IV BRICS LEGAL FORUM

Moscow
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BOOK OF ABSTRACTS

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Book of Abstracts

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Dear participants!

On behalf of the Association of Lawyers of Russia, I would like to welcome you at the IV BRICS Legal Forum.

Our Forum has today brought true professionals, lawyers from Russia, China, Brazil, India and South Africa.

Our main goal is to strengthen contacts and interaction of the law communities of our countries, together find solutions to our common problems.

The BRICS Legal Forum is an open platform for legal cooperation and professional exchange of experience and ideas among lawyers of the BRICS countries, promotion of «legal diplomacy», exchange of legal theory and practice, using law as an instrument for economic cooperation and social development of certain countries, strengthening of the rule of law and improvement of international law, working together on improving the status of lawyers, development of legal profession, establishing a comprehensive cooperation with international legal institutions.

The main purpose of the Forum is assistance in solving problems related to legal support of economic cooperation, realisation of major infrastructural projects, development of international financial and legal institutions.

Conditions for interaction between our countries are dictated by universal challenges of our time, new opportunities are being created, serious projects are being realised.

Today, one of the key challenges facing the humanity is the development of electronic technologies, which changes both the structure of the economy and numerous social relations.

I think we need to join all the legal potential of our countries on creating a regulatory legal framework for digitalisation of the economies of the BRICS countries. At present, no one has such experience. Whereas, this will contribute to a wider development of economic contacts between our countries.

Naturally, close contacts between lawyers aim to reduce trade barriers, implement such rules that would contribute to the development of business.

Creation of its own payment system by the BRICS countries, as well as a currency reserve pool, which would serve as the basis for protection against global pressure in terms of liquidity, will also be a subject of discussion at our Forum. Moreover, apart from these issues, BRICS is considering the initiative of creating an alternative rating agency.

The idea of establishing a BRICS rating agency was initiated firstly in 2015 during the Russian presidency period. It has been particularly important both for BRICS and all the emerging markets, where risks are higher than in developed countries, and where is often a lack of reliable data. At the same time, it is commonly known that the decisions on investing in one country or another are mostly conditioned by the ratings.

According to the poll carried out in early 2016 among 110 professionals from 24 countries of the world in the sphere of

investment, which published in the Annual report of the BRICS Business Council for 2016, the current credit ratings have many limitations and may cause profound mistakes in predicting crises. We should not forget about political preferences. And if adding to this the problems regarding the transparency of the methodology used by the «big three», we can speak about harmful consequences of its dominancy not allowing the economies and financial institutions of developing countries to obtain proper assessments.

In my opinion, at the Forum it is necessary to draw particular attention to international treaties and model rulemaking, development and harmonisation of legislation of the BRICS member states, ensuring international recognition and protection of intellectual rights.

We should get the tasks facing us being solved in parallel and quickly enough, which is impossible without involving a global research and technical experience. From this perspective, the international cooperation becomes a *sui generis* key for a rapid modernisation of the economies of the BRICS countries. It seems that the cooperation of the BRICS countries could play a significant role in modernisation and sustainable development. In certain BRICS economies a considerable experience has been gained, modern technologies have been used in different branches of the economy, which creates particular conditions both for expanding bilateral relations between the countries and developing a multilateral cooperation.

We would like to believe that our Forum will become a common platform in the sphere of countering laundering proceeds of crime and fight against financing of terrorism. In this regard, due to the lack of an international treaty uniting the BRICS member states, the priority is a gradual creation of documents determining the basis of cooperation and elaboration of a universal international treaty embodying a common approach to accomplishment of tasks as well.

Dear colleagues! I think it is important to hold within the Forum an expert discussion on the joint countering terrorism as one of the most pressing issues in today's realities. In the context of the fight against terrorism, main areas of cooperation are exchange of information and monitoring of persons suspected of terrorist activities in the territory of BRICS countries, elaboration of a universal definition of terrorism and promotion of a comprehensive convention on international terrorism, signing an interbank agreement for preventing financing of terrorist and other illegal cross-border activities.

