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Future of Dispute Resolution and Investment in BRICS

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Abstract: The BRICS is a term which refers to the group of Five Nations – namely, Brazil, Russia, India China and South Africa. They are touted to be emerging economies and hold an annual BRICS summit to commemorate their partnership and further their growth. One of the crucial components for their growth is investment within the BRICS Nations. This is aimed at the promotion of an equitable international economic order and expediting the growth of the BRICS nations. The dispute settlement mechanism is the key to establishing a stable and progressive investment regime. The countries of BRICS are culturally different and have different legal systems. This also leads to a varied regime of investment protection. In the 2014 annual summit, the Ministries of External Relations of the BRICS nations agreed to build a common approach to improve the investment agreement and improve their dispute settlement mechanism. The paper analyses the existing investment regime, legal systems of the BRICS nations and provides suggestions as to how the dispute settlement mechanism can further be amended and applied for encouraging investment and promoting economic growth.

Keywords: BRICS. Investment Protection Regime. Dispute Resolution.

Summary: BRICS is an organisation where five of the world's most promising economies have joined hands with a view to make the global system fairer and equitable. A fairer and just arbitration mechanism at the International Level contributes to this in a significant manner as it allows the developing and the least developed countries a chance to establish their presence in the international order. The existing system of arbitration is said to be dominated by the Global North and the Global South is often on the receiving end during international arbitration. This has been recognised by the BRICS nations and they have already started taking steps to provide a solution to this issue through the development of a BRICS arbitration mechanism. It is pivotal as it allows for an alternative to the currently existing

world order. The establishment of the BRICS dispute resolution centre at Shanghai seemed like a solution but it never took off. However, the internal development amongst the BRICS nations such as the India-Brazil BIT have been encouraging. Moreover, India has led the way through amendments of the Indian Arbitration and Conciliation Act, 1996 in a manner where it is more conducive to undergo arbitration and the process is made convenient and fairer for all the parties involved. Moreover, the BRICS nations have not compromised on collective measures as well and have already set up the Rules of Procedure of BRICS Expert Committee on Arbitration. The results of the deliberations of the committee will play a pivotal role in the determination of the future of the arbitration regime in the future. The winds of change are coming with the global south taking the lead. The European Union too has made certain changes to its arbitration agreements and the BRICS is expected to lead the way into a reformed era of arbitration.

Objective and scope of research

The research is carried out to understand the arbitration mechanism in the BRICS nations. BRICS has positioned itself as an influential alternative in the global system rivalling the dominance of the Western nations. The International Arbitration mechanism has been under scrutiny multiple times particularly by the developed and the least developed countries who have accused the existing system of favouring the Western nations and under representation of arbitrators from their countries. The BRICS sought to provide an alternative forum for dispute resolution and the establishment of the Shanghai Dispute Resolution Centre and the Expert Committee on Arbitration seemed to be progressive steps towards the same. However, since the Covid-19 Pandemic, the BRICS nations seem to have fallen off track as no significant progress has been made. This paper analyses the flaws in the current arbitration system, the efforts of BRICS to provide a viable alternative and suggestions for the establishment of an alternate dispute resolution mechanism under the aegis of the BRICS nations.

Research methodology

The methodology that will be employed is a secondary research methodology. A study of the existing resources like judgments, journal articles, Bilateral Investment Treaties, Legislations, Rules and Mechanisms will be used to formulate an analysis and provide suggestions for improvement of the existing regime.

Introduction

BRICS

The current global order is still largely regulated and dominated by the developed countries. They are still able to manage institutions, regulate currency exchanges and valuations on terms which are favourable to them. The legal mechanisms at the International Level such as World Trade Organisation, International Court of Justice, Permanent Court of Arbitration and more are primarily developed with the jurisprudence of the Western nations.

The emergence of developing countries who have economies which are growing at a fast pace, the imbalanced nature of the current order is being challenged. BRICS which includes Brazil, Russia, India, China and South Africa is a joint initiative of the nations to improve the international trade and aid in the creation of a more equitable economic order.[1] These countries have great potential and are attempting to leverage their ample resources for collective growth and a greater say in International Trade and investment. However, the key to bringing significant change in the International Order will still be dependent on the change in the functioning of International Legal Systems. The paper explores the existing legal systems of the BRICS nations with respect to investment disputes, their shortcomings and the positive steps which have been taken by the BRICS nations to harmonise their systems for greater economic growth.

Understanding the unfair arbitration scenario: why the stance taken by BRICS is important?

The process of arbitration has been growing in relevance and importance over the last few years. Its acceptability as a mode of dispute resolution is increasing with several arbitration institutions being set up on the International Level. The bodies like World Anti-Doping Agency, International Olympics Association and more have also acknowledged arbitration as a key mode of dispute resolution. The establishment of the *Court of Arbitration for Sport* in Switzerland was also done keeping the same in mind. In addition to this, arbitration is a key component of the International Investment Treaty Regime. In nearly all of the treaties, arbitration has been used as the only method of dispute resolution with a very limited scope of appeal. The arbitration agreements allow the investors to directly negotiate with foreign government in case there is a conflict. It has been seen as a way to

[1] *Joint Statement of the BRIC Countries*, Leaders Yekaterinburg, Russia (June 16, 2009) 5.

reduce the political motives of these disputes and provide a neutral forum for the proceedings.[2]

