REPORT

Conference on
INTERNATIONAL ARBITRATION IN BRICS
Challenges, Opportunities and Road Ahead
27th August, 2016 – Vigyan Bhawan, New Delhi

INAUGURAL SESSION

The Role of BRICS

The session commenced emphasising the impact and utility of BRICS in the present world economic order. The BRICS nations together comprise almost 50 percent of the total world population and a quarter of the world's total GDP. It was pointed that the combined GDP of BRICS nations amount to 16 trillion USD. 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, and other are of socio-economic and political importance, to propel this group of nations to greater prominence in the world order.

Regarding international arbitration

The session in its introductory note captured the idea of establishing an independent forum within BRICS to resolve potential disputes and move towards collective economic prosperity. The reasons in favour of such a forum stemmed *inter alia* from the inadequacy of the existing framework and the need to conduct international arbitrations more impartially. These reasons included the following:

a. With intra BRICS trade gaining momentum, there will be issues and disputes needing to be addressed between member countries and their trading representatives. Therefore, it is imperative to establish an intra BRICS dispute resolution forum to resolve these issues expeditiously.
b. It was further emphasised that inward and outward investments have an important role in boosting the GDP of the countries. Hence, there is growing importance towards closer co-operation, interaction between investors, reforms in economic ecosystems of the countries etc. In spite of the internal ideological apparatus, there has been a consensus on the need for

good economic reforms. However, reforms cannot be incremental, they need to be fast paced in order to encourage the investors.

c. The session also deliberated on the understanding of good governance, defining it in terms of openness for seeking investment and ensuring equity for all. As such, it was recommended that the dispute redressal mechanism should focus on institutional gains and losses across forums.
d. While determining the feasibility of the international arbitration system, it was found to be wanting due to its *ad hoc* and unpredictable framework. Developing countries have worryingly less representation in terms of arbitrators in the world forum. There is an overwhelmingly high number of lawyers and arbitrators trained in the western legal system. Also, there is a noticeable absence of appellate mechanism which has implications for fairness and justice.
e. The third point for examination is whether there ought to be exorbitant penal consequences of dispute settlement which unsettle the economic condition of the countries being involved.
f. Fourth, there have been concerns that when the countries are drawn into dispute resolution, the briefing on domestic laws or the socio-economic conditions of the countries is inadequate. No heed has been paid to the economic consequences of the dispute. It is essential that the new forum for reforms should be mindful of these questions and concerns.

All the above issues and areas of concern were debated and deliberated in three technical sessions of the Conference, viz.:

I. Arbitration and Dispute Resolution: Focus BRICS Countries
II. Dispute Settlement and Enforcement of Treaty Awards
III. Towards developing an International Arbitration Mechanism in BRICS

SESSION I: ARBITRATION AND DISPUTE RESOLUTION: FOCUS BRICS COUNTRIES

This session discussed the legal framework governing arbitration proceedings in the different BRICS nations. The discussion yielded the following main points:

A. **Brazil:** Legal framework for Brazil can be summed up as a tale of 4Es – Period of Exclusion (before 1986); Period of Expectation (1996-1999; waiting for the challenge on Arbitration Act to be decided by the Supreme Court); Period of Expansion (2000-2008); Period of Explosion (2008 onwards; Global economic crises and emergence of Brazil as global economic power).

   Brazil is a member of several international conventions including the New York Convention, Panama Convention. New mediation law has been enacted recently amending the civil procedure law. Brazil has monist legal regime and hence there are no compulsions of dual regime. They follow the UNCITRAL Model and there is substantial difference in domestic and foreign arbitral awards.

   Arbitration experience

   For an arbitration agreement to be enforced, it must be written but not necessarily signed. It is based on the principles of contract of adhesion. Arbitrators ought to be appointed in odd numbers and the appointments to be made in Full Clause. The representation of arbitrators in international bodies has been substantial, with the numbers at 14% of the total number of arbitrators. Nearly 7.2 billion dollars are currently in the arbitration proceedings.

   Ad hoc arbitration has been on the rise, especially because of the costs. The terms of reference are a mandatory feature of the institutions but is only an informal requirement in ad hoc arbitrations.

   Court intervention

   Courts operate on the basis that they ought to recognise the positive (obligation to refer the matter to arbitration) and negative (obligation to stay away from unnecessary intervention) effects of arbitration process. Courts may intervene in granting of interim measures and reliefs, prior to constitution of an arbitration panel. However, once the panel is set up, the panel may grant interim measures, which if not complied with by the parties is enforceable by the courts. The setting aside of the arbitral award is on specific grounds. These grounds for setting aside, especially public policy, have been narrowly interpreted and the courts have been tellingly pro-arbitration.

