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NOTE

The BRICS Centres of Dispute Resolution: causes, state of the art, and prospects

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Premise

The idea of an enhanced cooperation and exchange of knowledge and best practices among its member states in the fields of trade, commerce, and investments -among others- is at the heart of BRICS. In fact, intra-BRICS trade has nearly tripled over the last decade, supported by an increase in intra-regional trade for all member countries. Thanks to their influential and remarkable progress in promoting local currency (for de-dollarisation purposes), regional FDI, and regional trade, the BRICS economies have emerged and have taken a new space in the twenty-first century. This reinforced one of the core objectives pursued by BRICS which is that of enhancing the five developing economies' role in global governance; a role that should finally display their newly acquired economic and financial weight.

To achieve such a new world economic order, it is critical to remove barriers not only to trade and investments but also to the resolution of commercial and investments disputes. A dedicated forum that considers the unique characteristics of the BRICS nations would ensure a faster, more effective, and efficient resolution of such disputes. This is no breaking news to the BRICS legal forum, which has been dealing with the project of establishing a BRICS dedicated dispute resolution centre since 2015. This short article investigates the very reasons that lie behind the choice of creating an alternative BRICS centre for dispute resolution, as well as the many challenges it will have to face and the necessary steps for the centre to make in order to work properly, serve its purpose and be successful, in a market already dominated by several and well-established arbitral institutions.

1.The primary reasons for establishing a dedicated BRICS dispute resolution centre

Disputes are inevitable occurrence in international transactions. Different commercial and legal expectations, cultural traditions, political implications, and geographic locations are all causes of disagreements between the parties[1].Thus, investors and trade partners need a fair, flexible, and reliable dispute resolution mechanism that ensures their international disputes to be efficiently resolved, and that allows the parties to maintain a healthy business relationship over time. This is particularly true when it comes to BRICS; as the countries involved have different legal systems, cultures, and traditions, there will inevitably be legal misunderstandings and thus potential

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[1]Loukas A. Mistelis, 'International arbitration – corporate attitudes and practices'. 12 perceptions tested: myths, data and analysis research report' (2004) 15 American Revue of International Arbitration 525–591.

controversies. An effective dispute resolution system could help to alleviate the concerns that would otherwise jeopardize trade and investment in such areas. By far, arbitration has proved to have all the said characteristics, thereby becoming the preferred method for resolving international investments and commercial related disputes. The BRICS recognize arbitration, and where possible mediation, as the best ways to resolve international disputes when negotiation fail. What deserves a separate enquire concerns the reasons that prompted them to consider establishing a separate BRICS centre for dispute resolution: a whole new body devoted specifically to BRICS disputes and BRICS disputant parties. The following analysis will thus focus specifically on arbitration and on the shaping of the arbitral part of the BRICS dispute resolution centres.

The idea of setting up a specialized arbitration centre devoted to intra-BRICS International Arbitration in BRICS: Challenges, Opportunities and Road Ahead' (the 'Conference') hosted disputes stemmed primarily from several criticisms directed at the existing framework of commercial and investment dispute resolution that emerged atthe New Delhi conference on 'in 2016 by the Government of India, in collaboration with the Indian Council of Arbitration (ICA) and Federation of Indian Chambers of Commerce & Industry (FICCI).For most, as mentioned, the Conference signalled a great discontent from BRICS with the way international arbitration was administrated, and in this regard, many interesting and surprising aspects have emerged.

Although one of the most acclaimed aspects of international arbitration is its neutrality, criticism was raised by the BRICS experts (and particularly by the Indian government) concerning regime bias[2]and partiality of the existing arbitral tribunals towards developing economies. Indeed, the Indian experiences in *Dabhol* and the *White Industries* arbitration cases(2005; 2010) showed how, being dominated by the Western World[3], the investment arbitration system often failed to take into consideration specific public interests pursued by developing countries, thus exposing the double standards of the world economic order.

Such bias, especially in investment arbitration, have proved to be an issue of grave concern. According to Pinky Anand, Additional Solicitor General of India, "there still is 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 rather than to an Asian one, even where the local witness may be a recognized expert in his or her field"[4]. Anand further asserted that "Western arbitrators, in their arrogance, hold no respect for the laws of non-western countries and often tend to simply ignore entirely the law chosen by the parties or, worse, opine it to be meaningless"[5]. Those are strong accusations that should be duly proved, but the sole allegation says a lot on the way arbitration is being perceived by non-Westerners.