Professor M Sornarajah in his book, "The International Law on Foreign Investment," has expressed his views on how the International Investment Law has been expanded by the West. The Jurisdiction and making of norms have been largely controlled by the West. In cases of conflict, the decision makers are usually the private arbitrators who practically control the entire landscape of Investor State Dispute Settlement (ISDS). Over the recent years, there has often been a lot of controversy related to the handling of such disputes by the arbitrators. In the infamous Vodafone case in India, India had to spend millions of dollars in legal fees, pay for the legal fees of the corporation, bear arbitration expenses in addition to losing out on $3.8 Billion of revenue. The persons who have awarded the damages to the corporations are not judicial officers or judges who are well versed with the principles of law and aim to deliver equitable justice. They are presided over by arbitrators who can be academicians or lawyers who decide on such major issues. The proceedings are often kept secret and are not made open to public.

This creates a lot of debate regarding the conflict of interest with the arbitrators who preside over the proceedings also working for law firms or offering consultancy services. They service big corporations and are dependent on them for revenue. Their image is dependent upon how they handle the cases involving them. There is no assurance at all that they are going to operate in a fair and unbiased manner without showing any partiality. It is a common practice for a judge to recuse themselves from a case if there is a conflict of interest or the judge feels that their judgment may be clouded. However, when it comes to arbitration, such principles are hardly followed. Therefore, the selection of arbitrators needs to be curated carefully and done in a manner which is not detrimental to the interests of the parties and provides a sense of fairness and justice.

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[2] I.F.I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, ICSID Review–FILJ 1–25 (1986).

are extremely narrow. In the case of C.M.S v. Argentina, an appeal was filed before the annulment committee. The committee had found that the decision of the arbitral tribunal "contained manifest errors of law." However, it was powerless to annul significant parts of the decision since it had a very limited mandate.[3] This is a clear-cut example of the way the arbitral system is misused by the Western countries to gain favourable decisions.

In another case, *re The Owners of the Steamship Catalina and The Owners of the Motor Vessel Norma,*[4] where a counsel to one of the parties cited an Italian case. The response of the arbitrator was shocking and reeked of bias. He said that, *"Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians and in my experience the Norwegians generally are a truthful people. In this case I entirely accept the evidence of the master of the* [*the Norwegian vessel*]*."*

This indicates a clear bias where the arbitrator had several pre-conceived notions and they are surely going to influence his final decision. The arbitrator was removed by the Court in the case. When there exists any similar instance in modern times, the arbitrator should also be removed and barred from undertaking related proceedings in the future.

'Neutrality' is the most desirable quality in an arbitrator as it means that the arbitrator in independent and impartial. One of the tests applied to determine the independence of the arbitrators is the notion of 'relative reversibility'. In order to understand its application, we can take an example where a dispute exists between a buyer of nationality A and seller of nationality B. If the nationalities of the buyer and seller were reversed, the stance of the arbitrator should remain the same. If there is any difference in the stance, the arbitrator would not be classified as neutral.

Abundance of investment treaties with inherent biases

As of now, it is estimated that there are nearly 3,000 investment treaties that provide access to the similar terms that have already adversely affected the countries. The states have realised the ills that have occurred to them due to multiple instruments like Bilateral Investment Treaties (BITs), Foreign Direct Investments (FDI) and other International Agreements. However, as of now they are still bound by them and are forced to adhere to the terms and conditions to protect diplomacy

[3] Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, The Political Economy of the Investment Treaty Regime (Oxford University Press, 2017).

[4] *The Owners of the Steamship Catalina and The Owners of the Motor Vessel Norm,* 61 Lloyd's Rep. 360 (1938).

and respect International Law in which lies the greatest irony. They are forced to follow the agreements based on principles which violate the core of International Law itself. It is pertinent to note that the disputes do not arise instantly and often end up arising 15-20 years after the treaty has been signed. Thus, the nations are stuck in the loop where despite recognising the outcomes of such treaties, they have to comply with the law for the time being.

Moreover, with further economic liberalization and increasing global cooperation, it is essential that the investment activity continues. The doubts raised over the current regime help no one as the corporations result in missing out big investment and growth opportunities while the states will potentially miss out on cash inflow and the technological advancement that is brought in by foreign investment. It also aids the diplomatic relationship between nations and global integration. Hence, this cannot be done away with and is instrumental to keep the world running. Therefore, there is a need for a change in approach to do away with the doubts and the potential shortcomings and amend it to make it much more equitable and feasible for the states to pursue and maintain a balance of rights. This is something which the BRICS has sought to challenge and change. The development of an equitable dispute resolution system will be a sure shot step towards the achievement of this goal.

Bias and arbitration

The conflict still lies in the bias of the arbitrators where they may be used to apply different domestic and institutional laws while carrying out the proceedings and are reluctant to abide by the soft law instruments. Moreover, the confidentiality of arbitration proceedings leads to further disputes over the issue. Therefore, despite the application of all kinds of laws, it is still necessary to sort out the issues related to the bias of the arbitrators which can largely be resolved through the rectification of the selection process.

The main purpose of the elimination of bias in arbitration is the decision of legal claims on their merits. There should be no preconceived notion in the mind of the decision maker about the outcome of the case. The key desire when it comes to the selection of any arbitrator is perfect objectivity. Perfect objectivity in any instance is hard to achieve. However, the basic elements of the process can be identified as sufficient distance from the litigants and a willingness to understand the issue om its merits and give a fair decision.