B. **Russia:** Model law adopted in 1993 and Russia has also countersigned and ratified the New York convention, European convention and several other international instruments. The current wave of reforms has limited memberships to arbitral institutions. Unlike Brazil, it follows dual regime where there are separate domestic and international arbitral frameworks.

Arbitration experience

2 of the oldest Russian arbitration institutions still occupy most of the space in arbitration. Few of the forums are titled commissions. The period with most fertile reforms were witnessed during the period of USSR. Aforementioned reforms primarily related to liberal institutions and the availability of ready licences from government to open arbitration institutions. The panellist from Russia pointed that there has been a general consensus on good governance being defined in terms of simple, cost effective, plain and less complicated business arbitration models.

Court intervention

Even for enforcement, the early USSR regime was more favourable with the socialist state enforcing matters and awards through its own force. Because of the excessive presence of state courts, overwhelmingly favouring domestic matters, the familiarity and favourability with international arbitration has not been significant.

C. **South Africa:** The Arbitration Act is comprehensive and applicable to both international and domestic arbitration. The second key instrument is the Foreign Arbitral Award Act which stipulates the steps to enforce foreign awards in conformity with the New York Convention. The Protection of Business Act is the third legislation governing arbitration which mandates the approval of the Minister of Trade and Business for the enforcement of certain awards listed therein. However, South Africa recently introduced the International Arbitration Bill which has repealed the Protection of Business Act. This Bill is tentatively scheduled to be passed by end of this year.

Arbitration Experience

Agreement need to be reduced in writing and needs to be documented electronically. It has been acceptable to include the Permanent Court of Arbitration. Approximately 300 matters have been flowing into the system, with almost 10% international and rest of them domestic. Institutional arbitration has been far more successful than ad hoc arbitration. Arbitrators have demonstrably high ethical standards and most of them have been appointed from the pool of senior counsels, retired judges and experts.

Court intervention

Court intervention in arbitral proceedings has been minimal, as long as the arbitration agreement has been conferring power on the arbitrators. Misconduct, gross irregularity or acts or matters beyond the mandate of the arbitration have been the only grounds for court intervention. Usually, it takes 3 to 5 months for the grant of the award. But in cases where an appeal has been allowed, it usually taken a year to hear the full award.

D. **China:** Signed the NY convention 1987 with two reservations – on reciprocity, and commercial arbitration. Domestic arbitration is governed by the People's Republic of China arbitration law, which is not based on model law. Recognition and Enforcement of the award is governed by the Civil Procedure Law. Judicial interpretation by the Supreme Court also forms comprehensive source of law that fuels the regimes governing domestic and international matters.

Arbitration experience

Only mandated institutional arbitration has been permitted, primarily because of the wording of Article 16 which contains the word 'shall' while referring the matters to arbitration. Chosen arbitration commission will always have the power to refer the matter to arbitration. Default permission has been granted for either 1 or 3 arbitrators under Article 30. Arbitration proceedings are marked by short hearings. There are frequent occurrences of mixed proceedings, where there is a combination of arbitration and mediation. Arbitration commissions are separated from the government insofar as they are not within the government system. Usually, arbitrators are lawyers, law professors and government officials and there has been no apparent conflict in the process. Regarding the enforcement of foreign awards, there is a risk for non-institutional awards because of the specific wording of Art.283 which has considered only institutional arbitration to the exclusion of the others. There is lack of clarity and certainty in the law relating to international arbitrations and enforcement of awards.

Court intervention

Applications for interim measures are usually submitted to the commission which in turn presents it to the court. Art.28 and 46 are the key provisions in relation to foreign arbitration. There have been wide grounds for court intervention, including no arbitration agreement; arbitration procedure in violation of the legal procedure; matters outside the scope of the agreement; forged evidence; socio-economic or public interests are a few to name.

Summing up

In Brazil, there have been greater academic engagement in order to make the arbitration process more nuanced and streamlined to further interests of all.

Few countries like Russia have not had positive experience in investment arbitration. Protecting foreign business interests have been difficult but every party has understood that it ought to be done. There have been instances of even small countries like Cyprus financing significant investment in Russia, which has provided greater incentive to work towards a business safe environment.