The current international arbitration framework seems to be extremely unfavourable for developing countries also because of the inequitable representation of arbitrators on panels[6], which

[2] Scholars have defined 'Regime Bias' the manner in which rules of international trade, commerce and investment are crafted,interpreted, applied, and adjudicated between the developing and developed countries, by an administrative agency or at the adjudication by a domestic judicial body, or an international tribunal.

[3] Pinky Anand, International Arbitration in BRICS, Book of Abstract 2018 V BRICS Legal Forum, Cape Town, South Africa 23 – 24 August 2018, pp. 28-53.

[4] Ibid.

[5]Ibid. Disrespecting the choice of law expressed by the parties is a huge procedural violation, which may represent a solid ground to request the setting aside or even the annulment of the arbitral award.

[6]The lack of diversity and the uneven representation of arbitrators has been acknowledged within the profession and reported also by many Western arbitrators. See Joshua Karton, Diversity in Four Dimensions: Conceptualizing Diversity in International Arbitration,Giorgio Colombo, Joshua Karton, Filip Balcerzak, and Shahla Ali, eds,

results in a lack of empathy and due consideration of the socio-economic conditions prevailing in developing countries on behalf of the Western arbitrators. This ,in turn, translates in terms of unfairness to the parties to international arbitration, and even worse, in a due process violation. In point of fact, if some parties can find an arbitrator of their choice but others are unable to do the same, the issue is not only of ethical nature; it would also entail that the parties do not have equal access to sympathetic arbitrators and to how the arbitrators would understand and adjudge their conduct[7].

All of the above, cannot but undermine the overall legitimacy of international arbitration, heavily contributing to the idea of creating a BRICS centre that would ensure greater impartiality and fairer rules, a centre that would be closer to needs of those countries who would create, run and use the centre itself.

Another worrisome aspect, especially in investment arbitration, concerns its costs. 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. Investor-States arbitrations generally involve an investor and a State as contesting parties. The investors usually are cash rich conglomerates perfectly capable to cope with a major expense such as that required by investment arbitration. On the contrary, a State may not always be in the position to bear certain expenses: the 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. An investment arbitration centre that is well aware of such conditions, may be more incline to adopt emerging countries-friendly fees, making investment arbitration more accessible and less expensive.

To sum up, the arbitration landscape presented itself to the BRICS as biased, cost consuming and highly underrepresented by emerging and developing countries. A clear need to reform have emerged, especially in the existing investor-State arbitration mechanism under the International Centre for the Settlement of Investment Disputes (ICSID) and under bilateral investment treaties to account for the unique circumstances and challenges of emerging economies.

At the end of the day, the proposal to create its own arbitral centre is thus another example of the BRICS nations' dissatisfaction with the current international institutional landscape.

The reasons presented here mostly explain why the legal communities of BRICS have started pondering the idea of establishing a new BRICS dedicated centre of dispute resolution. But, resolving trade and investment disputes that arise within the BRICS -and then potentially between BRICS and low-income countries-in an efficient way, will also have important political outcomes, as it would boost and bolster the position of BRICS as a leader in the age of a new economic order.[8]

2. The BRICS centres of Dispute Resolution

Sustainable Diversity in International Arbitration (Edward Elgar 2022)Queen's University Legal Research Paper Forthcoming, 2022.

[7]It is exactly this impression that has given rise to the calls for the elimination of party-appointed arbitrators. See Catherine A. Rogers, 'Eliminate or Celebrate?: Party-Appointed Arbitrators and Cognitive Bias' (2022) 51-55.

[8]According to Feris and Ripley-Evans, "The BRICS nations regard themselves as the de facto vanguard of emerging economies, duty-bound to ensure that an international arbitration mechanism is developed, which has regard to factors relevant to emerging economies in the resolution of disputes". See Feris, Jackwell and Ripley-Evans, Jonathan, 'Challenges, opportunities and roadahead for international arbitration in BRICS', Bizcommunity, 1 September2016, available at www.lexology.com/library/detail.aspx?g=a5432c38-44ca4283-ac7d-3f92d46f2766

The BRICS Legal Forum has very proactively discussed legal cooperation towards the establishment of a BRICS common dispute resolution mechanism. The 2nd Legal Forum, in October 2015, resulted in the establishment of the Shanghai Centre of BRICS Dispute Resolution. It was born within the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre) and created with the support of the China Law Society and other members of the BRICS legal community. The establishment of such an institution had to reflect the close relations between the BRICS countries while providing a further instrument for increasing economic cooperation[9].Under the Indian suggestion, the Centre would have broad jurisdiction, having competence to settle both commercial and investor-State disputes[10].The hybrid form of the centre is certainly something new to the usual international arbitration practice where, generally, institutions deal separately with commercial and investor-State disputes.