When it comes to cross-border disputes, the want for adjudicatory neutrality is further increased. There is a want for a level-playing field where both the parties can be assured of a decision based on fairness and justice and not one of bias. It can also be a great tool for fulfilling the expectations the parties harboured

when they entered into an agreement. I international arbitration, more often than not, there is a co-existence of the nomination of the arbitrators by the parties and the institutional appointing authorities. In such situations, there is a possibility of a conflict between the criteria to determine impartiality adopted by the arbitral institutions and the standards laid down by the Domestic Courts of the parties.[5] Therefore, there is always a possibility of discontentment when it comes to the selection of an arbitrator.

In such cases, the objections raised by the parties also need to be analysed carefully. There is a possibility that the request for removal of arbitrators is nothing more than attempts to get an unfavourable decision dismissed. The empirical studies conducted do show that the parties in an arbitration prefer 'fair and just results' in the arbitration process. The candidates with a strong legal acumen, fair-mindedness and intelligence remain the ones preferred by the parties as arbitrators.[6]

In a study conducted by Richard W. Naimark and Stephanie E. Keer, the candidates were asked to rank the importance of a number of variables in the arbitration process before the commencement of the arbitration and after the delivery of the award. They ranked, 'fair and just result' as the most important variable with 90% of respondents and 75% of claimants voting for the same. The developing countries as well as the least developed countries are also pushing for the same at the International Level. This shows the need to develop a fair and just mechanism of arbitration.

BRICS: Growth showing need for a robust legal system

The growth has been attributed to the rising foreign investments in these countries. A 2013 report of the UN Conference on Trade and Development (UNCTAD) stated that, *"Since 2010 developing and transition economies have absorbed more than half of global FDI inflows, and in 2012 FDI flows to developing economies, for the first time ever, exceeded those to developed countries—with US$130 billion more."*[7] The BRICS countries also survived the economic downturns better as the flows in 2019 fell just by 30 per cent which is significantly lower compared to the FDI inflow for the develop world, It also recovered faster post the 2008 economic crisis when the share of BRICS in global FDI reached 20 per cent in 2012 more than tripling from the 6 per cent in 2000.

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5 William Park, Arbitrator Bias, No. 15-39 Boston University School of Law, Public Law Research Paper (2015).

6 Richard W. Naimark and Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People,* 30 Int'l Bus. L. 203 (2002).

7 UNCTAD, Global Investment Trends Monitor (2013).

BRICS has not only been an attractive investment destination but also invested significantly in developing and least developed countries. In 2000, the foreign investment from the BRICS nations was just $7 Billion which grew significantly to $126 Billion in 2012. This accounted for 9% of the total world flows. UNCTAD observed that, *"The rise of FDI in manufacturing, which has positive consequences for job creation and industrial growth, is becoming an important facet of South–South economic cooperation."*[8] Therefore, the BRICS nations are emerging amongst the fastest growing economies while also leading other countries of the Global South towards economic prosperity.

CAGR (Compounded Annual Growth Rate) of FDI in BRICS countries
(in USD millions)

Year	Brazil	Russia	India	China	South Africa
2014	63486	29152	34577	268097	5772
2015	49961	11858	44009	242489	1729
2016	53700	37176	44459	174750	2235
2017	66585	25954	39966	166084	2007
2018	59802	13228	42117	235365	5447
2019	65386	32076	50610	187170	5125
2020	**24778**	**9679**	**64351**	**212476**	**3106**
CAGR	**-13%**	**-15%**	**9%**	**-3%**	**-8%**

Source: OECD and IMF

It can be seen from the above table that over the years, the FDI inflow has been significant and India and China showcased a year-on-year increase even during the Pandemic. This can largely be attributed to the capability of both the countries to produce medicines and medical equipment which was crucial in aiding the fight against the Pandemic. BRICS nations consist of more than 40% of the global population and their contribution to Global GDP is 33%. As per the estimates of International Monetary Fund (IMF), BRICS countries are expected to account for more than 50% of the global GDP by 2030.[9] This shows that the BRICS nations possess immense potential for investment and their coming together signifies a want to influence world economy at a larger scale.

[8] Gayle Tzemach Lemmon, Investing in (and from) the BRICS, Council of Foreign Relations (2013).

[9] Ghousia Khatoon et al., *Analysis of Foreign Direct Investment Inflows of BRICS Countries for Pre-Pandemic Period and during Pandemic Crisis*, 11 Information Sciences Letters 809–815 (2022).

When the countries undertake a task of this magnitude, there is always a potential for disputes and disagreements. In such a scenario, it is essential that a robust mechanism for dispute resolution is present. The efficiency, affordability and fairness of such a mechanism is one of the major factors which investors consider when investing in a country. The BRICS nations are culturally different, have different forms of governments and legal systems. Therefore, the disputes can be a major cause of conflict and hinder their economic growth if a stable method of their resolution is not in place.

