comment.

7.6 The DTC, in its Final Report on BEPS Action 14 issued in September 2016, has made the following recommendations about MAP:

7.6.1 South Africa should adopt the OECD minimum standards as set out in BEPS Action 14 with respect to MAP;

7.6.2 SARS needs to be more active in supporting South African taxpayers during MAP processes;

7.6.3 To ensure the effectiveness of MAP, it is important that the performance measures against which officials working on MAP are measured should not be based on factors such as revenue obtained and the matter must be referred to an independent and separate unit within SARS that deals with MAP. For example, if the matter is a transfer pricing matter, it should not be referred to the SARS Transfer Pricing Unit;

7.6.4 Attention must be given to intensive recruitment and robust training of personnel by SARS, to set up and equip a specialised unit to deal with MAP issues;

7.6.5 It is important for South Africa to include Art 9(2) of the OECD MTC in those tax treaties where this sub-article has not yet been included. This is to ensure that the position in the South African tax treaties is in accordance with the OECD Commentary on Art 25;

7.6.6 SARS should not influence taxpayers to waive their rights to MAP, nor should taxpayers be prohibited as part of settlement negotiations, from escalating the portion of tax suffered to the Competent Authority for relief from double taxation;

7.6.7 Lack of an Advance Pricing Agreement ("**APA**") programme in South Africa is an inhibitor to foreign direct investment as it removes the opportunity to seek certainty on transactional pricing. An APA programme should therefore be introduced;

7.6.8 Although South Africa has guidelines and regulations on domestic dispute resolution and litigation, there is no published guidance on how to resolve disputes through the tax treaties. Such guidance should be created and published. In this regard, clear guidance on when SARS will entertain MAP needs to be given together with an appropriate process guide for taxpayers similar to the guide issued for domestic resolution. The DTC further recommended that the MAP guidance should contain details about when MAP will be applied, applicable time limits in which a taxpayer can approach the Competent Authority, who the Competent Authority is, what documents are required to be submitted with any application, interaction of MAP with domestic tax law, estimated timelines and the obligations of the Competent Authority.

7.6.9 Since most disputes concern transfer pricing, it is important that SARS' Interpretation Note on Transfer Pricing be finalised;

7.6.10 The current audit procedure in South Africa places the taxpayer in a position of uncertainty as to whether the matter is under audit or not;

7.6.11 The timing for applying for MAP needs to be clarified;

7.6.12 In relation to the "pay now, argue later" principle currently applied by SARS, DTC recommended that if a MAP matter take years before being resolved, SARS should be cognisant of the fact that not permitting the suspension of payment pending the outcome of MAP can be extremely detrimental to the taxpayer;

7.6.13 Many developing countries do not consider themselves yet ready for mandatory binding arbitration in the international taxation context. For example, India and Brazil made it clear in the BEPS discussions on this topic that they would not be involved in binding mandatory arbitration.

(UN Committee of Experts on International Cooperation in Tax Matters "*Secretariat Paper on Alternative Dispute Resolution in Taxation*" (8 October 2015 Para 21);

7.6.14 South Africa should call for MAP results and agreements reached (including the "anonymised" versions) to be published annually (this could be in redacted form – removing matters that are a confidentiality concern);

7.6.15 Exchange of existing best practices between SARS and other revenue authorities should be strongly encouraged. The DTC recommended that South Africa should in particular adopt the OECD recommendation regarding Best Practice 1 (inclusion of Art 9(2) in its tax treaties); Best Practice 2 (adopt appropriate procedures to publish MAP agreements reached); Best Practice 5 (implement procedures that permit, after an initial tax assessment, taxpayer requests for the multiyear

7.6.16 resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same); Best Practice 6 (take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending); Best Practice 7 (implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes); Best Practice 8 (published MAP guidance explaining the relationship between the MAP and domestic law administrative and judicial remedies); Best Practice 9 (publish MAP Guidance which provides that taxpayers will be allowed access to the MAP where double taxation arises in the case of bona fide taxpayer-initiated foreign adjustments permitted under the domestic laws of a treaty partner); Best Practice 10 (publish guidance on the consideration of interest and penalties in the MAP).

7.7 Regarding arbitration, the DTC recommended that South Africa should call for measures to be in place to make the arbitration process more transparent and it should only commit to the process if the rules are clear and transparent. Until the MAP arbitration process is made more transparent, South Africa should also be cautious about committing to an arbitration provision in the 2017 MLI. When South Africa becomes a party to the MLI, it should register a reservation not to commit to mandatory arbitration until the concerns regarding this process are rectified. Further, since mandatory arbitration is viewed by the OECD and taxpayers as a means of speedily resolving MAP, South Africa should call for international measures to be put in place to ensure transparency in the arbitration procedures. Lastly, at regional level, the DTC recommended that South Africa should recommend that a pool of arbitrators be formed with the necessary skills and qualifications.

8 SARS DRAFT MAP GUIDE

8.1 In accordance with the recommendations made by the DTC, SARS issued its Draft Guide on MAPs in 2018 ("**Draft MAP Guide**"). The Draft MAP Guide states that it is not to be used as a legal reference; it is not an "official publication" and accordingly does not create a "practice generally prevailing". It is also not a binding general ruling. Accordingly, a taxpayer cannot rely unreservedly on the contents of the Draft MAP Guide.

8.2 In conformance with the DTC recommendations, the Draft MAP Guide sets out in what instances the MAP would apply, circumstances in which a MAP request may be accepted or denied, how to go about submitting a MAP request and how the MAP interacts with domestic law. The Draft MAP Guide confirms who the Competent Authority for South Africa is.

8.3 The Draft MAP Guide is not in conformance with the DTC MAP Guidelines in the following respects:

8.3.1 It confirms that the competent authorities are not compelled to reach an agreement and therefore it provides no additional assistance to taxpayers wishing to initiate a MAP, other than to set out the minimum information that must be included in a MAP request and where such request should be submitted.

8.3.2 The Draft MAP Guide does not contain any time limitations nor does it contain response times or response obligations by SARS towards applicants.

8.3.3 The Draft MAP Guide does not state the procedure for obtaining a tax residency certificate from SARS.

8.3.4 The Draft MAP Guide simply recommends the approach which SARS will take in dealing with the interaction between South African domestic law objection and appeal processes, and the MAP Process, for example, whether the objection and appeal process is suspended pending the outcome of the MAP. The Draft Map Guide should instead be prescriptive about this. In addition, South African domestic law should be correspondingly amended to cater for this, otherwise the general uncertainty of the MAP process will remain.

8.4 The Draft MAP Guide is currently open for public comments.

9 BRICS MAP RECOMMENDATIONS

9.1 For South African taxpayers and their advisors, a special arrangement among BRICS Member States which facilitates and enhances the MAP will encourage and promote investment by South African multinationals into other BRICS Member States. Therefore, in accordance with the DTC MAP recommendations, and in accordance with OECD guidelines, and within the restraints of the relevant treaty obligations, the following is proposed:

9.1.1 Each BRICS Member State should create a special MAP Department within their Tax Authorities. Within such MAP Department, at least one official should be dedicated to BRICS MAP issues ("**the BRICS MAP Official**");

9.1.2 The dedicated BRICS MAP Official should receive joint training, should meet regularly, and should communicate frequently about inter-BRICS international tax issues;

9.1.3 The BRICS Member States must agree to a uniform MAP as regards time limits, regular feedback to taxpayers and taxpayer rights. In this regard it is suggested that Revenue Authority response times must be limited to 60 business days and that taxpayers must have the right to approach the Competent Authority of the other BRICS Member State directly on an appeal basis in pre-defined, time-limited circumstances;

9.1.4 The agreed procedure as per 1.3 above should be reflected in a BRICS MAP Convention, which is sanctioned under the domestic law of each BRICS Member State;

9.1.5 Each BRICS Member State should issue a BRICS MAP Manual giving guidance to applicants; and

9.1.6 South African domestic law should be amended to expressly deal with the interaction between the objection and appeal process as found in the Tax Administration Act, and the MAP. This should be of general application, not just for BRICS MAP. For example, the domestic objection and appeal process should be suspended pending the outcome of the MAP.

10 CONCLUSION

10.1 Based on the analysis as set out above, it would clearly be in the interests of the BRICS Member States for their taxpayers to have access to an efficient, voluntary, and transparent MAP in order to resolve international tax issues.

10.2 The OECD Action 14 MAP process, in which all of the BRICS Member States are participating, does not prevent "subgroups" of participating jurisdictions, like BRICS, from implementing their own detailed MAP rules.

10.3 Art 24(1) of the 2011 MCMAATM expressly allows for "subgroups" of Parties to the Convention, like BRICS, to mutually agree modes of application of the Convention.

10.4 The new Draft MAP Guide issued by SARS contains no details about timelines and processes which will be of general application to South Africa's bilateral tax treaties.

10.5 The BRICS Member States are clearly not yet amenable to, nor equipped for, mandatory arbitration.

10.6 It will be in the interests of mutual investment certainty, for BRICS to implement its own streamlined MAP processes, as follows:

10.6.1 Each BRICS Member State should create a special MAP Department within their Tax Authorities. Within such Map Department, at least one official should be dedicated to BRICS MAP issues;

10.6.2 The dedicated BRICS MAP Official should receive joint training, should meet regularly, and should communicate frequently about inter-BRICS international tax issues;

10.6.3 The BRICS Member States must agree to a uniform MAP as regards time limits, as well as regular feedback to taxpayers (with deadline) and taxpayer rights. In this regard it is suggested that Revenue Authority response times must be limited to 60 business days and that taxpayers must have the right to approach the Competent Authority of the other BRICS Member State directly on an appeal basis in pre-defined, time-limited circumstances;

10.6.4 The agreed procedure as per 10.3 above should be reflected in a BRICS MAP Convention, which is sanctioned under the domestic law of each BRICS Member State;

10.6.5 Each BRICS Member State should issue a BRICS MAP Manual giving guidance to applicants, containing details as set out above; and

10.6.6 South African domestic law should be amended to expressly deal with MAP, in conformance with the DTC recommendations.

10.7 The above proposed uniform procedures should be discussed among the BRICS Member States and should be adapted to be suitable for all States, after which the finalised proposals should be presented to the Ministers of Finance of the BRICS Member States for adoption, preferably by means of a new, separate multilateral taxation convention.

11 BIBLIOGRAPHY

11.1 Ault, H. (2013). "Dispute Resolution: The Mutual Agreement Procedure". Papers on Selected Topics in Administration of Tax Treaties for Developing Countries. Available from: http://www.un.org/esa/ffd/tax/2013TMTTAN/Paper8A_Ault.

11.2 Chen, S. (2017). "*The MAP tie-breaker rule for dual residence in Art 4(3) of the 2017 OECD MC*". Available from https://www.world.tax/articles/the-map-tie-breaker-rule-for-dual-residence-in-art-4.3-of-the-2017-oecd-mc-php.

11.3 Gianluca Darena, "*The Dispute Settlement Mechanisms Under the MLI: A Work in Progress1, 38 MJILDigitalSymposium 10 (2017)*".

11.4 Deloitte (2014) - "BEPS Action 14: Make Dispute Resolution Mechanisms More Effective". Available from https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/Deloitte%20OECD%20BEPS%20Action%2014%20-%20Make%20dispute%20resolution%20mechanisms%20more%20effective%20December%202014.pdf

11.5 Duffy, J and Bailey, T: "*The Case for Mandatory Binding Arbitration in International Tax*" Irish Tax Review (Vol 29 No 2 2016 79).

11.6 Government of Canada. (2018). "*2016 MAP Program Report*". Available from https://www.Canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-services/2016map.html.

11.7 Govind, S and Turcan, L (26 October 2017) "*Cross-Border Tax Dispute Resolution in the 21st Century*: A Comparative Study of Existing Bilateral and Multilateral Remedies" Derivatives and Financial Instruments (2017 Volume 19), No. 5.

11.8 Markham, M. (2017). "New Developments in Dispute Resolution in International Tax," Revenue Law Journal: Vol 25: Iss. 1, Article 4. Available from http://epublications.bond.edu.au/rlj/vol25/iss1/4.

11.9 OECD "*Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project"* OECD 2015. Available from https://www.oecd.org/tax/beps-explanatory-statement-2015.pdf.

11.10 OECD. BEPS Action 14 Peer Review and monitoring Assessment Schedule for Stage 1 Peer Reviews. Available from www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm

11.11 OECD Centre for Tax Policy and Administration. *Manual on Effective Mutual Agreement Procedures (MEMAP)* (February 2007 Version) OECD 2007.

11.12 OECD Centre for Tax Policy and Administration *Improving the Process for Resolving International Tax Disputes.* OECD 2004.

11.13 OECD Forum on Tax Administration *Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement*. Available from https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/map-strategic-plan.pdf

11.14 OECD *Mutual Agreement Procedure Statistics for 2016.* OECD 2016.

11.15 Schwarz *Schwartz on Tax Treaties* (2009) Chapter 19.

11.16 IMF/OECD. *Tax Certainty*: *OECD Report for the G20 Finance Ministers*. 2017 IMF/OECD.

11.17 OECD *OECD Invites Taxpayer Input On Fourth Batch Of Dispute Resolution Peer Reviews*.

11.18 OECD *BEPS Action 14 Peer Review and Monitoring*. OECD 2018.

11.19 OECD *About the Inclusive Framework on BEPS*. OECD 2018.

11.20 OECD *South Africa Dispute Resolution Profile* (update 1 September 2016). OECD 2016.

11.21 Oguttu, A.W. (2015). "*Resolving Double tax treaty disputes: the Challenges of Mutual Agreement Procedure with a special focus on addressing the concerns of developing countries in Africa-The South African and Ugandan experience*". 2015 SAYIL 160.