China has lack of clarity in current arbitration framework. However, the best feature of their legal system and which has been mooted for wider consideration, is the combination of arbitration and mediation (part confrontation, part compromising) which for them seems to be best suited for Asian nations.

South Africa has understood that the reforms must be conscious of the diverse historical and legal baggage. There have been several joint deliberations to forge an economic and legal environment where parties have a sense of ownership and a protective regime devised by themselves, which shall encourage greater investment.

SESSION II: DISPUTE SETTLEMENT AND ENFORCEMENT OF TREATY AWARDS

Introduction to Investment Treaty Disputes

While new economies in the block attract the investors because of the investment fortunes, they have also dissuaded them because of the unpredictability involved in the outcomes of the disputes. A number of treaties have been signed but only few of them have been enforced. 2015 witnessed a huge surge in investment related disputes, which have grave implications for both domestic and international economies. Most BRICS nations, have not had a very positive experience with investment arbitration. For most nations, there are fewer forums for challenging the award, appellate mechanism or annulment. Further, the claims before the arbitration have also been huge and disproportionate. There are often questions on whether such huge economic costs are justified, especially with poorer economies just reaching the threshold of development. Another question that was mooted for the panel was, whether our own internal laws should be consolidated and made more cohesive instead of looking outward towards more BITs and protective regimes, especially since there is no empirical evidence to establish co-relation between BITs and FDI.

Regarding Bilateral Investment Treaties

The panellists explored the question of why there has been a general hesitation to engage with BITs and creating openness with commercial arbitration. It is pertinent to mention here that the experience of BRICS nations with BITs has been contrasting. On one hand, Brazil has been the fifth largest beneficiary of FDI in the world (and the largest in Latin America) without ratifying any BITs, China has signed a whopping 130 plus BITs over the last two decades. Furthermore, the latter also signed and ratified ICSID in the early 1990s thereby indicating a favourable disposition towards BITs. India, Russia and South Africa have suffered adverse arbitral awards emerging out of BITs which have driven these countries towards a more conservative and cautionary approach, re-evaluating the *status quo* on BITs. Countries like Brazil and South Africa narrowed down on historical reasons of attracting more FDIs even without BITs as one of the reasons. Unlike traditional BITs, Brazil's new Model of investment agreement is named as Investment Cooperation and Facilitation Agreement (ICFA), which focuses primarily on promoting investment cooperation and facilitation and establishment of institutional framework for mechanism for risk mitigation and prevention of disputes. South African Government terminated its BITs with a number of countries and introduced the Draft Promotion and Protection of Investment Bill to provide a framework for the protection of all Investments in South Africa, both foreign and domestic, in line with their Constitution. India has recently introduced a revised Model BIT, with an objective to encourage foreign investments, and balance the rights of investors with the sovereign right of the government

to pursue domestic policy objectives.

The question of Sovereign Authority

Despite having a favourable stance towards BITs, China has repeatedly indicated its unequivocal dissent to the notion of diminishing its sovereign authority as a consequence of signing these BITs. The other BRICS nations have also initiated several steps to balance the sovereign interests and it rights to regulate, with investor interests. Russia and China have kept the grounds for court intervention open and have allowed much leeway for 'public policy' claims.

Problems with BITs

a. There has been no active provision for judicial review of awards. Some of the practical difficulties faced are:
    - Absence of competent authority for enforcement and oversight.
    - No rules for specific enforcement of awards
    - Uncertainty in domestic laws on foreign arbitrations awards
    - non-waiver of the state immunity doctrine (For e.g. China)

b. While admitting the general importance of BITs, there have been questions of what consequences are borne by the domestic developing economies as a result of these treaties and attendant arbitration arrangements.

c. There has been constant friction between commercial and labour interests; there have been open defiance of internal legal frameworks in order to accommodate interests of arbitration. These need to be addressed immediately. But one must also be mindful of the challenge that these may be irresolvable disputes.

d. Mis-use of existing investment arbitration mechanism and adverse awards;

e. Finally, there has been a thought of whether investors have been getting more protection for their rights and business interests than in proportion to what they contribute to domestic economies.