Arbitration offers a significant advantage over other methods of dispute resolution as it allows the parties to be greatly involved in the dispute resolution process and provide for an equitable award. Unlike the traditional legal systems, which are largely overburdened with the pendency of cases, arbitration offers an efficient mechanism for the resolution of disputes. Moreover, as stated by Aristotle, arbitration is based on equity and a fair arbitrator will lead to a result which will serve the interests of all the parties involved. He elaborated it by stating that, *"An arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity."*[10] The BRICS nations have also emphasized on arbitration and discussed its advantages during the 'Conference on International Arbitration in BRICS — Challenges, Opportunities and Road Ahead' hosted by India. Moreover, as stated earlier, arbitration is the preferred mode of dispute resolution at the global level. Therefore, it is imperative for the BRICS nations to influence the arbitration scenario in order to bring forth a fairer world order.

Understanding the factors behind legal system BRICS countries

One of the defining characteristics of the Global North is that most of the countries can be classified as democracies where the people have a significant role to play in the election of their representatives. On the other hand, the political set ups of the five BRICS countries differ from each other. Russia and China are classified as authoritarian regimes whereas India, Brazil and South Africa are primarily stated to be democracies. However, such a classification seems too simplistic since the system of electing representatives is not the only way one can understand the administration mechanism and legal system of the country.[11]

[10] Andrew Sucre, *Aristotle' s Conception of Equity in Context*, (2013), https://irl.umsl.edu/cgi/viewcontent.cgi?article=1201&context=thesis.

[11] Lucia Scaffardi, *BRICS, a Multi-Centre "Legal Network"?*, 05 Beijing Law Review 140–148 (2014).

A study undertaken by Ferrari in 2010, identifies three macro-families which can be used to understand a nation: *"Rule of Professional law, Rule of political law and Rule of traditional law."*[12] When this approach is applied to the BRICS nations, the following observations are made:

- Brazil and Russia will be a part of the Rule of Political law.
- India and South Africa will be under the Rule of Professional Law. However, the role of political hegemony and tradition still remains significant.
- China would be somewhere in the middle between the Rule of Political Law and the Rule of Traditional Law.

With this perspective, it can be seen that even though the countries differ largely in culture, tradition and mode of governance there is still a degree of commonality in the legal systems, understanding and administration. BRICS is an example of the changing geopolitical relationships and showcases the need to take a new inclusive approach to analyse the interaction between these nations. It should take the economic, institutional and social considerations into account.[13] There are two approaches which have been adopted at present:

Market-Focussed Approach: This approach focusses on binding the legal system and market rules in a way that it is favourable for meeting the economic objectives using *"legal transplant."*[14]

Rights-Focussed Approach: This approach uses the logic of policy transfer and also focusses on social interests.[15]

However, these approaches are largely based on a Western version. When it comes to BRICS, it needs to be understood that, *"The aspect of the BRICS phenomenon as a self-standing legal system not based on constitutional identities or common legal tradition, nor on express legal forms, is totally neglected; in fact, it is supported by 'legal flows' and mutual interactions of policy transfer and constitutional borrowing, that allow it to be a possible alternative to the models of regionalization tested in the western world"*.[16]

Therefore, it is improper to consider BRICS as a revolutionary organisation based on similar ideals and principles which seeks to overturn the existing world order. It is a group which has identified the need for a reform and seeks to gradually

[12] G. F. Ferrari, Crisi economico-finanziara e interventodellostato. Modellicomparati e *prospettive* (2010) p. 100.

[13] F.Fukuyama, The Future of History. Foreign Affairs (2012).

[14] G. Edwards, *Legal Transplants and Economics: The World Bank and Third World Economies in the 1980s—A Case Study of Jamaica, the Republic of Kenya and the Philippines. European,* 2, 243-283 Journal of Law Reform (2007*).*

[15] H. P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law (Oxford University Press (2010).

[16] M. Carducci & S. Bruno, *The BRICS Countries between Justice and Economy. Methodological Challenges on Constitutional Comparison*, 2, 46-58 Sociology and Anthropology (2017).

change the status quo over time. The countries have a huge task on their hands and the challenge of working together despite their ideological differences. It has been observed that, *""The BRICS can play an increasingly important role in helping to improve the health and well-being of the world's poorest countries."*[17]

The BRICS countries have the challenge of transforming trade and economics and adjusting their laws accordingly for the transition to be possible. They need to find a way where common objectives can be achieved using different instruments. The coming together of the BRICS nations shows a willingness to forego their exclusiveness and work towards a shared objective keeping common goals in mind. The efficiency, fairness and acceptability of theDispute Resolution Mechanism will be pivotal to the success of BRICS. However, there are a number of challenges which are to be addressed

Issues of Cohesion amongst the BRICS countries

There has been tremendous growth of arbitration in the BRICS nations in lieu of the rise in foreign investment. However, despite that, there has been limited cooperation at an individual level amongst the BRICS nations. This is evident from the fact that even till date, some members of the BRICS do not recognise the awards given by the other members. For example, India adapted to the changing scenario by making significant amendments to its Arbitration and Conciliation Act, 1996 which brought the rules in line with International Norms.[18]

If one of the parties to an award refuse to enforce it, the aggrieved party can approach the Indian domestic courts for the enforcement of the award. In order for the Indian Courts to enforce the decision, it must meet certain requirements. One of the conditions is that the award should be issued in a country which has ratified the 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' for it to be considered valid by the Indian Courts. Moreover, it should be declared by the Central Government of India that such a country falls under the purview of the convention. As of now, the Indian Government has listed 48 such countries. All BRICS members have ratified the convention. However, there has been no official notification for Brazil and South Africa in India. Therefore, the arbitral award issued in these countries cannot be enforced in India. Moreover, if the arbitrator's decision is not honoured, the aggrieved party has no option but to approach the domestic judiciary in the respective nations. This process can be

[17] GHSi, Shifting Paradigm. *How the BRICS Are Reshaping Global Health and Developments* (2012).