I hope that the Forum will take place in a working and constructive atmosphere of exchanging views and proposals, which would be useful in solving the tasks facing us. I wish all the participants and guests success in their work, constructive, creative and working contacts, which would definitely make an invaluable contribution to the development and prosperity of BRICS, as well as to the improvement of the quality of life in our countries.

Sergey Stepashin
Chairman
Association of Lawyers of Russia

Moscow Declaration

(Moscow, 1 December 2017)

WE, representatives of the legal communities of the BRICS member states, having gathered here in Moscow, Russian Federation, on 30 November – 1 December 2017 at the IV BRICS Legal Forum entitled «Interaction between the legal systems of the BRICS member states: towards an equitable global order»;

CONSIDERING the provisions of the final documents of the leaders summits of the BRICS member states, including the BRICS Leaders Xiamen Declaration (Xiamen, China, 4 September 2017);

SUPPORTING the objectives to create a more just, equitable, stable, democratic, representative international political and economic order rooted in the core values of social and human rights and the rule of law;

RECOGNISING the need to enhance cooperation within BRICS, based on the principles of equality, respect for sovereignty and mutual benefit;

ATTACHING great importance to the development of mutual understanding and dialogue amongst the legal community of BRICS for the promotion of the rule of law to preserve and promote human dignity and freedom through equitable and inclusive social, economic, political and cultural development;

STRIVING to accomplish the spirit of the 2014 Brasilia Declaration, 2015 Shanghai Declaration and 2016 New Delhi Declaration of BRICS Legal Forum by forming practical structures for implementation and monitoring

AFFIRMING the importance of strengthening the fruitful cooperation between the BRICS member states in the sphere of law and jurisprudence, as well as the need to establish more effective conditions for exchange at the professional and academic level;

DECLARE hereby as follows:

1. Cooperation in the sphere of law, which encompasses economic, social and other spheres of human enterprise, is integral to the development of BRICS and needs to be acknowledged as an important part of the BRICS initiative;
2. The main objectives of legal cooperation within BRICS are:
   - Exchanging experience between legal communities at the institutional level amongst the judges, lawyers and legal academics in different spheres, in particular regarding to national doctrines and practices for business and international trade;
   - Organisation of an effective communication and exchange of knowledge, students and faculty between law schools of the BRICS member states;
   - Development of professional relationships and business contacts between legal practitioners of the BRICS member states, by providing platforms for collaboration, networking and exchange of knowledge and practices and publishing the outcomes thereof;
   - Establishment of a BRICS Legal Forum «think tank» as a Centre for Legal Policy for BRICS to conduct research and carry out monitoring of legal aspects of BRICS functioning, including those which contribute to the promotion of the rule of law as constitutionally entrenched in each jurisdiction to achieve inclusive human development;
   - Establishment of a Board of Governors for policy direction and a Panel of Arbitrators and common institutional rules to coordinate and fuse the functioning of the BRICS Dispute Resolution Centers already established at Shanghai and New Delhi and the proposed Centers in Brazil, Russia and South Africa, to create a wider and broader framework of neutrality under the BRICS framework, for disputes arising within and outside of BRICS, and to set in motion

a time bound plan of action for implementation. The day to day administration and conduct of affairs of these centers will continue to vest in the respective jurisdictions. The concept paper proposed by the Bar Association of India will be fine tuned by January 31, 2018 and adopted as a Road Map by email circulation by the steering committee of the Forum, which is mandated to take further steps in this direction.