11.22 Oguttu, A.W. (2015). "*Tax base erosion and profit shifting in Africa-part 1: what should Africa's response be to the OECD BEPS Action Plan?*". XLVIII CILSA 2015.

11.23 Oguttu, A.W. (2016). "*Tax base erosion and profit shifting-part 2: a critique of some priority OECD action points from an African perspective-preventing excessive interest deductions and tax treaty abuse*". XLIX CILSA 2016.

11.24 Owens, J. (2004). "*Resolving International Tax Disputes: The role of the OECD*". OECD Observer: No 234, May 2004.

11.25 Preamble to the 2016 US. Model Income Tax Convention.

11.26 PWC. (2017) - "Mutual Agreement Procedure". Available from https://www.pwc.in/assets/pdfs/trs/transfer-pricing/2017/mutual-agreement-procedure-web-version.pdf

11.27 Rohatgi – *"Basic International Tax* (2002) 121-123".

11.28 Runge - *'Mutual Agreement Procedures and the Role of the Taxpayer' 2002 Internal Bureau of Fiscal Documentation 16 of 17.*

11.29 Sidhu, P.K. (2014). "*Is the Mutual Agreement Procedure Past Its "Best-Before Date*" and "*Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration"*? IBFD's Bulletin for International Taxation (Nov 2014) 590.

11.30 Tilllinghast "The Choice of Issues to be Submitted to Arbitration under the Income Tax Conventions" in *Alpert and Van Raad 'Essays on International Taxation'* (1993) 349.

11.31 Zuger - *Arbitration under Tax Treaties Improving Legal Protection in International Law* (2000) 101.

ANNEXURE 1

BRICS Bi-lateral Tax Treaties in Force as at July 31, 2018

- SA-Brazil;
- SA-Russia;
- SA-India;
- SA-China;
- Brazil-Russia;
- Brazil-India;
- Brazil-China;
- Russia-China;
- Russia-India; and
- China-India

Copies of Art 25 (or equivalent) of each of the above tax treaties are attached to this Annexure for ease of reference, as Annexures 1A to 1J.

ANNEXURE 1A

Article 25
South Africa – Brazil Tax Convention
24 July 2006

"Mutual Agreement Procedure

1 *Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with the provisions of this Convention, that person may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the Contracting State of which the person is a resident, the case must be presented within the time limits provided for in the domestic law of the Contracting State.*

2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the*

avoidance of taxation which is not in accordance with the convention.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.*

4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 1B

Article 24
South Africa - Russia Tax Convention
26 June 2000

"Mutual Agreement Procedure

1 Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority

of the other Contracting State, with a view to the avoidance of taxation not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.*

4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 1C

Article 24
South Africa – India Tax Convention
28 November 1997

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident of, if his case comes under paragraph 1 of Art 23, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the

case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement they may also consult together for the elimination of double taxation in cases not provided for in the Agreement.*

4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When is seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a joint commission consisting of representatives of the competent authorities of the Contracting States."*

ANNEXURE 1D

Article 25
South Africa - China Tax Convention
7 January 2001

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Art 25, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself

able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3 The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

4 The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of paragraphs 2 and 3. When it seems advisable for reaching agreement, representatives of the competent authorities of the Contracting States may meet together for an oral exchange of opinions."

ANNEXURE 1E

Article 25
Brazil - Russia Tax Convention
16 June 2017

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention.

3 The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention.

4 The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."

ANNEXURE 1F

Article 25
Brazil - India Tax Convention
11 March 1992

"Mutual Agreement Procedure

1 Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident. This case must be presented within five years of the date of receipt of notice of the action which gives rise to taxation not in accordance with the Convention.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority

of the other Contracting State, with a view to avoidance of taxation not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.*

4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States."*

ANNEXURE 1G

Article 25
Brazil - China Tax Convention
5 February 1993

"Mutual Agreement Procedure

1 Where a resident considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within 3 years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority

of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the provisions of the Agreement.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.*

4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of paragraphs 2 and 3."*

ANNEXURE 1H

Article 24
China - Russia Tax Convention
10 April 1997

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident and also, if his case comes under paragraph 1 of Art 23, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Agreement. Any agreement reached shall be implemented notwithstanding any time limits, provided for by the domestic law of the Contracting States.*

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement."*

ANNEXURE 1I

Article 25
China - India Tax Convention
21 November 1994

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Art 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself

able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the provisions of this Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3 The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

4 The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of paragraphs 2 and 3. When it seems advisable for reaching agreement, representatives of the competent authorities of the Contracting States may meet together for an oral exchange of opinion."

ANNEXURE 1J

Article 25
India-Russia Tax Convention
10 January 2001

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provision of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority

of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits provided for in the domestic laws of the Contracting States.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult with each other for the elimination of double taxation in cases not provided for in this Agreement.*

4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 2

Article 25
OECD Model Tax Convention

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Art 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive as a satisfactory solution, to resolve the

case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the limitation of double taxation in cases not provided for in the Convention.*

4 *The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.*

5 Where,

a) Under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for the person on taxation not in accordance with the provisions of this Convention, and

b) The competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the

domestic laws of these States, the competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph."

ANNEXURE 3

BRICS Member States which have Adopted Article 25(5) of the OECD MTC (or equivalent)

1 South Africa has only adopted Art 25(5) or equivalent in its tax treaties with Canada, the Netherlands and Switzerland.

2 South Africa has not adopted Art 25(5) it in respect of any BRICS Member State.

3 No BRICS Member States have adopted Art 25(5) in relation to any other Member State.

ANNEXURE 4

Article 24 of the 2011 MCMAATM

"Implementation of the Convention

1 The Parties shall communicate with each other for the implementation of this Convention through their respective competent authorities. The competent authorities may communicate directly for this purpose and may authorise subordinate authorities to act on their behalf. The competent authorities of two or more Parties may mutually agree on the mode of application of the Convention among themselves.

2 Where the requested State considers that the application of this Convention in a particular case would have serious and undesirable consequences, the competent authorities of the requested and of the applicant State shall consult each other and endeavour to resolve the situation by mutual agreement.

3 A co-ordinating body composed of representatives of the competent authorities of the Parties shall monitor the implementation and development of this

Convention, under the aegis of the OECD. To that end, the co-ordinating body shall recommend any action likely to further the general aims of the Convention. In particular, it shall act as a forum for the study of new methods and procedures to increase international co-operation in tax matters and, where appropriate, it may recommend revisions or amendments to the Convention. States which have signed but not yet ratified, accepted or approved the Convention are entitled to be represented at the meetings of the co-ordinating body as observers.

4 *A Party may ask the co-ordinating body to furnish opinions on the interpretation of the provisions of the Convention.*

5 *Where difficulties or doubts arise between two or more Parties regarding the implementation or interpretation of the Convention, the competent authorities of those Parties shall endeavour to resolve the matter by mutual agreement. The agreement shall be communicated to the co-ordinating body.*

6 *The Secretary General of OECD shall inform the Parties, and the Signatory States which have not yet ratified, accepted or approved the Convention, of opinions furnished by the co-ordinating body according to the provisions of paragraph 4 above and of mutual agreements reached under paragraph 5 above".*

ANNEXURE 5

Article 16 of the 2017 MLI

"Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with

the Covered Tax Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.

3 The competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement".

ANNEXURE 6

BEPS Action 14

Peer Review and Monitoring

Assessment Schedule for Stage 1 Peer Reviews*

1st batch By December 2016	2nd batch By April 2017	3rd batch By August 2017	4th batch By December 2017	5th batch By April 2018
Belgium	Austria	Czech Republic	Australia	Estonia
Canada	France	Denmark	Ireland	Greece
Netherlands	Germany	Finland	Israel	Hungary
Switzerland	Italy	Korea	Japan	Iceland
United Kingdom	Liechtenstein	Norway	Malta	Romania
United States	Luxembourg	Poland	Mexico	Slovak Republic
	Sweden	Singapore	New Zealand	Slovenia
		Spain	Portugal	Turkey

6th batch By August 2018	7th batch By December 2018	8th batch By April 2019	9th batch By August 2019	10th batch By December 2019
Argentina	Brazil	Brunei	Andorra	Barbados
Chile	Bulgaria	Curacao	Bermuda	Kazakhstan
Colombia	China	Guernsey	British Virgin Islands	Oman
Croatia	Hong Kong (China)	Isle of Man	Cayman Islands	Qatar
India	Indonesia	Jersey	Macau (China)	Saint Kitts and Nevis
Latvia	Papau New Guinea	Monaco	Turks and Caicos Islands	Thailand
Lithuania	Russia	San Marino	Bahamas	Trinidad and Tobago
South Africa	Saudi Arabia	Serbia	Anguilla	Bahrain

**www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm*

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Exploring the salience of BRICS for metropolitan municipalities in South Africa

ABSTRACT

It is important to note in this opening paragraph that one of the objectives of the BRICS configuration is to foster trade and investment relations among the BRICS countries.[1] It is equally important to note that BRICS has a multitude of objectives which pose as opportunities and/or threats for cooperation among BRICS countries. Some of these objectives include environmental management, climate change based on the principle of common but differentiated

[1] Clause 5 of the Joint statement of the BRIC Leaders, Ekaterinburg, Russia, 16 June 2009 states that '[w]e recognize the important role played by international trade and foreign direct investments in the world economic recovery. We call upon all parties to work together to improve the international trade and investment environment. We urge the international community to keep the multilateral trading system stable, curb trade protectionism, and push for comprehensive and balanced results of the WTO's Doha Development Agenda'.

responsibility, energy, food security, the fight against terrorism, inter alia.[2] Existing research seems to be limited to discussions of the international diplomacy mostly, and in terms of subnational diplomacy, research seems to focus on the role of civil society in subnational diplomatic relations. The existing work on both the international and subnational levels does not necessarily focus on the BRICS partnership. This paper explores areas and mechanisms of cooperation between BRICS partners at a subnational level within the context of South Africa.

South Africa is recognised as a quasi-federal system of cooperative government in terms of which powers are divided between three spheres of government, being the national, provincial and local governments.[3] Federal (and quasi-federal) constitutions typically have the following features: '(i) the existence of two levels of government: a general

[2] See generally Joint statement of the BRIC Leaders, Ekaterinburg, Russia, 16 June 2009'.
[3] Section 40 Constitution of the Republic of South Africa, 1996.

government for the whole country and two or more regional governments for different regions within that country, (ii) distribution of competence or powers- legislative, executive, judicial and financial between the general and the regional governments; (iii) supremacy of the constitution'. [4] This is true in the South African context as entrenched in section 40 of the Constitution.[5]

For most countries, including South Africa, local government is the sphere of government which is closest to the people. The delicate history of South Africa's spheres of government poses as a critical point of reflection in fully understanding the relevance of local government in the economic, social and cultural affairs of the Republic. Although the national sphere of government is largely responsible for the signing and ratification of international treaties, the local government is

[4] Mahendra Pal Singh 'The Federal Scheme' in Sujit Choudry, Madhav Khosla, and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (2016) Chapter 25 Oxford: Oxford University Press.
[5] Constitution of the Republic of South Africa, 1996.

most inundated with the functional implementation of such international agreements, as a facilitator.

South Africa joined the BRICS partnership on 24 December 2010. Although BRICS has numerous objectives, one of the overarching objectives is to facilitate trade and investment between BRICS countries, and to provide a South-centered alternative to traditional international financial institutions. BRICS Declaration 2009 to Declaration 2018 each speak to the desirability of increased investment among the BRICS countries. It is argued that one of BRICS' main objectives is to facilitate increased intra-BRICS investments, and that these objectives form part of both the national and subnational agenda of South Africa as per the National Development and the international relations strategy. BRICS countries seek to facilitate increased engagement with each other through both outwards and inwards investment inter alia.

BRICS has thus far established the New Development Bank as a binding legal instrument. However, the BRICS partnership has not established specific treaties relating to Trade and Investment. At present, there have been annual statements and/or declarations. This paper will endeavour to explore the extent of investment regulation explicit or implicit in the existing BRICS framework. The paper will explore the mechanisms for implementation of the BRICS investment framework and/or objectives at the local government level in the said metropoles. The study will examine whether BRICS is indeed a reality for metropoles, and if so, the mechanisms through which the said metropoles are engaging with other BRICS partners. The paper will also briefly explain the competencies of local governments to put them into context in relation to the BRICS investment framework, bearing in mind the constitutional mandate of local governments as being 'developmental' in terms of sections 152 and 153 of the Constitution.

Despite the mutual objective of BRICS countries to have increased inward and outward trade and investment among themselves, it is unclear whether this objective has materialised into practical measures of implementation within the major metropolitan cities of Cape Town, Johannesburg and eThekwini in South Africa. The aim of the paper is to explore and determine the salience of the BRICS partnership for the major metropolitan cities of Cape Town, Johannesburg and eThekwini.

The structure of the paper is as follows: First the paper will succinctly explain the BRICS investment framework. Secondly, the paper will explain the nature, structure and competencies and mandates of local governments in South Africa in relation to trade and investment. Thirdly, the paper will conduct a critical analysis of the nature, extent and importance of BRICS for the metropolitan cities of Cape Town, eThekwini and Johannesburg by exploring selected agreements, meetings, trade and investment outcomes, nature of engagements, reports, statistics and policy documents of each metropole in relation to BRICS.

The outcome of this paper is to determine whether there is in reality any importance attached to the BRICS partnership in the metropoles, and if so why, in what manner, and what are the outcomes; and if not, why not, and what are the barriers.

Varadachar Lakshmikumaran

Bar Association of India

BRICS MAP Recommendations

ABSTRACT

Mutual Agreement Procedure (MAP) is provided under Article 25 of the OECD/UN Model Convention. It is considered to be a mechanism for the settlement of disputes arising from the application of tax provisions provided under the convention. Such convention when entered into between two countries is referred to as a Double Taxation Avoidance Agreements (DTAA).