[18] Katarzyna Kaszubska, *A BRICS-only arbitration forum will not be the panacea imagined*, ORF (2016), https://www.orfonline.org/research/a-brics-only-arbitration-forum-will-not-be-the-panacea-imagined/ (last visited Sep 8, 2022).

lengthy, expensive and time consuming. Therefore, there is a need to find a joint solution for such issues.

Protection clauses in BITs of BRICS

Each nation of the BRICS has its own clause for investment protection. The clauses vary since the countries have different standards and are at different stages of development. The increasing globalisation and constant inflow of Foreign Direct Investment has prompted states across the globe to develop Bilateral Investment Treaties (BITs) to establish the rules of investors and the way the investment will be treated. The main motive of their enactment is to attract foreign investors by providing them with assurances regarding their investment while also ensuring that the investments are not done in a manner which is detrimental to the home state.

There is a framework for dispute resolution which is based upon International Standards in each of the BRICS nations. The development has been driven by the BRICS nations being a popular investment destination for foreign investors. The traditional system of justice in most countries across the globe is slow and can involve lengthy resolution of disputes. Therefore, investors prefer faster and more efficient methods like mediation and arbitration for speedier resolution of disputes and protection of their investment.

Why are the BRICS nations apprehensive yet pushing for reform?

The BRICS nations themselves have been on the receiving end of adverse awards under the investor state arbitration mechanism. This has created an apprehension about the fairness of the existing BIT's. For instance, India has been at the receiving end of international awards in the *White Industries case* and in the *Antrix Devas case* where it blamed the broad interpretation of the terms of the treaty by the arbitral tribunals. This prompted India to review its Bilateral Investment Treaties. The objectives of the review were as follows:

- Encouraging Foreign Investments into India.
- Ensure that the rights of investors are protected in a manner that it does not compromise the right of the Government for pursuing domestic policy objectives.

Other BRICS members also followed suit and have been making efforts to find ways for being attractive destinations while not negatively impacting their sovereign power for the regulation of investments. South Africa made a significant change to

its investment policy through a Cabinet Level review in 2007.[19] The system followed by South Africa earlier encouraged all sorts of investments and considered them beneficial to the economy. The changes were aimed at the introduction of a proper regulatory framework which ensures that the incentivisation of FDI is done while examining that the investments are used to contribute positively to the economy.[20]

The enactment of the Protection of Investment Act by South Africa was a culmination of the process. In cases of Dispute Resolution, the Act states that the disputes are to be adjudicated in domestic courts. International Arbitration will only be consented to by the Government once the domestic remedies have been exhausted.[21] Similarly, Brazil also made a unique framework for the facilitation of international investments. A number of Agreements on Investment Cooperation and Facilitation were there which were based on mitigation of risks and preventing disputes as a consequence of foreign investments.

On the issue of dispute settlement, it disallows private investors from initiating arbitration proceedings against the state in the cases where there is a violation of investment treaties. In order to resolve disputes and implementing regulatory framework, a Joint Committee has been set up. It comprises of parties from the government and private members along with the creation of ombudsman under these agreements who acts in conjunction with the committee for dispute resolution.

This shows that the BRICS nations have realised the importance of reviewing BITs in the light of adverse decisions given against them. Moreover, there is also a requirement to streamline the system for enforcing the awards of arbitral tribunal. The BRICS members in general have a paradigm shift where they have modernised investment treaties to suit the changing times. They are attempting to modernise and renegotiate investment treaties, awards and their enforcement.

Towards the development of a comprehensive arbitration mechanism for BRICS

The BRICS is an organisation which is aimed at promoting the influence of emerging and developing economies. It has advocated for the member states to be financially independent and self-sufficient in pursuit of this goal. The self-sufficiency in the field of finance is sought to be achieved through the establishment of the New Development Bank (NDB), which is an institution which provides finance to investment initiatives and projects for the promotion of sustainable development

[19] Leandi Kolver, *SA proceeds with termination of bilateral investment treaties,* engineering news (2013).
[20] UNCTAD, *Shift African investment towards industry, South African Minister recommends* (2021).
[21] Gaye Davis, *SA's new investment legislation slips in under the radar* (2015).

to the member countries of the BRICS, in addition to other emerging market and developing nations.[22] This was a significant step towards the establishment of a more just and equitable world order.

In furtherance of the same principle of enhancement of economic capacities of BRICS and other developing economies, particularly with respect to foreign investments needs a significant reform of the present Investor State Dispute Settlement Mechanisms. The development of fair and transparent dispute resolution mechanism amongst emerging and developing countries is a must for promotion of trust and spirit of cooperation between the countries. It should follow principles of non-discrimination and should be predictable to a certain degree in order to become an accepted and preferred mechanism for resolution of disputes between investors and states.