3. We propose the following as further areas of legal cooperation within BRICS:
   - Organisation of networking structures aimed at exchanging knowledge, information and best practices between judges, advocates, prosecutors and other representatives of legal professions of the BRICS member states;
   - Preparation of analytic reviews of legislation of the BRICS member states within the framework of cooperation in comparative law research (general and/or thematic reviews, such as «Business Law of the BRICS member states»);
   - Holding international conferences for exchanging experiences and for deepening cooperation in the areas of business laws, dispute resolution, anti-corruption, money laundering, terrorism and to develop common approach and strategy to contribute to development of international law and conventions and model laws and frameworks at various international fora, including related to the UN and other international bodies active in this area;
   - Publication of a research journal on the development of the BRICS legislation (for example, «BRICS Law Review»);
   - Formation of a working group on development and harmonisation of tax laws in BRICS;
   - Formation of a working group on Development of Legal Framework for Digital Economy and Governance and

Regulation of Innovations in Artificial Intelligence and Internet of Things;

- Formation of a rules drafting committee for harmonisation and development of common institutional rules of arbitration centers;

- Formation of Working Group on Study and Harmonisation of Business and Contract Laws.

Member Organisations shall make serious endeavor to nominate at the earliest 3 representatives each to form each working group, composed of established domain experts and practitioners, who will elect chair and co-chair and will hold constructive meetings before the next forum in South Africa and circulate draft rules 4 weeks prior to the V Legal Forum. The Working Groups will be empowered to co-opt experts to assist in their functioning.

Assessing the outcomes of the IV (Moscow) BRICS Forum, we, on behalf of its participants – legal communities of the BRICS member states, state the following:

1. We are conscious that the development of legislation of the BRICS member states on the principles of protecting national sovereignty, democracy, rule of law, humans rights and affording political and social guarantees by all the people, living in the BRICS member states, shall lead to sustainable political, social and economic development of these countries and their mutually beneficial cooperation.

   Unification of legal regulations and their harmonisation, balanced reception and incorporation shall serve as the basis for interaction of legal systems of the BRICS member states subject to the principles of independence, respect for state sovereignty and national law.

   International treaties, model «soft» rule-making, use of progressive global practice are the instruments of modern legal order, in the development of which BRICS member states

should contribute in a collective and collaborative manner and be guided by these instruments in fostering legal cooperation.

2. We envisage that the legal communities of BRICS shall act in a coherent, balanced and collaborative manner, with commonality of purpose, by forming positions respectful of legal identity and sovereignty of each member state, to develop and adopt uniform legal approaches and standards beneficial not only for BRICS, but to serve as benchmarks for international cooperation per se to achieve the objective of general welfare through sustainable economic growth.

   We underline the need of continuing our efforts in the sphere of tax and customs policy, establishment of information transparency and accessibility, countering corruption, money laundering, and fair and transparent disclosure of beneficial ownership of business structures.

   We believe that approving the multilateral model convention on cross boarder tax dispute resolution is an important step towards improving tax relations between BRICS member states.

3. We acknowledge the need to continue our efforts to prevent conflicts of national jurisdictions, improve jurisdictional attractiveness of each BRICS member state, which leads to an increase of international attractiveness of BRICS as a whole.

   Unification of national substantive and conflict-of-law rules is the most effective way to improve the jurisdictional attractiveness. State security of foreign investment is the key to form sustainable and favorable investment climate. Mutual recognition and enforcement of foreign judgments and arbitral awards determine the enhancement of credibility of the foreign jurisdiction. The BRICS legal communities intend to continue the cooperation on improving arbitral and other forms of cross-border dispute resolution, on lines of the initiative that forms part of the core objective of this

declaration above and to further innovate and expand the same.

4. We emphasise that coordinated efforts to ensure the stability of constitutional order of the BRICS member states, counter global terrorism, corruption, protect the sovereignty, security and territorial integrity of our states shall become one of the most important areas of cooperation between the BRICS legal communities.

   Fight against arms, drug trafficking and transnational terrorism are essential elements of joint efforts in the sphere of international security. The BRICS legal communities call to intensify the cooperation in this sphere to increase the joint contribution to face the major global threats.

5. We recognise the importance of environmental issues in all the BRICS member states and the need to enhance the international legal cooperation for ensuring environmental safety, creating legal mechanisms to prevent catastrophic climate change on our planet, legal basis of using the newest energy- and resource-saving technology, aimed at the protection of the environment.