Considering that the DTAA is concerned with the division of taxation powers between two sovereign nations, there can be situations when divergent interpretation of the provisions of DTAA may end up in a double taxation scenario. Despite the fact that the DTAA provisions are intended to address the issues of double taxation, the residents many times face instances where they get caught up in the inescapable shackles of taxation authorities in both the residence and

source countries, which in turn gives rise to multiple litigations spread over a number of years.

Though MAP is outlined in Article 25 of both OECD and UN Model Conventions, there are certain variations in terms of conditions of invocation, scope of such remedial procedures, etc. However, when it comes to proposing a draft model of MAP between the BRICS member nations, it is pertinent that the pros and cons of the different approaches contained in the two conventions (OECD& UN) should be debated and a common uniform approach must be evolved.

Basis the understanding derived from Article 25 of OECD/UN Model Convention and the discussions that took place at the BRICS summit in July 2018 in Cape Town, the following salient features should be taken care while drafting model MAP for BRICS member nations: -

- **Cause of action for invoking MAP**: -

  The point of trigger for invoking MAP by a taxpayer, should be clearly specified while drafting the MAP provisions. This is essential for the fact that a taxpayer should be aware as to when a cause of action arises due to which he can exercise his rights of seeking remedy under MAP. Such cause of action can be defined either by linking it to the receipt of a tax order or a point in time where the tax officer challenges the position taken by a taxpayer by way of a notice. Similar trigger lines can be defined for cases related to transfer pricing adjustments. Specific mention may also be made of the transactions which the BRICS intend to keep out of the MAP provisions.

- **Initiation of MAP by whom:-**

  Article 25 of the OECD/UN Convention uses the word person for the purposes of initiation of MAP proceedings in cases where action of one or both contracting states results or is likely to result in a scenario which is adverse for the taxpayer. India in its

DTAAs has adopted the word resident and person both while dealing with MAP. Such use of the term person and resident may lead to a situation where a taxpayer may not satisfy to a 'resident' of any of the countries yet a 'person' under the provisions of MAP. Such anomaly should be avoided and dealt with specifically by using similar terminologies so as to expressly lay down the intention of BRICS member nations to include a taxpayer based on residency test or otherwise.

- **Availability of domestic tax remedies after invoking MAP: -**

  MAP is considered as an alternate additional remedy over and above the remedies enshrined under the domestic tax provisions of the member countries. The existing article under OECD/UN Model Convention does not prohibit the taxpayer from seeking relief under domestic tax provisions while engaging in MAP separately. Such intentions of the BRICS member nations should be expressly published.

- **Providing timelines for making applications**

  Article 25 of the OECD/UN Model Convention provides for an upper limit of three years from the date of first notification of the action resulting in taxation not in accordance with the Convention. This timeline is not consistent in cases of DTAAs between different member nations. Such inconsistency in time-limits should be avoided while drafting MAP guidelines for BRICS member nations.

- **Application format and mention of Competent Authority to whom shall the application be made**

  The lack of common format for making an application of MAP, at times, leads to delay in filing applications along with relevant annexures. A common application format along with documents specified should be made part of MAP guidelines so as to provide the taxpayers of BRICS member nations a common approach while filing such applications.

- **Common classification guidelines for different streams of income**

  There can be situations where a stream of income may be treated differently for purpose of taxation in the country of residence and the source country. For example, income from sale of property may be treated as business income in one country, whereas as capital gains in another. Such issue of classification of income should be resolved through common guidelines and approach by way of prescribed methods after taking into account the domestic tax provisions of each member nation. This may make the resolution under MAP more effective and speedier.

- **Empowerment of Competent Authority**

  The competent authorities which will be engaged in the process of MAP proceedings should be given sufficient powers and mechanism for resolving disputes within limited time frame. Such powers should be provided by way of amendments in the domestic tax provisions of each member nations. Further, the publication of

procedures for approaching MAP issues will lead to greater transparency between the member nations, thus, providing an overall benefit to the taxpayers. The MAP guidelines should provide commentaries on the process for resolving international tax disputes with well-defined roles and responsibilities. The issues pertaining to anti-abuse provisions can be excluded from the MAP proceedings by taking consensus of all member nations. However, where anti-abuse provisions are a part of the DTAA, the same can be included in for the scope of MAP. Such limited remedies related to anti-abuse provisions can be kept on the understanding that member nations may not want to dilute the anti-abuse provisions by subjecting themselves to MAP proceedings.

Other Measures

It can also be recommended where the issues resolved under MAP can be taken as precedents for resolving future issues so as to give taxpayers more certainty and consistency in the

approach that will be likely to be adopted by the tax authorities of different member nations.

Conclusion

The foregoing prescriptions allows us to understand that for an effective MAP between the BRICS member nations there should be a simple, uniform and common approach formulated and adopted by all so as to give business entrepreneurs (being the eventual taxpayers) a transparent, certain and efficient tax environment, thus, leading to free flow of trade, investments, growth and prosperity across member nations.

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Consolidating BRICS Dispute Resolution Structures: Is it now the time to consider a BRICS IP Court?

EXTENDED ABSTRACT

1. Introduction

Intellectual property (IP) and international trade are important issues for all BRICS member countries. BRICS may be characterised as a free trade agreement that seeks to facilitate development, provide extensive financial assistance, and support various infrastructure and border defence projects between member countries. Because it is a multilateral trade agreement, BRICS aims to aid the free flow of goods and services by eliminating both import and export tariffs, non-tariff barriers and technical barriers to international trade.

Brazil, Russia, India, China and South Africa are members of the World Trade Organisation (WTO) and automatically signatories to the WTO's Agreement on

Trade Related aspects of Intellectual Property Rights (TRIPS). Established on January 1 1995, the World Trade Organisation provides a forum for implementing the multilateral trading system, negotiating new trade agreements and resolving trade disputes. At the heart of the WTO is ensuring smooth trade flows, predictability in the trading system and guaranteeing free and freer trade between members.

The WTO multilateral trading system is important in solving trade disputes, and its elaborate and detailed agreements are important for harmonizing global trade norms most of which have been embraced by BRICS countries through domestication. The TRIPS Agreement lays down the minimum standards of IP WTO members must adhere to alongside existing dispute settlement measures. As BRICS members move to harmonize most aspects of international trade and financial regulation, it becomes increasingly important to harmonize not only legal rules but the formal dispute resolution structures in the form of courts

and related tribunals. Disputes involving IP and intra-BRICS trade will increase as the integration between BRICS economies increases and the need for common dispute resolution forums regulated by the same laws and procedures will become inevitable. This calls for the establishment of a common BRICS IP Court that will deal with trade-related IP and IP disputes involving BRICS members. The court will be manned by specialized judges who are IP experts and its establishment will timeously anticipate the proliferation of intra-BRICS IP and trade related IP disputes.

In this paper I make the case for the establishment of the BRICS IP Court to facilitate legal harmonization, the reduction of acrimonious disputes and the development of the pertinent regional IP jurisprudence. I outline the functional hallmarks of the proposed court below and leave room for the court's jurisdiction to be extended to trade related aspects of intellectual property rights as well.

2. Justification of the Proposed BRICS IP Court

The justification of a BRICS IP Court hinges on a number of grounds. Like it is the case in the rest of the world, intellectual property law in BRICS countries is territorial and there are astonishing varieties of IP in each country.[6] The IP international conventions each country has domesticated also differ. There has never been a consolidated comparative study of BRICS IP laws to establish common areas presenting opportunities for immediate harmonization and those areas of stark difference, requiring concerted efforts at harmonization, save for the work by Deorsola et al.,[7] focusing exclusively on trade marks. Deorsola et al. investigate possible similarities and differences between the normative frameworks for the protection of trademarks, and ultimately adopt a comparative approach and discuss the BRICS major conventions,

[6] See generally Coenraad Visser & Roshana Kelbrick, *Intellectual property law*, 2013 ANNUAL SURVEY OF SOUTH AFRICAN LAW (2013).

[7] Adriana Brigante Deorsola, et al., *Intellectual property and trademark legal framework in BRICS countries: A comparative study*, 49 WORLD PATENT INFORMATION (2017).

treaties, international agreements and their legal impacts.

China has traditionally had IP tribunals within its legal system of People's Courts but introduced specialist intellectual property (IP) courts at the end of 2014.[8] Additionally, Brazil, India and Russia[9] have specialist IP Courts or tribunals within their jurisdictions.[10] South Africa is the only BRICS member with no specialist IP Court, however, the Court of the Commissioner of Patents, provided for in the Patents Act, may be considered a version of an IP Court or tribunal of limited jurisdiction. With the notable exception of the Commissioner of Patents, no other dispute resolution fora exist in South Africa for other forms of IP, hence

[8] Nari Lee & Liguo Zhang, *Specialized IP Courts in China - Judicial Governance of Intellectual Property Rights*, 48 IIC IIC - INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW (2017).

[9] According to Daria Kim, *Russia Establishes Specialised Court for Intellectual Property Rights,* INTELLECTUAL PROPERTY WATCH (2013), available at http://www.ip-watch.o rg/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/, Russia established its specialized IP Courts on 1 February 2013.

[10] Jacques de Werra, *ICTSD: Specialised Intellectual Property Courts - Issues And Challenges*, INTELLECTUAL PROPERTY WATCH (2016).

litigants will resort to the conventional courts for IP dispute resolution.

Because specialized IP courts deal with IP disputes from the perspective of each individual country, there is a need for courts that will deal with disputes from a regional BRICS perspective. This will auger well for consistency and uniformity, with positive spinoffs for intra-BRICS trade and investment.

Specialized IP courts have several advantages, some of which are:[11]

- The quality of the justice dispensed will improve due to the special technical expertise of judges and officers of the court appearing before it, over and above the fact that specializing in IP disputes on its own will improve judges' expertise.

[11] The listed advantages are based on Jacques de Werra, note 3 above 24-26.

- The specialized courts will keep pace with the ever-evolving IP and technology landscape.

- Having specialized judges reduces the chances of issuing judgements which are largely an outcome of the opinion of technical experts and other expert witnesses.

- Specialized courts will make the proceedings time and cost efficient.

- Specialized courts will promote consistency and uniformity in the application and development of the jurisprudence, hence predictable outcomes will benefit litigants and the society as a whole.

- The establishment and presence of these courts will discourage and reduce incidences of forum shopping since it will be clear/certain which specialized forum hears BRICS IP disputes.

- Finally, the establishment of these courts will lead to the establishment of specialized procedural rules that are tailor-made for IP disputes in their relevant contexts.

The establishment of a BRICS IP court will therefore promote innovation, entrepreneurship and the establishment of IP based industries whose intellectual property rights (IPRs) will be protected and litigated in an environment where predicable substantial and procedural IP rules apply. This will enable each BRICS member state to pursue its comparative IP advantage[12] in the comfort of the regional protection and litigation of IPRs. This paper uses patents and patent disputes as an illustrative motivation for the establishment of the court; but this does not in any way imply that other IP rights are unimportant and should not be dealt with by the proposed court.

[12] The concept of IP comparative advantage is widely explored by Gilles Saint-Paul, *Welfare Effects of Intellectual Property in a North-South Model of Endogenous Growth with Comparative Advantage*, 2 ECONOMICS E-JOURNAL ECONOMICS: THE OPEN-ACCESS, OPEN-ASSESSMENT E-JOURNAL (2008).

3. Paper Objectives

In order to fully make the case for the establishment of a BRICS IP Court, this paper pursues the following objectives, which are to:

3.1 Survey the levels and extent of patenting in BRICS member states;

3.2 Establish patent litigation trends in BRICS member countries;

3.3 Outline the main aspects of patent litigation provisions in BRICS members' domestic legislation and identify common trends which may lay the basis for common litigation approaches; and

3.4 Justify the establishment of the court by showing that expertise and other resources already exist within the region.

4. Methodology and approach

This paper is designed within the qualitative research paradigm and will largely be a desktop study of current treaties, international agreements, domestic laws and case law emanating from within the region in the context of patent litigation. The paper will use Habermas' critical theory in the legal context[13] as its theoretical lens. The data will be accessed from publicly available repositories such as government websites, court cases and websites of international and regional bodies.

5. Conclusion

It may now be the right to seriously consider the establishment of a BRICS IP Court to underline the importance of IP generally and trade related aspects of IP for the region specifically. Once the court is established, it will be manned by judges conversant with IP and innovation issues, additionally, counsel

[13] Mathieu Deflem, *LAW IN HABERMAS'S THEORY OF COMMUNICATIVE ACTION*, VNIVERSITAS (2008).

appearing before them will also be experienced IP practitioners. This will aid harmonization of IP litigation approaches in BRICS and create an atmosphere of certainty, uniformity and predictability in the resolution of IP disputes. Because BRICS is essentially a free trade agreement, the court may also have jurisdiction over trade-related aspects of IP disputes, in addition to having the liberty to pursue alternative dispute resolution (ADR) processes.[14]

References

Coenraad Visser & Roshana Kelbrick, *Intellectual property law*, 2013 ANNUAL SURVEY OF SOUTH AFRICAN LAW (2013).

Adriana Brigante Deorsola, et al., *Intellectual property and trademark legal framework in BRICS countries: A comparative study*, 49 WORLD PATENT INFORMATION (2017).

Nari Lee & Liguo Zhang, *Specialized IP Courts in China - Judicial Governance of Intellectual Property Rights*, 48 IIC IIC

[14] On the subject of IP and ADR processes, see R. Goldscheider, *Measuring the Damages: ADR and Intellectual Property Disputes*, 50 DISPUTE RESOLUTION JOURNAL (1995).

- INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW (2017).

Jacques de Werra, *ICTSD: Specialised Intellectual Property Courts - Issues And Challenges*, INTELLECTUAL PROPERTY WATCH (2016).

Gilles Saint-Paul, *Welfare Effects of Intellectual Property in a North-South Model of Endogenous Growth with Comparative Advantage*, 2 ECONOMICS E-JOURNAL ECONOMICS: THE OPEN-ACCESS, OPEN-ASSESSMENT E-JOURNAL (2008).

Mathieu Deflem, *LAW IN HABERMAS'S THEORY OF COMMUNICATIVE ACTION*, VNIVERSITAS (2008).

R. Goldscheider, *Measuring the Damages: ADR and Intellectual Property Disputes*, 50 DISPUTE RESOLUTION JOURNAL (1995).

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The Case for a South African Brics Arbitration Centre: Prospects and Challenges

Key words: AFSA; commercial arbitration; investor-state arbitration; dispute resolution;

ABSTRACT

1. INTRODUCTION

At the 10th BRICS Summit held in Johannesburg on 26 July 2018, the Russian President Vladimir Putin called on the BRICS bloc to increase trade partnerships between the BRICS member states and noted that intra-BRICS trade was already at $102 billion. He said:

"*A consolidation of trading partnerships is of great importance. It has grown 30% and is now at $102 billion*."[15]

As intra-BRICS trade continues to grow, so would intra-BRICS trade and investment disputes. The crisp question that comes to the fore becomes whether the BRICS bloc has the internal capability to resolve trade and investment disputes in accordance with the internationally accepted best practice when they arise.

This paper contributes thought in answering that very question. We propose that the BRICS member states must establish a uniform BRICS dispute resolution mechanism applicable to disputes arising out of intra-BRICS trade and investment given the disparity in the legal systems of the BRICS member states.

[15] https://www.timeslive.co.za/politics/2018-07-26-brics-countries-vow-to-work-even-closer-together.

In general, there are two mechanisms for the resolution of investor-state and commercial disputes, namely alternative dispute resolution (ADR) and litigation. ADR encompasses negotiation, mediation, conciliation and arbitration. Litigation may take place before the courts of a host state, a sub-regional court or even a regional or continental court.

Arbitration can be domestic (or national) or international. Domestic arbitration takes place in terms of the laws of a host state, while international arbitration takes place in terms of supranational rules of arbitration agreed upon between the parties.

Further, arbitration may be *ad hoc*, meaning that there is no arbitral institution charged with ensuring the smooth running of the arbitral proceedings, or institutionally administered, in terms of the rules of a permanent (or standing) arbitration institution such as the International Centre for Settlement of Investment Disputes (ICSID).

In the world of investor-state disputes, ICSID is the biggest permanent arbitration institution for investor-state disputes, followed by the Permanent Court of Arbitration (PCA).[16] With regard to commercial disputes, the Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Moscow Chamber of Commerce and Industry (MCCI), the Stockholm Chamber of Commerce (SCC) are examples of a permanent arbitration institutions.[17]

South Africa has not acceded to the Washington Convention.[18] Therefore, arbitration under the auspices of ICSID is only available to it under the ICSID Additional Facility Rules which are applicable to disputes where one of the parties is not an ICSID member state or a national thereof.[19] Furthermore, the Protection of Investment Act, 22 of 2015 does not

16 http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution.
17 http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution.
18 Also referred to as the ICSID Convention.
19 http://icsid.worldbank.org.

readily provide for investor-state international arbitration inasmuch as it provides for prior governmental consent and exhaustion of domestic remedies in that regard.[20]

The position is the same at SADC level, where 2016 Annex 1 of the SADC Protocol on Finance and Investments (SADC FIP) provides that investor-state disputes shall be referred to the courts of host states.[21] The 2006 Annex 1 that was repealed by the 2016 version provided for the referral of investor-state disputes to ICSID or United Nations Commission on International Trade Law (UNCITRAL) for arbitration.

At a continental level, there is as yet no regulatory instrument for foreign investments, although an investment protocol is being negotiated.[22] It remains to

[20] Sections 6 and 13 of the Protection of Investment Act, 22 of 2015.
[21] Article 25 2016 Annex 1. This Annex came into effect on 24 August 2017.
[22] Article 28 2006 Annex 1.

be seen what the provisions of this protocol will be regarding the resolution of investor-state disputes.

Nonetheless, if the protocol emulates the Pan African Investment Code (PAIC),[23] then African states shall resolve investor-state disputes as they see fit. Developments at the EAC-COMESA-SADC Tripartite Free Trade Area (T-FTA) Agreement must also be closely watched, as this agreement also provides for its own investment protocol.[24] The above makes plain that the position with regard to the resolution of investor-state disputes is complex and subject to regional integration developments. However, commercial disputes (business-business disputes) are not affected by the foregoing challenges, and thus the mechanisms for the resolution thereof are less complex.

The pros and cons of arbitration and litigation are as follows. With regard to investor-state arbitration, it is

[23] Article 42(1) PAIC.
[24] Article 45(1)(b) T-FTA Agreement.

argued that it has the following benefits.[25] Firstly, it provides an impartial, cheap and quick forum for the resolution of an investor-state dispute. Secondly, it provides an additional avenue of legal redress to covered foreign investors. Thirdly, it allows foreign investors to avoid national courts of a host State if they have little trust in their independence, efficiency, or competence. Fourth, it avoids recourse to diplomatic protection of investors. Fifth, it ensures the adjudication of claims by a qualified and neutral tribunal. Sixth, it removes any State immunity obstacles that may complicate domestic legal claims in some States. Finally, it allows for the recognition and enforcement of awards in terms of the ICSID Convention and the New York Convention.

The challenges of arbitration are as follows.[26]

25 Ngobeni TL *LLD Thesis* at 92-93.

26 Ngobeni TL *LLD Thesis* at 93-96.

Firstly, ISDS is costly, at least from a developing state point of

view. Secondly, most cases take a long time to reach finality. Thirdly, in most cases, it lacks an appeal mechanism, and therefore it fails to provide a mechanism for the correction of wrong decisions. Fourth, it lacks judicial precedent, and therefore it suffers from lack of consistency. Fifth, as a private process, arbitration is perceived as lacking in legitimacy thereby raising concerns about arbitrators' impartiality. Sixth, ISDS provides an exclusive forum for foreign investors to sue host states, and therefore it discriminates against local and other foreign investors. Seventh, there are complications regarding the enforcement of arbitral awards, especially those from non-ICSID tribunals, in that a court of a host state may refuse to enforce an award. Eighth, arbitrators from developing states are rarely appointed to cases. Ninth, investor-state arbitration is perceived as an exclusive club that is controlled by a few arbitrators and law firms. For example, a mere 13 arbitrators have decided more

than half of all known arbitration cases. Finally, arbitration exposes host states to additional legal and financial risks, without giving them additional benefits beyond the expectation of incoming investments.

Van Harten argues that the fact that only investors can commence arbitration claims, provides arbitrators with an incentive to favour investors, so as to advance the interests of the investor-state arbitration industry.[27] Furthermore, Van Harten argues that the fact that arbitrators are appointed on a case-by-case basis provides them with an incentive to appease those who appoint them.[28] Van Harten concludes that the lack of institutional safeguards to protect arbitration from the above possibilities undermines its normative basis.[29]

Additionally, it is argued that arbitration leads to regulatory chill.[30]

27 Ngobeni TL *LLD Thesis* at 95.
28 Ngobeni TL *LLD Thesis* at 96.
29 Ngobeni TL *LLD Thesis* at 96
30 Ngobeni TL *LLD Thesis* at 99-102.

With regard to litigation, there are at least five suggested benefits to the use of the courts of host states.[31] Firstly, such use puts foreign investors on equal footing with domestic investors, as well as with

other foreign investors from States that do not have BITs or TIPs with a host state. Secondly, this helps to establish a level playing field among foreign investors. Thirdly, local courts are well suited to applying and interpreting domestic laws. Fourthly, there is less need for arbitration in countries with well-developed and efficient legal systems, thereby making litigation viable. Fifth, the use of local courts enables and brings to the fore the development of legal and judicial institutions of a host state.

However, litigation before a national court also has its downside.[32] Firstly, there is an apprehension that a host state may not guarantee an efficient and independent

31 Ngobeni TL *LLD Thesis* at 102-103.
32 Ngobeni TL *LLD Thesis* at 103-104.

judicial system. Secondly, litigation before a national court may take long to conclude (e.g. due to high caseloads), thereby resulting in costly and inefficient litigation. Thirdly, national courts may be subject to political interference. Fourth, they may be biased towards foreigners. Fifth, they may lack the expertise to deal with complex international law principles applicable to investment transactions. Sixth, local courts may suffer from backlogs and inefficient procedures. However, national courts may, depending on the state of their rule of law, be an attractive forum for the adjudication of investor-state disputes. Furthermore, the extent of these challenges will differ from one host state to another. Therefore, the above challenges are not universal, and will logically vary from state to state.

Investor-state disputes are complex, partly due to their political nature. Hence the means of their resolution can be complicated as well, as can be seen from the

ongoing global debate regarding whether such disputes must be referred to litigation or arbitration.

On the other hand, the resolution of commercial disputes is less complex, as the disputes are not politicised, and the parties are free to decide how their disputes shall be resolved. Therefore, the arbitration of commercial disputes does not face all the challenges of investor-state arbitration, such as high costs and long duration for the conclusion of cases. The arbitration of commercial disputes is preferable, especially where the parties are from different jurisdictions with varying language, business culture, legal traditions etc. This partly explains the growing number of commercial arbitration centres in Africa and beyond. The next section will propose the viability of a South African dispute resolution centre that will deal with both investor-state and commercial disputes within BRICS member states.

2. PROSPECTS FOR A SOUTH AFRICAN BRICS DISPUTE RESOLUTION CENTRE

At its Fourth BRICS Legal Forum held in Moscow, during 30 November -1 December 2017, the BRICS Legal Forum declared (in the Moscow Declaration, 2017) that one of the main objectives of legal cooperation within the BRICS bloc is to establish, *inter alia*:

"*… a Panel of Arbitrators and common institutional rules to coordinate and fuse the functioning of the BRICS Dispute Resolution Centres already established at Shanghai and New Delhi and the proposed centres in Brazil, Russia and South Africa, to create a wider and broader framework of neutrality under the BRICS framework, for disputes arising within and outside of BRICS …*" [33]

[33] Moscow Declaration, 2017.

The purpose of the establishment of the BRICS Arbitration Centre - Republic of South Africa ("the Centre") is to harmonise and standardise dispute resolution and the functioning of the various BRICS Arbitration Centres within the BRICS member states.

It is not disputed that South Africa has an independent and well-resourced judicial system. According to an independent researcher Karen Bosman:[34]

South Africa ranks highly for various institutions important for attracting FDI as evidenced by the 2015 - 2016 World Economic Forum's Global Competitiveness Report which ranks South Africa 38th out of 140 countries for the strength of its institutions, including 24th for property rights and intellectual property rights. For judicial independence the country is also rated 24th, topping countries like the United States and

[34] Karen Bosman, Independent Researcher 'A working paper of the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch' (April, 2016) 5.

Austria. South Africa is ranked 14th for efficiency of the legal framework in settling disputes, and 17th for efficiency of the legal framework in challenging regulations; these too rate above developed countries such as the United States, Denmark, and Australia. For accountability South Africa is rated 2nd, for strength of auditing and reporting standards 1st, for protection of minority shareholders 3rd and for strength of investor protection 14th (down from 10th in the 2014-2015 report). South Africa is rated 11th for trustworthiness and confidence in its financial markets and 2nd in the regulation of securities exchanges.

The South African judiciary is pro-arbitration. The Supreme Court of Appeal of South Africa stated as follows in that 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.[35]

The major challenges faced by a BRICS Dispute Resolution Centre in South Africa are the following –

- The language barrier: five BRICS countries use four different languages, namely English, Mandarin, Russian and Portuguese.

- Legal system: the BRICS countries have different legal systems., including civil law systems, common law systems and hybrid systems.

- Internationally reputable legal authority: in international arbitration, the arbitrator must be well respected and experienced. The arbitral institute administering the

[35] *Zhongji Development Construction Engineering Company Ltd and Kamoto Copper Company SARL, 2015 (1) SA 345 (SCA)* at paragraph 30, page 12.

dispute resolution process must be established and reputable, with international exposure and the ability to manage international matters.

- Organisational structure, involvement and human capital required in order to ensure co-operation and engagement with other member countries. It is vital that the Centre should have the necessary structure and manpower to deal with day to day communication and the capacity actively to build a dispute resolution mechanism that is acceptable to all member countries.

In Redfern and Hunter on International Arbitration (6th edition)[36] the authors suggest that the basic requirements of an international arbitral institution include the following –

- Permanence.
- Modern rules of arbitration.

[36] Law and Practice of International Commercial Arbitration, 6rd Edition.

- Specialised staff.
- Reasonable charges.

In dealing with the requirement of "specialised staff" the authors comment as follows:

***"Specialised staff** –*

Some arbitral institutions adopt a 'hands-on" approach to the conduct of arbitrations under their rules: others are content to leave matters to the arbitral tribunals appointed by them, whilst keeping an eye on the general progress of the arbitration. Whatever role the arbitral institution plays, it needs specialised – and often multilingual – staff. Their duties are likely to be many and varied, including not only explaining the rules, making sure that time limits are observed, collecting fees, arranging visas and reserving accommodation,

but also advising on appropriate procedures by reference to past experience."[37]

The Moscow Declaration enjoins South Africa to establish a BRICS Dispute Resolution Centre similar to the ones established in Shanghai and New Delhi.