SESSION III: TOWARDS DEVELOPING AN INTERNATIONAL ARBITRATION MECHANISM IN BRICS

Introduction

Taking cue from the inaugural session, the present session conducted a meaningful discourse on the viability and logistical implications of setting up an international arbitration institution within the BRICS nations. The following was noted:

a. A general consensus against the dominance of developed nations in the existing forums of international arbitration, thereby resulting in institutional bias;
b. The unique issues and challenges faced by developing nations, regarding the socio-economic and political welfare of people within their jurisdictions, are often compromised or seconded to investor interest;
c. The governments need to guarantee rule of law to investors and investors rights should be proportional to their contribution to economic development
d. There is also the perpetual concern of being pre-judged, and failure of many western arbitrators being empathetic to the needs of developing economies and emerging countries; along with lack of adequate representation of developing countries on the arbitral panel;
e. limited options for appeal or annulment in the current ISDS Mechanisms;
f. The economic liabilities/penalties/costs involved with the current system seriously undermine the financial stability of several governments while hampering their ability to engage in governance.
g. While the idea of a BRICS centric mechanism for international arbitration was well-taken, the session also debated certain concerns in setting up such an institution. These have been discussed in greater detail, hereinbelow.

Need for a Specialised BRICS Arbitral Forum

The panellist from Brazil highlighted the fact that several institutions already exist which cater to BRICS related disputes and also have representation from the BRICS countries. Further, South Africa has collaborated with China to set up the China-Africa Joint Arbitration Centre which focuses on disputes between these countries. Furthermore, the Shanghai International Economic and Trade Arbitration Centre (SHIAC) has set up an independent BRICS Dispute Resolution Centre in Shanghai, which *inter alia* focusses on the enforcement of BRICS and resolution of trade and commercial disputes between traders from BRICS' nations. In light of this, the question that was raised was if there is a need to have another institution to add to the existing institutional framework for resolving disputes between BRICS nations.

Logistical Concerns in setting up a BRICS Arbitral Forum

The session also reflected on certain logistical concerns regarding the setting up of a BRICS arbitral forum which included the following:

a. Location of such an institution and hearing center;
b. Staffing issues and whether it should be limited to BRICS countries, or extend to Non-BRICS countries' representatives as well;
c. The need to achieve acceptability of a new BRICS centric forum, by it end users;
d. Ensuring acceptability of such forum by domestic courts outside of BRICS; and
e. Sustainability of such a forum.

Differentiating features amongst different BRICS nations

Another concern regarding setting up a specialised BRICS arbitral forum are the inherent cultural and experiential differences of the BRICS' nations. The members may have varying legal expectations from such a forum, and may also be diverging on the procedural framework to be followed by this institution. It is important to consider the different background and domestic variations in the arbitration framework in each of these countries, which will influence the expectations from a common BRICS forum. The issue of lingual differences is another challenge that will be faced by such an institution.

Benefits of a BRICS-centric arbitral forum

The following benefits were pointed out by advocates of a special BRICS arbitral forum:

a. Such a forum will comprise representatives from the BRICS nations, thereby allowing a unique expertise over local cultural ethos, and socio-economic and political concerns and realities;
b. The arbitrators will be more engaged to the disputes pertaining to BRICS nations, given their origin from the said countries, and capable of taking into account various differential socio-economic conditions/situations of the domestic economy;
c. Importance to ethical principles in appointment of arbitrators or secretarial support;
d. BRICS arbitration mechanism can be cost-effective, have a less onerous arbitration procedure, friendlier to SME;
e. Spread awareness by increasing the interaction between the legal experts in the BRICS nations about the existing arbitral institutions in the individual BRICS nations;
f. A transparent investment arbitration mechanism from the current confidential proceedings;
g. Ensure better mechanism for enforcement and appeal;
h. Prevent mis-use of arbitration by providing a mechanism for early dismissal of frivolous claims.

VALEDICTORY ADDRESS

The Way Forward

The Hon'ble Finance Minister, Mr. Arun Jaitley, strongly iterated the strength of the economies of the BRICS countries which have been able to stave off many detrimental ramifications of the global economic meltdown post 2008. While admitting that some member states were suffering from some economic concerns, the same were termed as transient issues which will be resolved due to the robust nature of economies of the BRICS countries.

It was recommended by the Hon'ble Finance Minister that a task force be constituted at the upcoming BRICS Summit in October (2016) to identify challenges in international arbitration in the BRICS countries. The said task force comprising representatives from the different BRICS member states, examine and recommend institutional reforms in the arbitration area to enhance economic cooperation between member states, and develop an alternative arbitration mechanism for dispute resolution.