And when the Shanghai experiment was still at the very early stages, the 3rd BRICS Legal Forum, held in New Delhi, in September 2016 led to the establishment of the 'New Delhi International Centre of Dispute Resolution of BRICS countries and other developing economies' and already prospected the establishment of new arbitral centres in all of the five countries to be "structured in a manner so as to secure opportunities and promote excellence within the BRICS"[11]. Unfortunately, very little is left to know about the New Delhi centre. Unlike the Shanghai centre, which has a dedicated BRICS Dispute Resolution website[12], where it is possible to read about the model text, the institutional rules, how to apply, fees and list of arbitrators, the Indian centre does not provide any BRICS related information, nor it has a dedicated website.

Taken in such a short span of time, the decision of creating new centres all together appears hasty. Too many aspects should have been better pondered and coordinated before. No wonder that the only (scarcely) working centre at present is the Shanghai one. The others are either missing or under construction. It was only with the Moscow Declaration issued at the end of the 4th BRICS Legal Forum of 2017, that a Board of Governors for policy direction was established, together with a Panel of Arbitrators. The Declaration also set the aim of creating common institutional rules to coordinate and fuse the functioning of the BRICS Dispute Resolution centres already established in 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 auspices, for disputes arising within and outside of BRICS, and to set in motion a time bound plan of action for implementation[13].

Several years have passed, but unfortunately, a lot is yet to be done to make these centres authentically "BRICS". Just to make an example, taking a look at the list of arbitrators provided by the Shanghai centre (the only one that is accessible),it is possible to note how this is still characterized by a vast majority of Chinese arbitrators; arbitrators from other BRICS nationals are very few[14], and there still is a strong percentage of Western arbitrators. Not that they should have

[9]Feris, Jackwell, 'An international arbitration system for BRICS – is it an imperative for further economic cooperation', Lexology, 18 August 2016; available at www.lexology.com/library/detail.aspx?g=6541959b-3054-4821-a55a672e00c4776c

[10]This is not surprising, considering all the criticisms and the very not pleasant experiences with Investment Arbitration that have been just discussed.

[11] III BRICS Legal Forum, New Delhi Declaration, 2016.

[12]The Shanghai Centre of Dispute Resolution website is accessible at http://www.shiac.org/BRICS/index_E.aspx

[13] IV BRICS Legal Forum, Moscow Declaration, 2017.

[14]The new Panel of Arbitrators is constituted by 965 arbitrators. In the Panel, 604 arbitrators which take 62.59% are from Mainland China, while 361 which take the rest 37.41% are from Hong Kong SAR, Macau SAR, Taiwan region and foreign countries. All the arbitrators come from 74 countries and regions around the world, including 36 countries along the Belt and Road. The number of nationalities of the arbitrators has increased by 13 compared to the former Panel, including 10 new countries along the Belt and Road. The new Panel of Mediators is constituted by 42 mediators, including 40 China mainland mediators and 2 foreign mediators.About11 arbitrators listed were South African, 5

been completely excluded, but they should at least be a minority. Otherwise, the same neutrality issues mentioned above have a chance to repeat themselves, even though in a different forum.

Moreover, the institutional rules adopted by the Shanghai Centre seem pretty standard and very similar to the rules traditionally adopted by other Chinese arbitral institutions. Once more, to ensure that the centres serve the BRICS, the rules should have been appropriately shaped and drafted to guarantee its interests and needs. Rules crafting should be at the very basis of a BRICS arbitral institution, which would otherwise be incapable of being chosen by the parties, and thus to effectively operate.

This is a salient the point. These new centres will have to compete on the arbitration market. They will have to be chosen by the parties. Therefore, what are value-added options created by the BRICS centres for disputing parties? Why should they be chosen over the others? If the BRICS arbitration centres do not make progress on providing the kind of justice its users increasingly demand, those users will go elsewhere for their dispute resolution needs, and all efforts will be in vain. That leads to the final considerations about the necessary steps BRICS should make next, at both Legal Forum and Heads of State level, to ensure that the BRICS centres work efficiently and to avoid any waste of time and energies.