The Arbitration Foundation of Southern Africa (AFSA) is a leading arbitral institution endowed with the attributes set out above. AFSA has the following important advantages:

- In collaboration with the China Law Society, it pioneered a China-Africa dispute resolution mechanism thus calling into existence the China Africa Joint Arbitration Centre (CAJAC) during 2013. The CAJAC project's founder arbitral institutions are AFSA and Shanghai International Arbitration Centre (SHIAC). CAJAC has since grown to include such arbitral

[37] *Ibid.*

institutions as Beijing International Arbitration Centre (BIAC), Shenzhen Centre for Internal Arbitration (SCIA) and Nairobi Centre for International Arbitration (NCIA).

- The CAJAC project is a successful model in international commercial and investment dispute resolution. AFSA is thus in a unique position to meaningfully contribute its unique expertise flowing from its longstanding diplomatic ties with the China Law Society (it being a major driving force behind the BRICS dispute resolution mechanism) to the creation of a BRICS Uniform Dispute Resolution Mechanism. The CAJAC model should thus serve as a prototype for the BRICS Uniform Dispute Resolution Mechanism.

- It is the only South African arbitral institution with a proven track record in developing a major international arbitration initiative in partnership with a BRICS country.

- AFSA and its CAJAC partners are currently looking at possibilities of bridging the gap between civil and common law systems by developing a set of uniform arbitration rules that can be adopted by all the CAJAC partners.

- AFSA is a well-established arbitral institution that administers domestic and international arbitrations.

- The establishment of AFSA International Division was announced during the course of 2017 at which time the AFSA International Rules were published in anticipation of the International Arbitration Act, 2017 coming into effect. The AFSA International Division is currently administering 24 international matters from around the world including USA, Italy, the UK, Rwanda, Australia, the Bahamas, Mauritius, Saudi Arabia, Kenya, Switzerland, Botswana, Mozambique, Namibia, Tanzania and Brazil. AFSA International is also finding an enthusiastic uptake from leading international arbitrators throughout the world.

- AFSA has a panel of international arbitrators with diversified nationalities who also serve on various international arbitration panels, such as Hong Kong, London, Singapore and Australia. Its committee members include major African and International law firms, senior counsel and retired judges, who have profound knowledge of both South African and international law. They are also well informed and well aware of ongoing developments in international arbitration.

- In years of working with the China Law Society, AFSA has acquired knowledge and understanding of the Chinese system. It has an in-house translation capability and is therefore able to overcome language barriers between Mandarin and English.

- AFSA is the only arbitral body in South Africa that administers arbitration. This is important because *ad hoc* arbitration is not acceptable in mainland China.

- AFSA has facilities, such as large arbitration rooms, breakaway rooms and interpreter rooms, that meet international standards. AFSA also has in-house conference facilities.

- AFSA's ability to design unique customised arbitration systems is tried and tested.

- AFSA has expertise in various fields, including construction, infrastructure, international trade and commerce and international investment.

- AFSA has a mediation division. This is important, as mediation is a dispute resolution mechanism which is favoured in China.

- AFSA has experience in dealing with the financial arrangements which are required to be put in place in administering international arbitrations, where fees are often required to be paid to foreign arbitrators.

The appointment of a leading arbitral institution of AFSA 's calibre as BRICS SA Centre would engender confidence and credibility in South Africa as an international arbitral seat of choice.

The arbitral centre should offer the following services at a minimum: mediation, conciliation, and arbitration. However, one should bear in mind the challenges of arbitration discussed above. Each challenge will be addressed separately, so that proposals in dealing therewith can be made.

Arbitration Cost

Cost in this regard refers to the cost attendant upon the engagement of the arbitral institutions, arbitrators' fees and disbursements, and legal costs. Currently, institutional administration costs for ICSID[38] and the PCA are very high.[39] Therefore, the proposed Centre must steer clear of such exorbitant fees.

38 https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx.
39 https://pca-cpa.org/fees-and-costs/.

In this regard it has to be emphasised that statistically speaking, the majority of the cost of international arbitration is on the parties' legal representatives as opposed to the arbitral institution and the arbitrator(s).

Speed

The proposed Centre must stipulate strict timeframes for the conclusion of administration and conclusion of cases in its rules. For example, it must indicate the period within which arbitrators must be appointed, as well as the period within a tribunal must render an award. Although this is bound to be case dependant, the Centre must expressly state its commitment to ensuring a speedy, efficient and cost-effective outcome.

Appeal

The rules of the proposed Centre must provide for an appeal mechanism where the disputants are desirous of employing such a process. This will enable the correction of errors of law that may have been

committed by a tribunal of first instance. The significance of this proposal, apart from there being a precedent in this regard, is that it allows for a relook at the merits award inasmuch as a review of the arbitral award does not reach the merits.

Judicial precedent

Lack of judicial precedent is a major challenge that results in conflicting decisions and thus leads to lack of consistency and predictability. It is for this reason that we propose that the Centre should entail a measure through which its published awards are accessible to disputants in a redacted format for consistency and predictability. The rules of the proposed centre should stipulate that tribunals shall aim to create legal certainty by taking previous decisions into consideration.

Legitimacy

The establishment of the proposed Centre must involve consultation with a broad range of stakeholders, so that

it is not seen as having been established for the purpose of benefiting certain groups only.

The right to commence arbitration

With regard to investor-state disputes, the dominant practice whereby only investors can commence arbitration is untenable. So is the emerging pattern in terms whereof states can only commence arbitration by way of counterclaim. The ideal manner of remedying this situation is to first enable states to commence arbitration against investors e.g. for the violation of environmental or other obligations. Naturally, a state shall remain entitled to access other remedies provided in its domestic laws for this purpose. Furthermore, other stakeholders such as communities and their organisations should be enabled to commence arbitration in the event that investors violate their legal obligations. Once again, such communities can also access other remedies provided by law for that purpose. What is paramount here is that arbitration

should not be seen as the prerogative of investors only, as that isolates other stakeholders.

The current trend whereby arbitration is predominantly commenced against developing states is worrying, and contributes to the negativity around investor-state arbitration.[40]

Enforcement of awards

With regard to investor-state disputes, this issue can be complex, depending on whether an award is a foreign or domestic one. Foreign awards are usually enforced in terms of the ICSID Convention or the New York Convention. With regard to commercial disputes, the parties are free to agree a mechanism for the enforcement of awards.

[40] See for example ICSID Caseload Statistics 2018-2 at, available at 11. https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf.

Appointment of arbitrators from developing states

Arbitrators from developing states are rarely appointed to cases, as can be seen from recent ICSID statistics.[41] Investor-state arbitration is also perceived as an exclusive club that is controlled by a few arbitrators and law firms. For example, a mere 25 arbitrators handle more than half of all known investor-state arbitration cases.[42] There are no statistics in this regards relating to commercial arbitration. Therefore it is unknown if this challenge also exists in commercial arbitration. Suffice to say that the Centre must monitor and influence the appointment of arbitrators to ensure a balanced spread of appointments.

Costs to host states/respondents

Finally, arbitration exposes host states to additional legal and financial risks, without giving them additional benefits beyond the expectation of incoming investments.

41 See for example ICSID Caseload Statistics 2018-2 at 20-22.

42 See Langford M, Behn D and Lie RH *Journal of International Economic Law*. 2017 (20) 301–331.

However, not all disputes face the challenge of high arbitration costs. The use of expedited arbitration may significantly reduce the cost of arbitration as matters will be concluded speedily.

3. CONCLUSION

The resolution of cross border commercial disputes and investor-state disputes will always be contentious. The appointment of AFSA as South African BRICS Dispute Resolution Centre will go a long way in resolving some of the challenges set out above. AFSA is appropriately positioned to play this role. AFSA will, no doubt, deploy its design expertise to design BRICS specific rules. AFSA has vast experience in this regard. It has, by way of example, most recently designed special rules for CAJAC and AFSA – International. In designing BRICS SA Centre rules, AFSA would have to address the challenges that face arbitration, as discussed above. This will be a necessary exercise to enable AFSA to discharge its new mandate. We believe that AFSA is equal to this task.

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Mutual Development of Alternative Dispute Resolution of BRICS Countries

ABSTRACT

Economic interests of the BRICS member states encourage forming a constructive interaction between them.

The final Declaration of the IV BRICS Legal Forum (Moscow Declaration), adopted in Moscow, Russian Federation on 1 December 2017, stipulates the need of continuing the cooperation in the sphere of improving arbitration and other forms of alternative resolution of cross-border disputes.

Among the alternative dispute resolution (ADR) mechanisms, the mediation can become a key factor in forming a favourable climate in the BRICS countries.

Negotiations with the use of mediation technologies in dispute settlement related to conclusion and performance of cross-border contracts makes it possible to achieve the result of “win-win”, lay a foundation for future mutually beneficial cooperation, adaptation of foreign partners business of the BRICS member states, increase mutual trade and investment flows.

ADR procedures, including mediation, is widely used in the BRICS countries. However, each jurisdiction has its own specific features of mediation procedure corresponding to the mentality and traditions. In particular, in Russia, “close” mediation is more preferable as it allows to keep the confidentiality of the dispute. Moscow Declaration sets as one of its objective the elaboration of common rules to coordinate and ensure the functioning of the dispute resolution mechanism within BRICS dispute resolution institutions.

There is a need of unification of mediation procedures regarding to the settlement of BRICS cross-border disputes, exchange of experience, mediation techniques, mutual training of mediators of the member states.

The Novgorod Regional Department has developed the draft Memorandum on cooperation of legal communities of the BRICS countries in the sphere of mediation.

Objectives of the Memorandum are:

- formation of an effective system to promote the development of mediation, ADR for contributing to the economic development of the BRICS member states;
- strengthening the economies of the BRICS member states;
- ensuring their harmonious development and rapprochement, sustainable growth of business activities, balanced trade and fair competition.

To achieve these goals, it is proposed to establish a Coordination Council of the BRICS member states in the sphere of mediation – a collective and consultative body of international cooperation aimed to develop proposals, activity plan and deal with joint issues in the sphere of mediation, analyse and elaborate proposals on solving the most important issues within its competence.

The establishment of the Coordination Council will contribute to the creation of an effective mechanism of settling international commercial disputes on the basis of BRICS institutions. Mediators of the BRICS countries could join their efforts to develop such a mechanism. Moreover, permanent bodies could be created within the Coordination Council.

PJ Veldhuizen
Partner and Gillan & Veldhuizen
Nano Matlala
Partner at Maluleke, Seriti, Makume, Matlala and Mavundla

Discussion Paper on International Trade Agreements

Introduction

International business transactions are concluded by or among parties from different countries evidenced by a written agreement in legal parlance referred to as contract. These agreements are governed by international contract law unless the parties choose either party's laws as the governing law of the agreement.

International Commercial Law is a body of legal rules, conventions, treaties, domestic legislation and commercial customs or usages including the principle of *lex mercatoria*, that governs international commercial or business transactions.[43]

[43] *Lex mercatoria* refers to that part of international commercial law which is unwritten, including customary commercial law; customary rules of evidence and procedure; and general principles of commercial law.

International contracts invariably contain uniform clauses developed over centuries which mutually protect the rights of the parties to the agreement and spell out rights and obligations, the boilerplate clauses broadly accepted in international commercial contracts. A purchase and sale agreement would conventionally incorporate four boilerplate clauses dived as follows:

(a) the first part lays down rules on the goods and services, namely: delivery, price, payment conditions and documents to be provided.

(b) The second part governs the remedies of the Seller in case of non-payment at the agreed time; the remedies of the Buyer in case of non-delivery of goods or services at the agreed time, lack of conformity of goods or service, transfer of property and legal defects.

(c) The third part contains the rules on avoidance of contract and damages − grounds for avoidance of contract, avoidance procedure, effects of avoidance in general, as well as rules on restitution, damages and mitigation of harm.

(d) The fourth part contains the standard provisions.

Key Specific Common Clauses

Description of the subject matter of the agreement

This clause is one of the central clauses in an international agreement as it defines the subject matter of the agreement. For example, in the Sale of goods or Services agreements, this clause provides a precise and detailed descriptions of the goods or services. If the subject matter of the agreement is not described precisely enough, for instance in the service agreement, the procure of services may have no recourse should, the service provider deliver services which technically meet the contract description but are unsatisfactory for the service procure purposes.

Contract price

These clauses indicate clearly the contract currency and the price amount in both figures and words. Should the parties fail to agree on a price in the contract, this clause may include a provision explaining the method for determining the price.

Delivery Terms

This clause will provide for, in case off goods or "delivery terms" or "shipping terms", including the party responsible for international transport and administrative costs; the point of transfer and risk of the goods; responsibility for customs and payment of import duties; and responsibility for obtaining insurance coverage.

It will also describe precisely the place and within that place the exact point of delivery, specify such the amount of the extent of insurance coverage and any necessary limitations on suitable transport.[44]

[44] See The Practical Guide to Incoterms.

Time of delivery or Contract Duration

The time of delivery clause or contract duration clauses specific date for delivery or performance of certain activities.

Time of Performance Clause

Some contracts will provide that "time is of the essence", which may support an action for breach of contract where the contract is not completed within a reasonable (or specified) time. This type of clause is often seen in infrastructure construction contracts, as it is important that the project be completed in time.

Payment conditions

These clauses indicate the payment modes and terms.

Inspection of goods by the buyer

Where it is a sale of goods, these clauses will indicate whether the goods need to be inspected "before shipment" (also known as pre-shipment inspection or PSI); the place of inspection as well as other details such as inspection company.

Retention of title

The retention of title (RoT) clause is a common one in international trade. It provides that the seller retains ownership of the goods until the full purchase price is paid and that the seller may reclaim the goods if the price is not paid. There are several variations of RoT clause, but to major types can be distinguished: (a) the simple RoT clause, under which the seller retains title until price is paid, and (b) the extended clause, under which the seller seeks to extend its title to include: the proceeds from any sale of goods and any other indebtedness owed to the seller by buyer.