Proposed features of a fairer system of dispute resolution

- The current system of arbitration suffers from structural bias and partiality due to over-representation of the Western Nations. Therefore, it is important to ensure that the developing countries have more representation in the arbitration panels. This will ensure that the decision-making process is fair and is not solely based on Western Jurisprudence.
- The mode of governance, economic parameters, business environment etc. vary across the globe. Therefore, the decisions should take the unique factors of each nation into consideration before giving a decision. It should also look into the domestic legal system of the state to know the requirements of an enforceable award even if it is not bound by the domestic law of the country.
- The arbitral decisions have often resulted in the States incurring significant financial costs. At times, the cost is of such a large magnitude that it can destabilise the entire economy of a country. Thus, the decisions should be reasonable and should take such local factors into consideration.
- Moreover, there have been instances where adverse decisions have given against countries in arbitration processes. However, the hands of the domestic courts are often tied and they are unable to reverse such decisions. Therefore, it is imperative to develop a mechanism which allows for appeal against such orders.

[22] VII BRICS Summit, 'Ufa Declaration – Ufa, Russian Federation, 9th July, 2015', available online at http://brics2016.gov.in/upload/files/document/5763c20a72f2d7thDeclarationeng.pdf.

Role of BRICS in bringing forth the change

There are a number of mechanisms and rules for arbitration which have been developed at an international level like the ICSID, SIAC, PCA and more. However, nearly all of these methods have been developed with a western perspective in mind. The BRICS could develop its own dispute resolution mechanism for the governance of disputes within its member nations. The mechanism can be expanded to other nations and evolved to be applicable at a global level. It should be developed to provide an alternative to the existing system of dispute resolution prevalent globally and bring forth the idea.

Measures taken towards the promotion of fairness in Arbitration by BRICS nations

Change in the process of the appointment of an arbitrator by India

Under the Indian Arbitration and Conciliation Act, 1996 there was no concrete procedure to make sure that the arbitrator who is appointed to adjudicate the dispute between the two parties is unbiased. In an effort to address the issues related to selection of arbitrators and discouraging bias in the arbitration process, the Arbitration and Conciliation (Amendment) Act, 2015 grants the liberty to the parties to appoint an arbitrator mutually. The number of arbitrators can be freely determined by the parties. If the parties are unable to reach an agreement, the process will be carried out by a sole arbitrator. This is a good step since it grants the power to the parties and provides them with discretionary power when it comes to the selection of an arbitrator.

Section 11 of the Arbitration and Conciliation Act, 1996 provides the procedure for the appointment of an arbitrator. The arbitrator can be of any nationality under the Act, unless the parties have agreed differently. There is a possibility that the parties are unable to come to a mutual agreement for the appointment of an arbitrator. In such a situation, either of the parties can request the appointment by the Supreme Court or a person or Institution designated by the Supreme Court when the case is one related to International Commercial Arbitration. In cases of domestic arbitration, the same task is carried out by the High Court or a person or institution designated by it.[23] Section 12 provides the disclosure which is needed to be made by an arbitrator to ensure that he fulfils the criteria of impartiality and can carry out the process in a fair and impartial manner.

[23] Abhishek Kumar, Selection and Appointment of Arbitrators in India, S & P (2017).

The Section 12(1) of the Act has been amended. It mandates that the arbitrator disclose the following:

> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

The Fifth Schedule provides a number of grounds which can be used as justifiable doubts in order to raise doubts over the relationship of the client with the parties. Some of the grounds include:

- The presence of a business relationship of the arbitrator with one of the parties.
- The presence of legal relationship between the parties or the law firm which the arbitrator works and one of the parties.
- A close family relationship of the arbitrator with one of the parties.
- Major financial interest of the arbitrator with one of the parties.
- Previous involvement of the arbitrator in the dispute involved.
- The arbitrator shares a close relationship with a third party who will be affected by the outcome of the dispute

If the parties want to raise concerns, they can do so under the grounds mentioned in the Fifith and the Seventh Schedule of the Indian Act.

The Punjab and Haryana High Court in *Reliance Infrastructure Limited Vs. Haryana Power Generation Corporation*[24] that the words "*or has any other past or present business relationship with a party"* mentioned under the 1st Entry of the fifth schedule do not include a former employee, consultant or advisor of the party. It stated that the principles of Strict Statutory Interpretation will be applied when grounds under Section 12 of the Act have been taken. The Delhi High Court also allowed a past employee to act as an arbitrator in the case of *Hindustan Construction Company Limited* v*. IRCON International Ltd.*[25]

The Indian Courts have also given several positive decisions after the Amendment to the Act. In *Perkins Eastman Architects DPC* v. *HSCC (India) Limited,*[26] the Supreme Court faced the issue of appointment of arbitrator by one of

[24] Reliance Infrastructure Limited v. Haryana Power Generation Corporation, 2016 (6) ARBLR 480 (P&H).
[25] Hindustan Construction Company Limited v. IRCON International Ltd, ARB.P. 596/2016.
[26] Perkins Eastman Architects DPC v. HSCC (India) Limited, 2019 (9) SCC OnLine SC 1517.

the parties or their officers and employees. The Court stated that, *"There were two categories of cases. The first category comprises of cases where the managing director is himself named as the arbitrator and also has the power to appoint any other person as an arbitrator. The second category is one where a managing director is merely empowered to appoint an arbitrator but does not act as an arbitrator himself."* The Court took the view that both of the categories suffer from invalidity since the independence and fairness of the arbitrator is questionable in both the circumstances.

