



BACKGROUND PAPER

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

Preamble

As India prepares to host the 8th BRICS summit in October this year,¹ this unique conglomerate of nation states stands on the brink of taking decisive strides in establishing a more equitable international economic order. The edifice of BRICS rests upon socio-economic and political co-operation between its members, which are among the fastest growing economies in world. In the run-up to the 2016 summit, it becomes important to assess, evaluate and debate ideas and insights regarding arbitration and dispute resolution mechanisms which are integral to economic growth and stability.

The present conference titled, *'International Arbitration in BRICS: Challenges, Opportunities and Road Ahead'*, ("Conference") is being hosted by the Government of India (Department of Economic Affairs, Ministry of Finance), in collaboration with the Indian Council of Arbitration (ICA) and Federation of Indian Chambers of Commerce & Industry (FICCI). The Conference presents a forum for engaging in this crucial discourse to promote a stronger arbitration regime and culture in the BRICS countries. This Consultation Paper seeks to highlight the main areas warranting debate, pertaining to three main segments:

- a. Arbitration and dispute resolution: Focus on BRICS countries;
- b. Dispute settlement and enforcement of Treaty Awards; and
- c. Towards establishment of an international arbitration mechanism in BRICS.

Each of these segments has its respective concerns needing deliberations reforms and resolution, which must be achieved through cooperative brainstorming and common consensus. This Consultation Paper is divided into three sections, listing the issues and points for discussion for these three thematic segments, with the intention to initiate greater debate as we approach the 8th BRICS Summit.

Arbitration and Dispute Resolution: Focus on BRICS Countries

The introductory session of the conference should help lay out a succinct yet comprehensive description of alternative dispute resolution ("ADR") regimes in BRICS member states. Pertinently, experts from BRICS countries will share their experiences in dispute resolution within their respective jurisdictions. Since its conception, BRICS has played an important role in the world economic order, particularly in global investments.

¹ More details on the 8th BRICS Summit to be hosted by India, are available online at <http://brics2016.gov.in/content/innerpage/8th-summit.php>.

This trend has occurred in tandem with the evolution of dispute resolution frameworks within member states, to make them more amenable to generating investor confidence and ensure adequate checks and balances. The ultimate objective is to ensure that the legal framework manages these huge inflows of foreign capital.

The objective of this session is to deliberate upon the existing statutory frameworks governing arbitration (and other dispute resolution mechanisms) within the BRICS members. The discourse will seek to provide details both from a domestic view and from the perspective of a foreign investor, as well as report on recent judicial decisions and advice about pitfalls regarding arbitration.

This introductory segment sets tone for the remainder of the conference sessions which will explore more specific facets of international arbitration. Given the diversity of speakers from each of four member states besides India, namely Brazil, China, Russia and South Africa, this session presents an interactive platform to debate the following main points:

- a. Evolution of ADR mechanisms within the respective jurisdictions of the member states;
- b. Statutory framework governing arbitration;
- c. Recent trends on international arbitration involving the BRICS member states; and
- d. Any other notable references that fit to the theme of the discussion.

Dispute Settlement and Enforcement of Treaty Awards

Many States have faced adverse awards under investor state arbitration which has triggered a review of the Investor-State Dispute Settlement (ISDS) mechanism. India has faced its first adverse treaty award in the *White Industries* case and lately in *Antrix Devas* case, largely due to the broad interpretation of treaty terms by arbitral tribunals. India initiated a review of its Bilateral Investment Treaties ('BITs') with a two-fold objective in mind:²

- a. To encourage inflows of foreign investments; and
- b. To balance the rights of investors with the sovereign right of the government to pursue domestic policy objectives.

Apart from India, other members of BRICS have also devised ways to balance between safeguarding investments while not compromising the sovereign power of the state to regulate investments within its jurisdictions. For example, South Africa revamped its investment policy, pursuant to a review initiated at the Cabinet level in 2007.³ The transition has witnessed a fundamental shift from considering all investment as sound and beneficial for the economy, to stipulating certain regulatory framework which balances the incentivising FDI with the utility of these investments for positive contribution.⁴ In light of this transitional phase, South Africa enacted its Protection of

² Prabhash Ranjan, 'Antrix-Devas: A bit of protectionism', available online at <http://thewire.in/57586/antrix-devas-a-bit-of-protectionism>.

³ Leandi Kolver, 'SA proceeds with termination of bilateral investment treaties', available online at http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21/rep_id:4136.

⁴ UNCTAD, 'Shift African investment towards industry, South African Minister recommends', available online at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=292&Sitemap_x0020_Taxonomy=UNCTAD%20Home.

Investment Act last year, when it received the President's assent in December.⁵ On the question of dispute resolution, this Protection of Investment Act allows for the disputes to be adjudicated in domestic courts, while permitting the government to consent to international arbitration only after the exhaustion of domestic remedies.⁶

Brazil is another member state which has a unique framework for international investments. In recent years, it has signed several Agreements on *Investment Cooperation and Facilitation* which establish an institutional framework for risk mitigation and prevention of disputes arising out of foreign investments. Specifically, pertaining to dispute settlement, private investors are disallowed from initiating arbitration proceedings against the state, in cases of violation of any investment treaties, including BITs.⁷ Instead, a Joint Committee comprising governmental and private parties' representatives, is set up for the implementation of the agreement framework, including dispute settlement. An ombudsman is also created under these agreements to act in coordination with the Joint Committee in resolution of disputes.