Force Majeure

It is common for international trade contracts to be made subject to force majeure or "hardship" clauses that excuse the parties from performance when their failure is due to impediments beyond their control or which were reasonably unforeseeable such as the outbreak of a war, earthquake or hurricane.

Indemnification Clause

An indemnification or indemnity clause requires that one party indemnify the other in the event that specified expenses are incurred.

Performance Guarantees

In big infrastructure project, the contract may also contain a "Performance Guarantee" clause. This clause usually requires a contractor to guarantee the full and due performance of the contract according to the plans and specifications. Should the contractor fail to construct the building according to the specifications laid out by the contract, the client is guaranteed compensation for any monetary losses up to the amount of the performance bond.

Breach

On the breach, the contracts first define cases that constitute a breach of contract (where a party fails to perform any of its obligations under the contract, including defective, partial or late performance). On that basis, these contracts establish the rules for two different situations.

First is the case where the breach of contract amounts to a fundamental breach. That would be the case where strict compliance of the obligation which has not been performed is of the essence under the contract; or where non-performance substantially deprives the aggrieved party of what it was reasonably entitled to expect. The agreements also leave the possibility for the Parties to specify cases which are to be considered as a fundamental breach, i.e. late payment, late delivery, non-conformity, etc. In the case of a fundamental breach, they allow the aggrieved party to declare the contract void, without fixing an additional period of time to perform what is specified in the contract. In the second situation, the breach of contract does not amount to a fundamental breach. The aggrieved party is obliged to fix an additional period of time for performance. Only when the other party fails to perform the obligation within that period, may the aggrieved party declare the contract void. The agreements adopt the rule that a declaration of avoidance is effective only if made by notice to the other party.

Resolution of Disputes

All international trade contracts will contain a dispute resolution clause. This clause provides for the alternative between arbitration and litigation. In the event the parties opt for arbitration the clause will specify the place of arbitration and the language. If the parties opt for litigation as the required mode of dispute resolution, the parties will designate the national or municipal courts in which lawsuits are be filed.

Applicable Law

Concomitant to the dispute resolution clause is the applicable law and jurisdiction clause. This set out in the contract both the governing law and jurisdiction – i.e. which country's laws govern the terms of the contract and in which country's courts will any dispute be finally decided. The question of applicable law and jurisdiction will be determined on the basis of the principal foreign element aspects that impact materially on a transaction.

These*, inter alia*, include:

(i) Where the parties to the contract are not both based in the same country.

(ii) Where each party only has substantial assets in the country where it is resident.

(iii) Where the transaction is governed by the law of another country, e.g. because it may be considered that the contract was formed in that other country.

(iv) Where the whole or part of the transaction is to be performed in a different country from that in which one or both parties are based.

In most cases the parties tend to choose the system of law with which they are familiar, and such a choice of law will generally be respected by the courts of another jurisdiction - subject to matters of public policy and the mandatory laws of that other jurisdiction.

Notably, despite parties stipulating the specific jurisdiction they wish to apply, certain mandatory laws such as consumer laws may regulate trade beyond the borders of a single jurisdiction. An appropriate example of such legislation is South Africa's Consumer Protection Act which regulates, *inter alia*, rights and obligations of consumers and suppliers. This legislative framework affords consumers with remedies which effectively impose strict liability against the entire supply chain, regardless of trade agreement, which parties, *inter alia*, include:

(i) Producers;
(ii) Distributors;
(iii) Importers;
(iv) Retailers;
(v) Service providers;
(vi) Intermediaries[45]

It is suggested that parties to an international trade agreement be mindful of legislative liability and should be

[45] Consumer Protection Act 68 of 2008, Section 60-61.

encouraged to incorporate back-to-back indemnities or non-recourse terms in any supply, distribution or trade agreements.

General

In the event that the agreement is in a language not to common to either party certified translated copies would be exchanged. A signed legal Counsel's opinion would be filed by each party certifying compliance with the laws governing each party.

The V BRICS CONFERENCE delegates today is requested to critique this paper and add inputs on how the paper can accommodate members where it appears to be at variance with the respective municipal laws. BRICS an independent community should develop its own trade and financing agreements and such agreements should not be in breach of international conventions binding the respective BRICS members. It is for this reason that the open critique and inputs would enable all members to agree on a harmonised trade agreement inter se.

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Tax Cooperation among the BRICS Countries and Mutual Agreement Procedure from the Chinese Perspective

ABSTRACT

While the cross-border commerce and the digital economy has become underpinning of the world economy, it becomes much more difficult for nation states to enforce their domestic tax rules. To enforce tax liabilities, tax authorities of different jurisdictions need to cooperate and be able to access information on income of their residents and non-residents deriving income from its own jurisdictions. A number of policy issues must be addressed in tax cooperation: how can the resolution mechanism of cross-border tax disputes be more effective and efficient? In which manner tax information shall be exchanged, spontaneously, automatically or only upon request? May the jurisdictions assist with tax collection?

As the techniques of tax administration are becoming more sophisticated and advanced, how can the legitimate tax rights of taxpayers be properly protected?

In Xiamen Summit of BRICS conference (2017), leaders of BRICS countries have agreed that “the members nations will work for promoting a more equitable, pro-growth and efficient international tax environment, deepening cooperation to address Base Erosion and Profit Shifting (BEPS), promoting exchange of tax information and improving capacity-building in developing countries.” In addition, BRICS will “strengthen tax cooperation to increase BRICS contribution to setting international tax rules and provide, according to each country’s priorities, effective and sustainable technical assistance to other developing countries.”

Johannesburg Declaration by BRICS Summit 2018 acknowledges the continued support provided by the BRICS Revenue Authorities for all the international initiatives towards reaching a globally fair and universally transparent tax system. The BRICS Countries will continue to deal with

the implications of the digital economy and to ensure the fairness of the international tax system particularly towards the prevention of BEPS, exchange of tax information, and needs-based capacity building for developing countries. The leaders commit to deepen exchanges, sharing of experiences, best practices, mutual learning and exchanges of personnel in taxation matters.

With this commitment, the BRICS countries, like many countries in the world, have taken common steps to support the BEPS action plan launched by the OECD and the transparency movement. In the area of exchange of information, each BRICS country includes a tax information exchange article in the bilateral tax treaties. Each has entered into at least some bilateral tax information exchange agreements. Each has been a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. In terms of dispute resolution, the treaties that the BRICS countries have signed include the provision of mutual agreement procedure (MAP). As the members of the BEPS inclusive Framework, all the BRICS countries have

committed to implement the minimum standards regarding improving the MAP under treaties.

For decades, the MAP process based on tax treaties was considered ineffective due to the reasons, e.g. no obligation for the Competent authorities to resolve treaty-related disputes; not easy procedures for access to MAP even when eligible; complicated and time-consuming MAP process due to the document requirements, no sufficient dedication and resources of tax authorities to MAP; absence of an arbitration clause , the lack of involvement and the absence of procedural rights for the taxpayers, and etc. BEPS action 14 was released with an aim to strengthen the effectiveness and efficiencies of the MAP process, and minimize the risks of uncertainty and unintended double taxation So far, the progress that have been achieved based on this action plan has been noted: according to the 2016 MAP statistics released by the OECD in Nov. 2017, the opening inventory of MAP cases in 2016 is significantly higher than the previous years, while the number of cases closed during the year increased and the average time taken to close the case

shortened. Among the BRICS countries, the use frequency of MAP is not even (see the table).[46] India has the largest amount of caseload, whereas in Russia MAP was seldom used.

	Start inventory	Cases started	Cases closed	End inventory
Brazil	11	4	2	13
Russia	0	2	0	2
India	622	78	55	645
China	160	32	84	108
South Africa	19	6	1	24

In China, it has an opening inventory of 160 cases (113 cases are transfer pricing cases, and 47 are other cases) as of 1 January 2016. As of 31 December 2016, the closing inventory was 108, including 31 cases started in 2016. In China, the closing of MAP cases has been sped up, and the inventory

[46] http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2016-per-country-all.htm

level has been significantly reduced with a high success rate of 91%. The average time taken to resolve the transfer pricing cases is 26.14 months, and for other cases is 16 months. This shows the determination and actions of China's tax authorities to promote bilateral consultation and noticeable progress made in the MAP process. This change is significant, particularly taking into account China's increasing outbound investments. In March 2017, the SAT issued a Public Notice on the Administrative Measures for Special Tax Adjustments and Investigation and Mutual Agreement Procedures (SAT bulletin No. 7, 2017) which provides guidance under domestic law for MAP cases resulted from the special tax adjustments (TP cases); This bulletin, together with the SAT bulletin Releasing the Implementation Measure of the MAP (SAT bulletin No. 56, 2013) and the SAT Bulletin on Matters Regarding Enhancing the Administration of Advance Pricing Arrangements (SAT bulletin No. 64, 2016), constitutes the regulatory framework of China MAP processes.

Since all the BRICS are members of the BEPS inclusive Framework, five countries have committed to implement the minimum standard under BEPS action 14 reviewed by their peers in the context of Forum on Tax Administration on Mutual Agreement Procedures Forum (the "FTA MAP Forum"). The assessment schedule for the stage 1 peers review is August 2018 for India and South Africa, and December 2018 for China, Brazil and Russia.[47] Can this collective action guarantee a more effective and efficient tax dispute resolution among the BRICS countries? Not necessarily. The table above clearly shows large discrepancies among the BRICS countries in practice in resorting to and exploiting the MAP.

At this moment, a priority question to be addressed is whether consensus can be reached among the BRICS countries that MAP is the most acceptable means for dispute resolution, before arbitration is widely accepted. If yes, then to what extent the sufficient resources, proper authorities and

[47] http://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf

independence can be provided to MAP? From the legal perspective, the relationship between the MAP and the domestic judicial system need to be sorted out.

Furthermore, the taxpayers' involvement in the MAP process and the protection of their legitimate rights is another heavy topic to be addressed. It was not until these questions are adequately discussed, it remains uncertain whether the MAP provision under the treaties signed by the BRICS countries can play an important role in resolving the cross-border tax disputes.

Today, BRICS countries enjoy a unique position of power in today's global economy. BRICS, with the unifying acronym, are often held up as the likely source of the voice and vision of the new generation of tax policy makers globally. The position grants BRICS countries increasing influence. By working together, we believe the BRICS countries could be the engine facilitating worldwide cooperation on tax issues.

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http://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf

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'Goals of Self and Others can be Unified', Promoting the Modernization of International Commercial Arbitration Cooperation in the BRICS Countries

PRESENTATION

Ladies and Gentlemen, Dear Friends:

Chinese President Xi Jinping made an important speech, entitled Keeping Abreast of the Trend of the Times to Achieve the Common Development, at the BRICS Business Forum held in Johannesburg on July 25, and he said that 'Economic cooperation is the most important and most productive field of BRICS cooperation. The business community is the main force of the BRICS economic cooperation.' Although the BRICS members have different national conditions, they have the same development goals. Since economic cooperation may inevitably cause disputes, properly treating and effectively resolving disputes have become the most

important part of promoting economic cooperation. Therefore, international commercial arbitration is the best way to resolve international economic and trade disputes. This is also the reason why the BRICS Legal Forum includes the coordination and modernization of the international arbitration laws and practices of BRICS into the special topics this time.

In fact, the previous forums have already achieved positive results on the issue of international commercial arbitration. For example, at the third BRICS Legal Forum, experts proposed to establish an efficient dispute resolution mechanism by adopting the best international arbitration standards and establish arbitration centers in BRICS. In President Xi Jinping's speech at the BRICS Business Forum, he also pointed out that the birth and development of the BRICS mechanism is the product of the changes in the world economy and the evolution of the international structure. In the first ten years, the BRICS cooperation has made outstanding contributions to the recovery of the world economy and the return to growth. The next ten years will

become crucial for transforming the new and old kinetic energy of the world economy, accelerating the evolution of the international pattern and power contrast, and reshaping the system of global governance. Standing at the new starting point of the times, an important mission of the new round of legal forums shall further promote the modernization of international commercial arbitration cooperation in BRICS member states.

Therefore, we should uphold the concept of ‘Goals of Self and Others can be Unified’ and actively promote the construction of the international commercial arbitration mechanism of the BRICS countries. As early as 1990, Chinese sociologist *Fei Xiaotong* once put forward the 16-word rumor of 'Achieving one's own goal yields gratification, lending a hand to consummate others' goal doubles satisfaction, goals of self and others can be unified, and thus the world can be harmonized' to express his vision of blending and understanding each other's different civilizations. The cooperation of international commercial arbitration in the BRICS countries should be in line with the economic

cooperation of the BRICS countries, strengthen service awareness and service levels. This will be conducive to resolve and prevent the commercial disputes.

According to a survey conducted in 2015, almost one-third of respondents prefer London as the venue for arbitration because of the excellent humanities services of the UK arbitration institutions such as the London International Court of Arbitration. In order to better develop international commercial arbitration, the BRICS countries need to establish a modern concept of international commercial arbitration, position commercial arbitration as a professional service and better serve the interested parties.
Based on what I mentioned earlier, I would like to share some suggestions in this significant occasion.

--Actively promoting the unified understanding and application of the concepts of ‘non-arbitrability’ and ‘public policy’ in the New York Convention. The New York Convention has not clarified the concepts of ‘non-arbitrability’ and ‘public policy’, so the meaning and application of these

two concepts are not consistent in various countries and regions. For example, although the arbitral tribunal makes a ruling on an international mineral trade dispute, the host country court holds that the mineral trade dispute belongs to the scope of ‘public policy’ since the mineral transaction is involved in mineral tax. In fact, whether the transaction concerning mineral taxes is belongs to public policy is debatable. However, in other countries such as China, the domestic law does not use the concept of ‘public policy’. In China, we use the term of ‘social public interest’ rather than ‘public policy’. Between the BRICS countries, the concepts of ‘non-arbitrability’ and ‘public policy’ shall be clearly defined, and this will strengthen the certainty of transactions and contribute to the certainty of economic and trade exchanges.