In another significant interpretation of the Indian Act, the Bombay High Court in the case of *DBM Geotechnics & Constructions Pvt Ltd* v. *Bharat Petroleum Corporation Ltd.,*[27] held that in case an arbitrator is disqualified under 7th Schedule of the Indian Act, it will also disqualify him from any contractual right he might possess as the arbitrator to the dispute. However, the Indian Supreme Court affirmed this decision in the case of *TRF Ltd.* v. *Energo Engineering Projects Ltd.*[28] where it allowed the appointment of an arbitrator by an ineligible arbitrator if allowed would practically allow the ineligible arbitrator to take part in the arbitration process and influence the outcome by proxy. It reaffirmed the stance taken by the Bombay High Court and held that, *"once an arbitrator has become ineligible by operation of law, he cannot nominate another person as an arbitrator."* These decisions can provide the guiding principles for a joint mechanism for arbitration by the BRICS nations.

India allowing India parties to choose a foreign seat of arbitration

If the parties involved in an arbitration were Indian parties, they were not allowed to hold the arbitration at a foreign seat since it was considered to be contrary to public policy. However, this argument was rejected by the Supreme Court of India in the case of PASL Wind Solutions Private Limited v. GE Power Conversion.[29] It held that 'party autonomy' is the bedrock of the arbitration process and termed it as "the brooding and guiding spirit of arbitration". It held that, "Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals….".

This was a significant decision by the Supreme Court of India as it will give a great push to the arbitration process. There are a number of foreign companies which have wholly owned subsidiaries in India and may not prefer India as a seat for arbitration for the fear of bias. This allows them to undergo arbitration in a

[27] DBM Geotechnics & Constructions Pvt Ltd v. Bharat Petroleum Corporation Ltd., 2017 (5) ABR 674.
[28] TRF Ltd. v.Energo Engineering Projects Ltd., (2017) 8 SCC 377.
[29] Special Leave Petition (Civil) 3936 of 2021 (arising out of GHC judgment dated November 11, 2020), Supreme Court of India Judgment dated April 20, 2021.

neutral territory, thus widening their options. The Court has not commented on the flexibility in terms of law, so for the time being, the applicable law will be Indian Law. However, it signifies a sure step towards the adoption of arbitration and will provide guidance for the development of a joint arbitration mechanism involving BRICS.

Establishment of a BRICS Dispute Resolution Centre at Shanghai

All the member nations of the BRICS have a legal framework on arbitration which is based on international standards. The preference of investors and businessmen for these methods is well known and the nations have been using these methods for dispute resolution. India and China were the top two users of the Singapore International Arbitration Centre in 2015. This shows that arbitration does form a significant part of the business dealings of these nations.

Therefore, in furtherance of the ambition of the BRICS member countries to reform arbitration, a Dispute Resolution Centre was established at Shanghai. However, the centre has failed to take off and has not received any application for arbitration since its inception. The concept was novel as the centre had its own rules and model clauses. The website of the centre is partly functional and it does provide an option to submit an application for arbitration. However, the last update on the website with respect to an activity or an event has been in 2018 and post the onset of the Covid-19 Pandemic, the future of the Centre is uncertain.

Despite its failure, it can be seen as an attempt by the BRICS nations to provide an alternative forum to arbitration with just rules and better understanding of the ground level realities of the least developed countries and the developing countries. In the near future, the centre needs to be revived or a new one needs to be established so that the BRICS nations can set an example for the conduct of arbitration proceedings across the globe. Moreover, in order to ensure the success of the Centre, they must ensure that maximum possible arbitrations which involve a BRICS member country, as one of the parties are conducted at such a centre.

Establishing Rules of Procedure for BRICS Expert Committee on Arbitration

The BRICS nations are intent on the development of a model for single arbitration despite their differences. The task is proving to be monumental and has taken a significant hit particularly during the post pandemic phase. However, prior to the Covid-19 Pandemic, there were certain developments to fulfil their motive. The intention of the BRICS nations was expressed by a Russian lawyer who stated that, *"It is planned to create a BRICS+ single arbitration centre, comprising representatives of all countries. This initiative will be discussed by an international working group. Experts will present proposals from all the countries to develop a single*

arbitration standard. This is a rather complex procedure, requiring consideration of interests and observation of public order of all countries, development of a single website, a common system and common rules or reservations referring to common rules, single recommended list of arbitrators, elements of collective governance and establishment of such centres."[30]

In furtherance of the same, Rules of Procedure of BRICS Expert Committee on Arbitration have been established. It is a collaboration between the official organisations of lawyers of all the BRICS member countries which is established under the Legal Forum of the BRICS. Its purpose is to, "promote the overall development of arbitration in the BRICS countries, to achieve the integration of legal culture in the region, to prevent and resolve disputes arising within the region, and to discuss the significant issues as to refine and improve international arbitration rules and recommend regional arbitrators."[31]

However, the expert committee is yet to hold meetings or make any comprehensive progress towards the development of a concrete mechanism for an inter-BRICS dispute resolution mechanism. The Rules of Procedure are comprehensive and are sufficient to effectively guide the process of developing a concrete system of arbitration which can provide an alternative to the existing system.