BRICS nations have experienced adverse decisions and a review of the BITs is an important exercise. Further, the related challenges faced by investors in enforcement of treaty awards may also require attention. Being part of an economic and political bloc envisioning a greater role in the global economic order, it is imperative for India to learn valuable lessons from its counterparts pertaining to investment treaty arbitration and its consequences, as it looks to rework the governing framework for BITs within its jurisdiction. The present section presents an interesting opportunity to modernise and restructure investment treaties in India, the enforcement of treaty awards, and further the abovementioned objectives. Other members of BRICS have undergone similar paradigm shifts regarding foreign investments, investment treaty disputes, and treaty awards and their enforcement. These discussions can *inter alia* be pertinent to the following points:

- a. Reasons triggering this policy change towards investment treaties, i.e. from an extensively investor friendly approach to a more balanced approach;
- b. Implication of this transition for disputes arising under investment treaties and other legal frameworks;
- c. Discussion on the evolution of indigenous mechanisms to ensure investor safeguards, as well as the right of the sovereign to determine the beneficiary state's public policy;
- d. Enforcement framework under the indigenous investment regimes; and
- e. Any other notable references that fit to the theme of the discussion.

Developing an International Arbitration Mechanism in BRICS

BRICS envisions a greater influence of emerging countries and developing economies in the global economic order. In pursuit of this vision, since its conception, BRICS has advocated the need for financial independence and self-sufficiency for its member states

⁵ Gaye Davis, 'SA's new investment legislation slips in under the radar', available online at <http://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-law>.

⁶ Id.

⁷ For example, in 2015, Brazil entered into two such agreements with Mozambique and Angola. Copies of these agreements are available online at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR; and http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-afi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280, respectively.

and these economies. The 7th BRICS Summit hosted in Ufa, Russia, witnessed the establishment of the New Development Bank (“NDB”), which has been envisioned as an institution for financing infrastructure investment and sustainable development projects in BRICS and other emerging markets and developing countries.⁸ This was a strong first step towards fulfilling its envisioned ideals of a more balanced world economic order. The institution seeks to be seminal to enhancing mutual cooperation in important areas pertaining to foreign investments between the member states of BRICS, as well as funding infrastructure investments in other developing countries.

This principle of enhancing economic capacities of BRICS and other emerging and developing economies, especially regarding foreign investments, also brings to the forefront the impending need for reforming the existing Investor State Dispute Settlement (“ISDS”) mechanisms. It is necessary to to promote a culture of trustworthiness amongst emerging and developing countries, provide certainty of dispute resolution, and highlight the cultural, social and economic similarities between developing countries. Arbitration mechanism must be transparent, non-discriminatory and predictable so that it becomes an accepted and preferred mechanism for investor state dispute settlement. These features should include the following:

- a. Ensuring adequate representation of developing countries on the arbitral panels of the proposed institution, thereby eliminating structural bias and partiality;
- b. Greater appreciation of the unique challenges and aspirations of governments and balancing out the same with private investor interests;
- c. Ensuring a more balanced understanding of concepts and standards used in domestic legal systems;
- d. Imposing financial liabilities or costs while appreciating its ramifications on the existing financial conditions in developing countries and ensuring that such costs do not undermine the financial stability of local governments; and
- e. Allowing greater options to appeal awards or adverse orders in cases where it is justifiable, thereby imparting greater flexibility in the dispute resolution process;
- f. Address the concerns regarding multiplicity of proceedings and forum shopping;
- g. Ensure a mechanism for early dismissal of frivolous claims.

As BRICS represents the *de facto* vanguard of such developing economies, it must take the first steps towards pursuing these reformatory actions.

This session therefore allows a chance to debate the viability, modality and overall structural framework, and the objectives and vision of such entity mechanism. The session may involve discussion on the following areas:

- a. The need of an inter-BRICS dispute resolution mechanism along the lines of other ISDS mechanisms like ICSID, SIAC, EU Investment Court etc.;
- b. The tentative structure and operational framework of this mechanism;
- c. The role of this prospective mechanism in furthering the goals of safeguarding investor rights as well as ensuring a sustainable development of BRICS’ member states;
- d. The expansion of its services to non-BRICS nations; and
- e. Any other notable references that fit to the theme of the discussion.

⁸ VII BRICS Summit, ‘Ufa Declaration – Ufa, Russian Federation, 9th July, 2015’, available online at <http://brics2016.gov.in/upload/files/document/5763c20a72f2d7thDeclarationeng.pdf>

Conclusion

This conference is an important precursor to the 8th BRICS Summit, and presents a crucial opportunity for reviewing various aspects of international arbitration and treaty awards, and safeguarding investors' interests. Outcomes at this conference could go a long way in better understanding and optimally utilising the legal framework governing international arbitrations involving BRICS member states.

The suggestions and inputs generated through rigorous and thorough discourse in the various sessions, may be drafted into a document that captures the way forward for presentation at the BRICS summit in October, for the necessary action of member states.