In addition to the above, the valedictory address emphasised on the principle of *fair trade* which is fundamental to free trade and commerce. It was stressed that optimal balance between public welfare and commercial interests must be attained, in order to enhance the economic standing of the BRICS nations. Highlighting the change in trend towards international arbitration, the Secretary of Department of Economic Affairs, Mr. Shaktikanta Das, advocated the need to pursue remedies before domestic courts as the first recourse for settling commercial disputes. The Secretary of Department of Legal Affairs, Mr. Suresh Chandra, while recapitulating the discussions of the preceding sessions, stated that an intensive debate must take place on the idea of setting up a BRICS arbitration forum.

CONCLUSION

The BRICs nations debated on the idea of a credible international dispute resolution mechanism among BRICS countries (and even other developing nations), at the same time presented the reservations on the logistical and other concerns regarding its functionality and framework. To keep the debate and deliberations on this issue going, the Indian Minister of Finance proposed to the BRICS nations to set-up a Task Force of experts and officers from BRICS nations to explore the possibilities for an arbitration mechanism in these countries.

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Programme

10.00 – 10.30 AM	**REGISTRATION**
10.30 – 11.30 AM	**INAUGURAL SESSION**
	• **LIGHTING OF LAMP** • **Welcome Address by:** Mr. Ajay Tyagi, Additional Secretary, Department of Economic Affairs, Ministry of Finance, Government of India • **Special Address by:** Mr. Onkar S Kanwar, Past President, FICCI and Chair of BRICS Business Council • **Inaugural Address by:** Mr. Ravi Shankar Prasad, Hon'ble Minister for Law & Justice, Electronics & Information Technology, Government of India • **Concluding Remarks by:** Mr. N G Khaitan, President, ICA
11.30 – 12 NOON	**COFFEE / TEA BREAK**
12 NOON – 1:15 PM	**SESSION 1**
	ARBITRATION AND DISPUTE RESOLUTION: FOCUS BRICS COUNTRIES Moderator & Speaker: Mr. Gaurab Banerji, Senior Advocate & Barrister, Supreme Court of India Panelists: • **Brazil :** Mr. Mauricio Gomm, Vice President, CAM-CCBC • **Russia**: Mr. Alexey A Kostin, Chairman of ICAC and MAC (Maritime Arbitration Commission) - Russian Chamber of Commerce and Industry. • **China** : Dr. Fan YANG, Director, International Dispute Resolution Academy and Scholar-in-Residence, International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP • **South Africa** : Ms Deline Beukes, CEO, CAJAC Johannesburg, China-Africa Joint Arbitration Centre

1.15 PM – 2.00 PM	**LUNCH BREAK**
2.00 PM – 3.00 PM	**SESSION 2**
	DISPUTE SETTLEMENT AND ENFORCEMENT OF TREATY AWARDS Moderator & Speaker: Ms. Pallavi Shroff, Managing Partner, Shardul Amarchand Mangaldas & Co. Panelists: • **Brazil :** Mr. Ricardo Lewandowski, Partner, Clyde & Co LLP • **Russia** : Mr. Vladimir Khvalei, Partner, Baker & McKenzie • **China** : Ms. Mariana Zhong, Associate, Dechert LLP • **South Africa** : Mr. Patrick Lane, Senior Counsel, The Maisels Group
3.00 – 3.15 PM	**COFFEE / TEA BREAK**
3.15 – 4.15 PM	**SESSION 3**
	TOWARDS DEVELOPING AN INTERNATIONAL ARBITRATION MECHANISM IN BRICS Moderator & Speaker: Mr. Nishith Desai, Managing Partner, Nishith Desai Associates. Panelists: • **Brazil** – Mr. James P Duffy IV, Partner, Baker & McKenzie LLP, New York • **Russia** – Mr. Timur Aitkulov, Partner, Clifford Chance • **China** – Mr. Jun YANG, Managing Partner, Jade & Fountain PRC Lawyers • **South Africa** – Mr. M.D. Kuper, Senior Counsel and Chairman of AFSA
4.15 PM	**CONCLUDING & VALEDICTORY SESSION: ROAD AHEAD**
	Summing up by: Mr. Suresh Chandra, Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India **Concluding Remarks by:** Mr. Shaktikanta Das, Secretary, Dept. of Economic Affairs, Ministry of Finance, Govt. of India **VALEDICTORY ADDRESS BY:** Mr. Arun Jaitley, Hon'ble Minister for Finance and Corporate Affairs, Government of India
	NETWORKING HIGH TEA