Although clearly defining the extension of 'non-arbitrability' and 'public policy' has always been a problem, the BRICS countries already have considerable advantages in promoting the unified understanding and application of relevant concepts. First, the BRICS countries, as leading powers in developing countries, are standing at a similar

stage of economic development, it is thus easy for them to achieve a consensus on the understanding of 'non-arbitrability' and 'public policy'. Second, the BRICS countries have established a framework for cooperation already. As President Xi Jinping pointed out that, 'the basis of the BRICS cooperation has been laid, and the overall structure is emerging.' The BRICS countries have reached consensus on many issues. By good cooperation, the BRICS countries may also reach consensus on this issue. The relevant research institutions, experts and scholars of the BRICS countries shall further research and analyze certain commercial cases and share the research results, jointly discuss the political and legal principles behind the relevant cases, actively promote the relevant results to the arbitration institutions, and form a strong guide.

-- Keeping up with the times and providing convenience to strengthening the research and judgment on the BRICS arbitration standards. Compared with the principle of openness in court proceedings, a distinctive feature of arbitration is confidentiality. The basic information of the

interested parties to the arbitration and the basic facts of the case shall not be disclosed. Also, the arbitral decision is generally not open. Although this is a significant advantage of arbitration, it likes a 'double-edged sword'. Especially, compared with the requirements of the development of the times and the cooperation of the BRICS countries, this demonstrates a negative effect. For example, this objectively hinders the research, exchange, and advancement of international commercial arbitration, so that the BRICS countries cannot reasonably grasp the arbitration standards.

In order to foster strengths and circumvent weaknesses, it is necessary to hide the key information of the interested parties in the arbitration decision by learning the experiences of the International Chamber of Commerce Arbitration (ICC), so that it can protect the privacy of the interested parties and achieve the purpose of researching the arbitration decision. Alternatively, it is also feasible to transform the facts in certain cases, so that no one can infer the information of the interested. The purposes of protecting the privacy and academic exchange can thus be achieved. This not only*

helps experts and scholars to study international commercial arbitration cases accurately, but also promotes trade development among BRICS countries by allowing commercial entities to understand the scale of international commercial arbitration.

-- Further implementing the mechanism for recommending arbitrators. All BRICS countries have established the BRICS Dispute Resolution Center. In China, the BRICS Dispute Resolution Center has been launched in Shanghai. The Dispute Resolution Center cannot be well operated without high-level arbitrators. The BRICS countries have already tried to recommend arbitrators to each other. In the future, we should further recommend industry experts with sufficient knowledge of the political, economic, legal and cultural knowledge of BRICS as arbitrators of dispute resolution centers, and this will help the BRICS countries to better solve the commercial disputes.

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Dr Chen Rui

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The Innovation and Practice of International Arbitration Rules in China

From the Perspective of the Internationalization of the SCIA's Arbitration Rules

ABSTRACT

It is a hot topic in BRICS legal society that how to formulate unified arbitration rules for the BRICS. The authors try to share the stories about *SCIA Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules* (hereinafter the "Guidelines"), which released on October 26, 2016, and hope to enlighten the legal societies of BRICS to a path to BRICS arbitration rules.

The Guidelines have attracted special attentions from and are highly praised by the commercial and legal communities from both China and abroad. It was not a sudden success, but closely connected with the role of Shenzhen Court of International Arbitration as the pioneer in the process of internationalization of China's arbitration.

I. A brief review of the SCIA's internationalization process

Shenzhen Court of International Arbitration (also known as South China International Economic and Trade Arbitration Commission, and previously known as China International Economic and Trade Arbitration Commission South China Sub-commission and/or China International Economic and Trade Arbitration Commission Shenzhen Sub-commission) (the "SCIA"), is an arbitration institution that always sticks to the vision of independence, impartiality and innovation and the party-centered doctrine, so as to establish a commercial environment that is more internationalization-oriented, market-oriented and

ruled-by-law. The SCIA was entrusted with the mission of acting as the pioneer in the internationalization of China's arbitration since the early 1980s. On June 28, 1982, Mr. Rui Mu, a leading scholar of China's international economic law, member of the Commission on Legislative Affairs of the NPC's Standing Committee and deputy dean of the Institute of Law of Chinese Academy of Social Sciences, talked about the blueprint and missions of the SCIA at an informal discussion meeting on the establishment of arbitration institution in Shenzhen SEZ of Guangdong foresightedly as follows: "Based on the demand of the establishment of the special economic zone, it is very necessary for us to establish a competitive arbitration institution in the special economic zone, so as to resolve the economic disputes arising out in the special economic zone by ourselves. ... It is also a struggling process for us to establish an arbitration institution that is trustworthy, influential and adaptable to the international requirements. We must have the ambition that the arbitration institution of the special economic zone

would, on basis of the future development of the special economic zone, become a center for international arbitration in the Far East region. It should be influential in the international society rather than restricted to the special economic zone."

Nowadays, a photocopy of the minutes of Mr. Rui Mu's talk is hanging on the SCIA's Historical Album. Since its establishment on April 19, 1983, the SCIA has, over more than three decades in the past, always steadily followed the plan of Mr. Rui Mu, stuck to the development trend of international arbitration to establish the arbitration rules and arbitration system that is consistent with international practices and [48]has ranked No. 1 for lots of times in domestic arbitration society. For example, the SCIA has laid the principle of private hearing of arbitration cases during its early

[48] The Report of the 19th CPC Congress states that "China adheres to the fundamental national policy of opening up and pursues development with its doors open wide. China will actively promote international cooperation through the Belt and Road Initiative. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international cooperation to create new drivers of shared development."

preparation stage; among its first panel of 15 arbitrators, there were eight from Hong Kong and abroad; and in 1989, the SCIA became the first arbitration institution of mainland China whose arbitration award was enforced abroad pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

On basis of its trustworthiness in the past three decades, Shenzhen Municipal Government made a separate legislation of special economic zone for the SCIA pursuant to its legislative authority as special economic zone and issued the Administrative Rules of Shenzhen Court of International Arbitration (trial version) (Order of Shenzhen Municipal Government No. 245) (hereinafter the "Administrative Rules") on November 6, 2012. The Administrative Rules are not only the first legislative document for arbitration institution in the world, but further enhance the reform, innovation and internationalization of the SCIA: It establishes the Council-centered governance structure

for the internationalized statutory body, and among the 13 members of the second Council, there are seven members from Hong Kong and abroad, and one member from Hong Kong even takes the office of deputy council director for the first time; the arbitrators come from 50 different countries/regions, and overseas arbitrators account for 40.6% of the whole arbitrators, ranking the highest in China; the SCIA has resolved almost 10,000 arbitration cases since its establishment and the parties to the cases come from 113 countries; since Hong Kong's reunification with mainland China in 1997, the arbitration award of the SCIA has never been rejected by Hong Kong court for implementation pursuant to the Arrangement of the *Supreme People's Court on Mutual Enforcement of Arbitration Awards Between Mainland China and Hong Kong Special Administrative Region*("Hong Kong SAR"); according to statistics of Hong Kong Judiciary in 2014, the Hong Kong courts totally implemented 13 arbitration awards made in mainland China, including 5 awards made by

the SCIA, accounting for 38.5% and ranking No. 1 among the domestic arbitration institutions.

The SCIA's above exploration in internationalization provides a solid foundation for the formulation of the Guidelines.

II. A brief review of the background for the Guidelines

The SCIA is entrusted with even more expectations and demands in the new era for improving the investment and market environment, speeding up the pace of opening to the world, reducing the cost of market operation, building a stable, fair, transparent and expectable commercial environment, and speeding the construction of the new open economic system. In September 2015, Ms HE Rong, Vice President of the Supreme People's Court PRC at that time, paid a visit to the SCIA and appreciated the SCIA to take the lead in experiment and creatively apply the United Nations Commission on International Trade Law Arbitration Rules (hereinafter the "UNCITRAL Arbitration Rules")

to promote the cooperation between mainland China and Hong Kong on basis of Qianhai model area of rule of law and Shenzhen-Hong Kong Cooperation Zone. The domestic and international celebrities of the industrial and legal societies also suggested the SCIA to formulate more open, internationalized and market-oriented arbitration rules to adapt to the latest development of international arbitration and the new requirements of arbitration by the parties in the new situations from such perspectives as facilitating the participation in the global competition and cooperation, facilitating the reduction of operational cost for Chinese "going-out" enterprises, and enhancing the predictability of dispute resolution.

The SCIA's council keenly grasped the market demand. On January 6, 2016, the 10th Council Meeting of the SCIA passed a resolution (SCIA Council Minute [2016] No.1) on basis of the motion of its Strategic Development and Arbitration Rules Revision Committee, and authorized to establish the formulation

team of arbitration rules, so as to trace the latest development of international arbitration and investigate the latest demands of the domestic and international parties, and revise and formulate, on basis of the application of the SCIA's Arbitration Rules (2012 version) for more than three years in the past, the arbitration rules which are most consistent with the rule of market development, best satisfy the demands of the parties and accommodate the dynamic development of international arbitration.

Against this background, the drafting team of international rules (hereinafter the "drafting team") pursuant to the above resolution after the Spring Festival of 2016. The drafting team first collected and compared the arbitration rules of top arbitration institutions in the world. After several rounds of deliberation, the drafting team believed that the UNCITRAL Arbitration Rules is a suitable reference for the SCIA's international rules. The United Nations Commission on International Trade Law ("UNCITRAL")

issued the UNCITRAL Arbitration Rules in 1976, which was revised first in 2010 and then again in 2013 by adding the current Article 1(4). The UNCITRAL Arbitration Rules emphasize the autonomy of the parties and are universally recognized; therefore, many famous foreign courts of international arbitration have formulated special procedural guidelines to accommodate the UNCITRAL Arbitration Rules or formulated their arbitration rules by reference to the UNCITRAL Arbitration Rules.

While formulating the SCIA Arbitration Rules (2012 edition), we have also prescribed in Article 3(3) that the parties may agree on the application of the UNCITRAL Arbitration Rules and nominate the SCIA as the appointing authority. However, the SCIA still had some operational problems in the application of the UNCITRAL Arbitration Rules. According to the analysis of the drafting team, the main reason is that the SCIA fails to adopt some procedural guidelines, rather than the fact that the UNCITRAL Arbitration Rules mainly

rely on the more flexible ad hoc arbitration mechanism. In recent years, the legal practitioners of China pay more and more attention to the development of the UNCITRAL Arbitration Rules, yet none of the domestic arbitration institutions have adopted any such procedural rules. On the contrary, some foreign arbitration institutions have adopted the UNCITRAL Arbitration Rules to arbitration cases conducted within the territory of China; it not only poses challenges to, but also throws some light on, the development of China's arbitration practice.

The above analysis was supported and affirmed by the Council, and it believed that the formulation of procedural guidelines is more proper to meet the intention of "revis[ing] and formulat[ing] ... the arbitration rules that is most consistent with the rule of market development, best satisfies the demand of the parties and accommodates the dynamic development of international arbitration".

Then the drafting team studied the background of the revisions of the UNCITRAL Arbitration Rules and the measures adopted by the international arbitration institutions (including but not limited to the American Arbitration Association, ICC International Court of Arbitration, SIAC, HKIAC, and SCC) to accommodate the UNCITRAL Arbitration Rules, and prepared the preliminary draft of the Guidelines and conduct in-depth surveys on its feasibility. Considering Hong Kong plays a leading role in mainland China's reform and opening to the world and it has a sophisticated commercial environment that is internationalized, market-oriented and law-based; the trend of closer relationship among the Great Bay Area of Guangdong, Hong Kong and Macau; the drafting team creatively took Hong Kong as the default place of arbitration for cases resolved under the UNCITRAL Arbitration Rules in the draft Guidelines. This "breakthrough" stimulated hot debate during the formulation process. The dissenters hold that it is inconsistent with Chinese Arbitration Law and contrary to the current judicial practice, and would cause a huge

shock to the existing system. The supporters believe that Hong Kong is a common law area, and Hong Kong Arbitration Ordinance is formulated on basis of the UNCITRAL Model Law on International Commercial Arbitration; compared with mainland China, legal practitioners of Hong Kong are generally more familiar and tactful with the UNCITRAL Arbitration Rules and ad hoc arbitration.

As a result, the drafting team held multiple expert deliberation meetings, including three seminars with the Supreme People's Court and two seminars with the Department of Justice of Hong Kong SAR ("the DOJ") to collect their advice. Both the Supreme People's Court and DOJ have highly praised the idea of strengthening the cooperation between mainland China and Hong Kong in legal practice and formulating the Guidelines to apply the UNCITRAL Arbitration Rules, and they believe the Guidelines will not only have the characteristics of being more open and more international, but also facilitate the cooperation

between mainland China and Hong Kong to build the international center of dispute resolution. The formulation of the Guidelines is also highly praised by the Hong Kong Bar Association, Hong Kong Law Society and other bodies as a measure for further promoting the internationalization of China's arbitration and stimulating more legal practitioners of Hong Kong to participate in the international arbitration of mainland China. A candle light will become dim if it is not tendered, and the reason will not be apparent if there is no argument. Along with the deliberation, the default place of arbitration in Hong Kong becomes a consensus and is kept in the Guidelines.