3. Steps forward

As the project of establishing the five BRICS Dispute Resolution Centres -one established in each of the five BRICS jurisdictions-is already a reality, it would be necessary to start thinking about providing the same standards and services to users willing to seize one of the BRICS centres, and how to make them appealable to potential clients. Whether the user will be sited in South Africa or China, the services and the quality offered must be the same. This serves two purposes: it ensures all BRICS nationals to equally access the same arbitration standards, no matter the place, and prevents the centres from competing with each other in the overall arbitration market, at least on a matter of substance. Thus, harmonization and unity of the centres are two key objectives to be achieved in the short run. To do this, and to overcome the previously mentioned flaws of the international arbitration, as the lack of neutrality, there are many necessary steps to be taken. A few are mentioned as follows.

- **Unify Institutional Building Rules of the BRICS Dispute Resolution Centres**

In order to unify the standards of the BRICS Dispute Resolution Centres, thereby allowing the parties to get the same level of service regardless the physical location of the centre, it will be necessary to combine the institution building rules of the five countries. However, at present, there are major differences among BRICS on the matter[15]. This would require BRICS experts to further study and exchange knowledge about institution building rules of their home country to ultimately achievethe unification of standards. The desirable outcome should consist in the integration of institution building of the five countries to finally obtain something completely new, which takes into consideration present and future needs, and which can be defined authentically BRICS. In this manner, the dispute settlement centres established in all the BRICS countries will form a single and cohesive international dispute settlement agency.

- **Unify the Procedural Rules of the BRICS Dispute Resolution Centres**

The procedural rules to apply in the BRICS centres must be designed, coordinated, and adhered to according to the needs of the BRICS countries and BRICS parties. They should be highly flexible, provide the disputants with autonomy, take into consideration the different legal cultures and

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Brazilian, 4 Russian nationals and only 3 Indian. The full list of arbitrators is accessible at http://www.shiac.org/upload_files/file/2021/20210816152714_0030.pdf

[15] Yundong Chen, Suggestions on the Establishing Dispute Resolution Mechanism in BRICS Countries, Book of Abstract 2018 V BRICS Legal Forum, Cape Town, South Africa 23 – 24 August 2018, pp. 54-71.

backgrounds of the potential parties, and limit the amount of local judicial intervention. Having such characteristics, the parties will be more inclined to choose one of the BRICS arbitration centres rather than a non-BRICS arbitral institution.

The harmonization of procedural rules should be easier to accomplish than the institutional settings' integration mentioned above. The reason is that the rules of the arbitral procedure of the BRICS countries have heavily borrowed from the UNCITRAL Arbitration Rules(as revised in 2010). Therefore, the procedural standards are supposed to be similar, even though further work will be required to harmonize what not fully defined within the UN Arbitration Rules, e.g., matters of arbitrability and public policy[16].

- **Diversified and qualified arbitrators**

Considering all the issues underlined in the previous paragraph, resulting from the lack of diversity and representation within the arbitration panels, the BRICS should secure their Arbitral Centres with lists of arbitrators belonging to the five BRICS nations in the same percentage. They should have different professional backgrounds, education, legal culture, individual personality, and the necessary skills to create confidence in the parties and provide higher-quality decisions that would ultimately enhance the comprehensive reputation of the centres.

• **Unify the recognition and enforcement of rules and decisions**

All the BRICS countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the "New York Convention", 1958) therefore,to some extent, the BRICS countries' reciprocal recognition and enforcement of awards should have a solid foundation. However, there are still great differences in the specific procedural implementation[17] of the Convention(China, for instance, have adhered to it on a reciprocity basis) and on the interpretation and application of the grounds listed by the New York Convention to refuse the enforcement and recognition of foreign awards[18]. Such differences directly affect the immediate realization and protection of the rights and interests of the parties, and indirectly damage the effectiveness of the arbitral awards and the development of BRICS arbitration. Therefore, the BRICS should coordinate their positions on the reciprocal recognition and enforcement of arbitral awards, ensuring their immediate, smooth, and effective recognition and enforcement, especially when the same are issued by the BRICS Dispute Resolution Centres, thus fostering the confidence and loyalty of the parties in choosing and using these national centres as dispute resolution agencies.