India-Brazil BIT: A recipe of what lies ahead

India and Brazil signed a new investment agreement in January 2020. It is significant in the sense that it has abandoned the practice of investor-state arbitration in the favour of state-to-state arbitration. Moreover, it has taken the right to grant compensation award from the tribunal and limits the role of the tribunal to interpret the BIT and order the parties to conform to any measure which they are not complying with. The Preamble of the BIT states that its intention is to, *"maintain a dialogue and foster government initiatives that may contribute to an increase in bilateral investments."* An investor is not provided with the right to directly bring a claim against the state under this BIT.

The move seems to be radical at the first instance. However, the sentiment regarding investment treaties has been changing on a global level. The call for reforms has been heard by UNICTRAL as well, whose Working Group III is looking into options to reform investor-state arbitration.[32] Europe is also looking to change its arbitration landscape with more than 168 BITs along with their sunset clauses

[30] *Brics Nations Look Establishing Common Arbitration Centre*, SILK road briefing (2019).
[31] Rules of Procedure of BRICS Expert Committee on Arbitration.
[32] United Nations Commission on International Trade Law, Working Group III: Investor-State Dispute Settlement Reform, 2002.

to be terminated whenever there is a ratification of a new multilateral treaty.[33] They also plan to replace the investment-state arbitration mechanism with a court structure.

India and Brazil have amended their model BITs in the recent times after due deliberations. The approach adopted by India and Brazil in their model BITs is very different. India's Model BIT allows for investor-state arbitration once the local remedies have been exhausted by the investor for a period of five years. Brazil's model BIT on the other hand does not provide for investor-state arbitration. It adopts a scheme which provide for a mechanism of dispute resolution through joint consultations at the initial stage. If the dispute is not resolved, it provides for state-to-state arbitration. Therefore, it took a lot of effort to draw out a balanced BIT despite the differences in individual approaches.

The India-Brazil BIT incorporates features from the Model BITs of both the countries and also adds certain new elements. The approach of preventing disputes and their resolution looks to have had a greater influence of the Brazil Model BIT. Article 18 of the India-Brazil BIT provides that if either of the states are of the view that a measure violates the terms of the BIT, the matter can be referred to it to a Joint Committee which has members from the government of both the parties. The committee can recommend a general measure or one for the specific investor. It can also call representatives of the affected investor before it. Article 19 provides that if a dispute cannot be resolved using this method, the matter can be referred to state-state arbitration on the mutual agreement of both the parties.

The Brazil Model BIT allows the award of compensation. However, in the Brazil India BIT, the power to grant compensation has not been provided to the tribunal. Article 19(2) of the BIT states that, *"The purpose of the arbitration is to decide on interpretation of this Treaty or the observance by a Party of the terms of this Treaty. For greater certainty,* ***the Arbitral Tribunal shall not award compensation****."* Thus, the BIT is primarily aimed at resolution of disputes in an amicable manner without the imposition of hefty fines and compensation in an arbitrary manner which can be detrimental to the economy of the both the countries. It successfully accommodates some of the important aspects of the model BITs of both the nations and attempts to provide a fair and just mechanism for resolution of disputes. The components of the BIT can be important in deciding the future course of action taken by the BRICS when it seeks to develop a joint arbitration mechanism.

[33] Tom Jones, The pendulum has swung back, Global Arbitration Review (2019).

Final considerations

BRICS is an organisation made by five of the emerging economies in the world who have the potential to dominate International Trade in the years to come. They have recognized that the current system of dispute resolution is largely built by the Western Countries and has several unfavourable characteristics attached to it. Therefore, they seek to provide an alternative system of dispute resolution. At an individual level, all of the BRICS member countries have made changes to their dispute resolution mechanism, modified and amended BIT's and shifted to a system they believe to be relatively safer from the existing system of arbitration.

They have also made their ambition of providing an alternative system of Dispute Resolution public time and again. In furtherance of the same, they have gone to the extent of establishing a BRICS Dispute Resolution Centre in Shanghai and the Rules of Procedure of BRICS Expert Committee on Arbitration. This shows that the intention to provide an alternative system has been there. The major deterrent to this ambition has been the lack of cohesiveness amongst the BRICS nations and the impact of the changed geopolitical situations since the onset of the Covid-19 Pandemic.

This has changed the focal point of the discussions between the BRICS member countries who are emphasising economic recovery, global trade, advancement of science and technology, medicine and more. As a result of this, dispute resolution and arbitration seem to have taken a back seat. It is imperative that the BRICS member nations shift their focus back to arbitration and dispute resolution since it will form a key part in their future ambitions. Moreover, the lack of cohesiveness amongst some BRICS nations themselves is another hindrance for the success of joint initiatives. For example, India and China are often involved in geopolitical skirmishes and tensions. The BRICS countries had to be careful and chose to keep a neutral stance in the Russia-Ukraine War. The challenge on their hands is to bring about a change in a system developed by the Western countries while remaining dependent on them as a market for the goods and services provided by the BRICS countries.

The establishment of a fair and equitable system of dispute resolution is contingent on presenting a united front and showing the changed system in action. The BRICS countries need to work towards the system, establish a functional institution for arbitration and use the system to prove that a real alternative exists. If all the steps are fulfilled, then it will be a shot in the arm for the BRICS nations who are committed to the development of a fairer and just world order.

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