In addition, as the SCIA Arbitration Rules provides that the SCIA may accept arbitration cases between host governments and investors by applying the UNCITRAL Arbitration Rules, and the UNCITRAL Arbitration Rules revised in 2013 has absorbed the UNCITRAL Rules on Transparency in Treaty-based Investor-State

Arbitration, the Guidelines also provide the SCIA with the room to accept investment arbitration cases.

After thorough discussion, the Guidelines (preliminary draft) is submitted to the Strategic Development and Arbitration Rules Revision Committee of the Council. On September 16, 2016, the Council of the SCIA made the comment and opinion for revision of the Guidelines (preliminary draft) in its resolution of the 12nd Council Meeting (SCIA Council Minute [2016] No. 3). On October 18, 2016, the Council of the SCIA adopted the Guidelines by a unanimous resolution of the 13nd Council Meeting (SCIA Council Minute [2016] No. 4).

III. Summary of the Guidelines

The Guidelines have totally 13 clauses and one annex. The Guidelines mainly prescribe, on basis of the function of the SCIA as the appointing authority, the location of arbitration, management and service, appointment of arbitrators, challenge of arbitrators, collection and management of arbitration fee, etc, and

the Schedule of Fees and Costs of Arbitration is included in the Guidelines as an attachment. The key feature of the Guidelines is that it clarifies the function of appointing authority provided in the UNCITRAL Arbitration Rules and emphasizes mainly the following aspects:

1. **Place of Arbitration.** The international arbitration usually takes the place of arbitration as the criteria for determining the "nationality" of an arbitration award; after many years' exploration, the judicial review of foreign-related arbitration in China has also accepted the criteria gradually. [49] Although as a matter of fact, the SCIA's arbitration rules has stuck to the international practice and allowed the parties to agree on the location of arbitration, the parties have agreed Hong Kong as

[49] Refer to Article 18 of the Law on the Application of Law in Foreign-Related Civil Relationships: The parties may agree on the law applicable to the arbitration agreement. If there is no such an agreement, the law of the residence of the arbitration institution or the law of the place of arbitration shall be applied.

the location of arbitration in only a few cases, mainly for the following reasons: first, many parties are not aware

2. of the matter before the dispute arises; second, most domestic disputes are resolved in accordance with the domestic law; and third, the parties may have taken the cost of dispute resolution into their consideration.

To encourage the parties to take Hong Kong as the location of arbitration, the Guidelines provides in Article 2: "Where the parties have agreed on the place of arbitration, such agreement prevails. If the parties have no such agreement, the place of arbitration shall be Hong Kong, unless the arbitration tribunal otherwise decides." This mechanism not only sticks to the autonomy of the parties and the power of the arbitration tribunal but allows more case to select Hong Kong as the location of arbitration.

The mechanism is adopted mainly for the following reasons: first, according to the SCIA Arbitration Rules (2016 edition), when the parties agree on the application of UNCITRAL Arbitration Rules by the SCIA, they have also agreed on the application of the Guidelines. Therefore, the provision on the location of arbitration in the Guidelines represents the autonomy of the parties; second, there may be more parties from Hong Kong adopting the SCIA arbitration; third, there may be more Hong Kong professionals to take part in the SCIA arbitration as arbitrators, attorneys or expert witnesses and have a share in the domestic market of legal services, because the law of the location of arbitration is deemed as the applicable law of the arbitration procedure unless otherwise agreed by the parties; fourth, Qianhai, with its special geographic location and position in government policy, is the cooperation base of arbitration of mainland China that is most suitable for taking Hong Kong as the location of arbitration, and the legislation of Shenzhen SEZ also provides that the SCIA is the cooperation platform for

Qianhai International Arbitration; fifth, the parties to international commercial arbitration and investment arbitration involving Chinese enterprises are more likely to adopt the SCIA arbitration when Hong Kong is prescribed as the location of arbitration.

3. **As regards management and service.** The Guidelines strictly stick to the three functions of an appointing authority prescribed in the UNCITRAL Arbitration Rules, i.e. the appointment of arbitrators, the decision on challenge of arbitrators, and the financial management of arbitration cases. The SCIA will provide other services only at the request of the parties or the arbitration tribunal, so as to fully ensure the autonomy of the parties and the power of the arbitration tribunal in the management of arbitration case.

3. **As regards the collection and management of relevant arbitration fees.** On basis of the management and services provided by the arbitration institution, the Guidelines also clarify the collection and

management of the relevant arbitration fees, so as to further increase the transparency of arbitration procedure to the parties.

IV. The Follow-ups of the Guidelines

Since its adoption by the Council of the SCIA, the Guidelines have attracted continuous attention from the legal, industrial and commercial societies. Here, I will share three follow-ups briefly.

1. Release of the Guidelines and the new Arbitration Rules.

The Guidelines attracted great attention from the domestic and international legal society. On October 26, 2016, Mr. Rimsky Yuen Kwok-keung SC, Secretary of DOJ, attended the ceremony for issuing the new SCIA Arbitration Rules. Before the ceremony, Mr. Xu Qin, then Mayor of Shenzhen City, held a talk with Mr. Rimsky Yuen Kwok-keung SC. Mr. Xu expressed his thanks to the whole society of Hong Kong for their support to the innovation of the SCIA and the

cooperation between mainland China and Hong Kong; he also said that international arbitration and the legal environment is a significant part of the environment for international business and Shenzhen will further strengthen the cooperation with Hong Kong. The SCIA, as a result of the reform and opening-up policy of mainland China and the cooperation between Shenzhen and Hong Kong, is always an important platform for the cooperation in legal profession between Shenzhen and Hong Kong over the past 30 years. The new Arbitration Rules issued by the SCIA are even more internationalized compared with their predecessors; they are not only the innovation of arbitration rules to accommodate the market demand in the background of “One-Belt One-Road” Initiative, but also indicate the ever more intimate and enhanced cooperation in international arbitration between Shenzhen and Hong Kong. Mr. Rimsky Yuen Kwok-keung SC pointed out that the SCIA has made a significant contribution to the cooperation between Shenzhen and Hong Kong and it has established an

innovative and stable platform for the relevant cooperation between Shenzhen and Hong Kong in the respects of administration of arbitration, panel of arbitrators, arbitration practice and training, etc.

Mr. Rimsky Yuen Kwok-Keung SC said in his address at the opening ceremony, the SCIA will rank No. 1 again. The Guidelines is the first procedural guidelines formulated by an arbitration institution from mainland China on basis of the UNCITRAL Arbitration Rules. “The formulation of the Guidelines is a forward-looking and creative measure of the SCIA and is of great significance. According to the Guidelines, the parties may choose to apply the UNCITRAL Arbitration Rules. It reflects the fact that the SCIA fully respects the wills of the parties and gives consideration to the internationalization of commercial arbitration.” Furthermore, in Article 3 of the Guidelines, it prescribes that if the parties have no such agreement, the place of arbitration shall be Hong Kong, unless the arbitration tribunal otherwise decides. He said, DOJ heartily

welcomes this arrangement and hopes that the Guidelines will further enhance the cooperation between mainland China and Hong Kong in international arbitration and create ever greater effect of synergy. He indicated that the DOJ will further support and promote the exchange and cooperation between Shenzhen and Hong Kong in the international law and dispute resolution services and enable them to jointly participate in the development of international arbitration and promote the arbitration culture of Shenzhen and Hong Kong to a new level.

2. Forum on the application of the Guidelines.

On June 29, 2017, the seventh Legal Forum for South China Enterprises on “One Belt-One Road: Chinese Enterprises and Investment Arbitration” was held in Shenzhen. The forum attracted great support from the Supreme People’s Court, the Ministry of Commerce, the State-owned Assets Supervision and Administration Commission of the State Council, the Hong Kong and Macao Affairs Office of the State

Council, the Department of Law of Liaison Office of the Central People's Government in the Hong Kong SAR and other departments. They have dispatched representatives to attend the forum, give PRESENTATIONS to participate in the discussions, and expect the SCIA to play a more active role in the resolution of disputes related to international investment and commercial activities in the background of "One-Belt One-Road" strategy. At the same time, representatives of the ICSID, the WTO's Appellate Body, the UNCITRAL Regional Centre for Asia and the Pacific, and ICC Arbitration & ADR North Asia also attended the forum in Shenzhen and conducted in-depth discussions on many cutting-edge issues like application of the Guidelines to arbitration of investment disputes. Over 200 people, including officers of well-known companies, government officials, scholars, arbitrators, and lawyers from China, France, Portugal, Italy, Holland, USA, Canada, UK, Germany, Swiss, etc. have participated in the event.

3. Roadshow of the Guidelines in Hong Kong.

On October 12, 2017, Shenzhen Municipal Government, the DOJ and the SCIA jointly held the "Signing Ceremony of Renewed Co-operative Arrangement on Legal Matters between Shenzhen Municipal Government and the DOJ as well as the Seminar on the New Arbitration Rules of the SCIA" at the Hong Kong Department of Justice Centre. Mr. Rimsky Yuen Kwok-Keung SC, Secretary of DOJ at that time, and Mr. Gao Zimin, Deputy Mayor of Shenzhen Municipal Government, attended the event and gave PRESENTATIONS.

The officials from relevant departments of Shenzhen Municipal Government and the DOJ, and lawyers, scholars and arbitrators from major arbitration institutions located in Hong Kong, Hong Kong Bar Association, Hong Kong Law Society, Guangdong Provincial Association of Lawyers, Shenzhen Municipal Association of Lawyers, famous law firms from mainland and Hong Kong, Hong Kong University,

Hong Kong Chinese University, Hong Kong City University, etc as well as professionals from the industrial and commercial societies of Hong Kong have jointly witnessed the signing ceremony and conducted thorough discussions on the new Arbitration Rules of the SCIA, especially the Guidelines.

V. Epilogue: Future of the internationalization process of SCIA

The Guidelines have attracted wide attention and high praise from the industrial and commercial societies of both China and the world since its release over one year ago. Some parties have agreed on the application of the Guidelines and even consulted the SCIA for some specific issues on its operation. That means a significant approval and encourage to the whole members of the drafting team, the SCIA and those people caring about and supporting the reform and innovation of China's international arbitration. The authors believe that it is not only an approval of the Guidelines that contains only 13 articles, but also

approval of the SCIA's struggle in the road of internationalization for more than three decades in the past, and even an approval of the exploration of the route, theory, system and culture of China's international arbitration. The SCIA will firmly hold its faith as before and stick to the road of internationalization.

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Research on the qualification and regulation of Chinese digital financial institutions

ABSTRACT

Nowadays, we always associate digital finance with PayPal, Alipay[50],WeChat wallet[51] and so on. These non-cash payment tools bring convenience to us. We do not need to carry credit or debit cards and can just pay anything with our mobile phone. That is to say, technology is changing finance. Digital finance or Fintech is the combination of Finance and technology. Looking back on the history of the evolution and development of technology and finance, we know that credit cards were born in the 1950s, ATM in the 1960s, Online banking or Internet banking in the 1990s, and now we use third-party payments.

50Alipay is a payment tool used by Taobao and Alibaba websites.

51WeChat payment is a payment tool developed by Tencent Inc(incorporated company).

In China, the beginning of digital finance is marked by the birth of Alipay in 2003. In October 2003, Alibaba's Taobao started to use Alipay. In 2007, Apple Inc's I Phone ushered in the era of the mobile Internet. Smart phones have become increasingly popular. In 2011 Tensnent Inc launched its mobile social software, that is WeChat. In China, more than 80% of consumers are using WeChat. At present, many people use WeChat payment.

With the entry of Internet companies into the field of financial payment, many emerging financial models have also developed, such as small-loan companies, peer-to-peer lending companies (P2P) and crowdfunding platform. Digital finance has rapidly developed in China.

Why has digital finance developed so rapidly in China? Why is the scale of digital finance so large? There are many reasons. In my opinion, there are at least three main aspects.

The first reason is the shortage of traditional financial services in China. China has a large population and a large area. Many small and micro enterprises, low-income persons and people in rural areas have not received good financial services. When digital finance appears, it is widely favored by people.

The second reason is the development of digital technology. In the past few years, the popularity of smart phones has especially provided an important driving force for the development of digital finance. Of course, the development of digital technology is available all over the world. A large number of users enjoy the convenience of digital finance.

The third reason is deregulation. China's regulatory environment for digital finance is relatively tolerant and relaxed. To a certain extent, it has been absent from regulation in the past few years. P2P platform is a very good example. The first P2P platform was on-line in 2007.Until mid-2016, A department rules was issued.

At present, although the scale of China's digital finance is very large, there are still some problems. In my view, there are two views to share with everybody about the future supervision of digital financial institutions.

Firstly, Digital finance should not change the nature of Finance. Digital finance has promoted the innovation of financial business. However, none of digital finance business has changed the function and nature of finance so far. Third-party payment does not change the function and nature of payment, nor does P2P change the function and nature of investment and financing, nor does Bitcoin change the nature of money.

Therefore, digital finance should also be included in the existing financial supervision system. We should pay attention to the nature of the financial business itself. For example, third-party payment should be included in the banking supervision. Bitcoin is regarded as a virtual commodity instead of money.

Secondly, we should balance the demands of different interest groups. Digital finance has changed the interest pattern of the traditional financial industry. Regulators in different countries are facing the problem of balancing the conflicts of interest between the old and new interest groups or different practitioners.

Therefore, the future financial system integrated into digital finance will be the result of the game of interests of all parties.

In a word, digital finance is growing continuously in China. It has profoundly changed and shaped the traditional financial system. In this process, there are both conflicts and convergence. The legal supervision of digital finance and the balance and protection of the interests of all practitioners are concern. We must perfect our financial legislative system and supervision system and keep a lookout on financial risks. It also needs the joint efforts of legal professionals from all over the world. That is because we live in an era of rapid development. And the legal system will also develop with the economy.

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