This last point is a very determinant one:the lack of arrangements would lead to a large number of deadlocks in the recognition and enforcement of awards, preventing the winning party from benefitting from the award in one of the BRICS jurisdictions and thus failing the purpose of BRICS to resolve disputes effectively and in a time and costly-friendly way. In this scenario, arbitration in itself would lose its credibility and comparative advantage.

Concluding thoughts

The BRICS legal communities intend to continue the cooperation on improving arbitration and other forms of cross-border dispute resolution to further innovate and expand the same. The Legal Forum has played a crucial role in developing BRICS arbitration and it should thus continue to make efforts in drawing the attention to arbitration matters and reinforce the commitment to the initiative through their annual Conference, which is a recognized official event within the BRICS agenda. But equal commitment should also come from the top government levels. Going back to answering the question posed at the beginning: "what are the value-added options created by the

[16] Ibid.

[17] The Shanghai Centre of Dispute Resolution has a dedicated page to the recognition and enforcement pattern within the BRICS, which is accessible at http://www.shiac.org/BRICS/arbitrate_informations_detail_E.aspx?id=181

[18] See art. V of the New York Convention.

BRICS centres for disputing parties?", other than providing suitable rules and neutral arbitrators, a Treaty concluded between the BRICS Heads of State on the recognition and enforcement of the awards issued by the BRICS Arbitration Centres would be a huge push towards greater attractiveness and efficient functioning of the Centres. Besides, generally speaking, the recognition and enforcement of foreign arbitral awards or non-domestic awards is important for the promotion of trade and investment amongst states. Therefore, if the BRICS aim to facilitate trade and attract investments -consequently bolstering their economic growth- they should seriously take this latter aspect into account, especially following to the recent developments on the creation of a BRICS currency.

Establishing a working and authentic BRICS dispute resolution centre or, at this point, a BRICS system of Dispute Resolution, would not solely mean that the BRICS have found an efficient way to work out their differences and preserve their economic partnerships over time. This innovation would have many other important internal and external implications that should be properly regarded. For what concerns the internal dimension, the effective creation of the BRICS Dispute Resolution centres would represent another major step in the BRICS institutional building (just as it was the case for the New Development Bank, but this time in the field of Alternative Justice)thereby reinforcing the inner ties of the BRICS cooperation. As for the external dimension, a recognized system of BRICS Dispute Resolution would be a great display of soft power, which passes broader messages about its political and legal stability. The BRICS arbitral infrastructure would thus strengthen the position of the BRICS as leader in the Global South and make it a reference point for all those countries who have seen the same flaws in the present-day international arbitration.

For all the above and more, it is worrisome and disappointing to note that the BRICS Dispute Resolution Centres' initiatives are left out from the Summits Declarations -which should decisively give more credits to the project- and even almost disappeared in this year's meetings schedules under the Chinese Chairmanship. The BRICS Dispute Resolution Centres may turn out to be a great success. There is nothing like this in the current dispute resolution scenario. The project is absolutely pioneering. But to succeed, the BRICS will have to work synergically at all levels. The Heads of States and their Ministries should also actively participate in it.

Actions to finalize the project should be taken now. In fact, it is already late. As for the year2019, the final Declaration of the VI Legal Forum signalled the "the urgent need to complete the project for the establishment of BRICS Dispute Resolution Centres within BRICS member states[19]". And again, in 2020, the VII Legal Forum highlighted the need to enhance cooperation and legal harmonization on the arbitration matters, and to make the further necessary efforts to create the BRICS Dispute Resolution Network[20].

Right when one would expect the project to be finally completed, it now seems to have been postponed, or stalled. For the initial five to six years, BRICS arbitration experienced a great acceleration, only to dramatically slowdown in the last two years. The reasons for this may be several, starting from the COVID-19 pandemic that certainly forced other more pressing priorities, to the recent Ukrainian war, which once again, shifted the areas of current concern. But it is at this critical juncture, right when the BRICS are demonstrating reciprocal support and renewing their commitment to enhancing cooperation and strengthening ties, that dispute resolution should be prioritized and should play a key role in fostering such high-quality relations and keep them healthy over time. The peaceful settlement of disputes cannot but improve the cohesion of the group, towards an increasingly solid and prosperous future.

[19]BRICS VI Legal Forum, Rio De Janeiro Declaration, 2019, point 5.
[20] BRICS VII Legal Forum, S. Petersburg Declaration, 2020, point 2.