We will continue our joint researches and exchanging experience of the legal regulation in the sphere of environmental safety and protection from pollution, as well as natural resources management of the BRICS member states, in accordance with national conditions and priorities.

We intend to continue an active exchange of experience relating to the elaboration of sports legislation and management of sports activities. Preventing and combatting doping and corruption in sports are an important area of legal cooperation of the BRICS member states. With particular interest, we explore the possibility of forming an international legal mechanism of realisation and protection of intellectual property (IP) rights of the sportspersons.

We unanimously accept and endorse the proposal of the Law Society of South Africa to host the V Legal Forum in South Africa in 2018 and thank them for this gesture.

Participants of the IV BRICS Legal Forum (Moscow, Russian Federation) express gratitude to the host party, Russian Federation, and highly appreciate its efforts in organising a very high quality Forum both in terms of content and hospitality.

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Just global order: modern approaches

Distinguished guests, ladies and gentlemen!

I could not but have responded to the proposal to speak at the present Forum, since I believe that discussing actual legal issues by the representatives of the legal communities of our countries promotes the improvement of national legal systems, creates conditions for an effective interaction on the basis of an equal partnership and makes a constructive contribution to the democratic development of the entire system of global relations.

Such meetings in the format of the so-called «legal diplomacy» significantly complement the exchange of views between legislators of our countries, which takes place within regular BRICS parliamentary forums. The international BRICS association, established for solving financial and economic tasks, year after year builds its legal and political capacity, expands the spheres and forms of its cooperation, which enhance not only state authorities but also civil society structures. The latest seem particularly valuable

as they open the prospects for forming a **global civil society**, which alone can become the true guarantor of a just legal world order.

The fact that the justice of the global order is the subject of discussion of the present Forum shows that the BRICS Legal Forums have already developed a sufficient potential for understanding problems put on the global agenda. And the main issue hereof is undoubtedly elaboration of just frameworks of the modern world order.

When we speak about **world order**, it is not so much about the traditional system of international relations, where the main actors are sovereign States and their unions, but about the system of *global* relations governed mostly by transnational corporations imposing their own rules. It is in this emerging sphere of relations that the justice problem is particularly acute. And from this point of view, I would like to consider the stated matter. Moreover, the key issues of international law (such as unauthorised intervention in the internal affairs of sovereign States, double standards, ultimately putting pressure on the States policy by means of economic sanctions, use of economic sanctions as a method of unfair competition etc.) can be solved only in case of establishing a legal order acceptable for all within the *global* space.

History has shown that the shortcomings of the former bipolar world system pale before the risks for international law attempting to set a unipolar world. Only within a multipolar world is it possible to achieve a just and equal partnership between the actors of international relations. Therefore, taking this opportunity to speak from this tribune, the regional cooperation between the States and, first of all, the union of the BRICS countries enhancing nearly half of the world population, is now the most important guarantor of the legal frameworks of international relations and justice of the world order as a whole.

It is equally important to note the fact that the BRICS can be considered as an institutional model for creating the rules of the

future world order, within which the forms of an equal partnership between States with strong cultural and social specific features, located in different hemispheres, with very different histories and consolidating a huge number of nations and ethnic groups are elaborated.

A separate and very big topic is the concept of «**justice**». All leading philosophers of the world in one way or another have expressed their own understanding of this problem that is eternal for the mankind. Without going into discussion, I would like just to join the point of view of those who think that justice revealed through the category of equality is basically (in its conceptual core) a *legal* problem. The etymology of the Latin word «*justitia*» itself, meaning both fairness and justice, indicates in favour of that understanding of the essence. Not less expressive is the legal nature of justice presented in Russian language, where «law» (**прав**о) is the root of the word «justice» (с**прав**едливость).

Considering the problem of the **justice of world order**, above all things it is necessary to respond to the following questions. Is law as expression of the formal equity (and, respectively, the formal justice) a universal regulator able to organise the international relations space, where the interests of the States belonging to different civilisation systems come face to face? Or does each civilisation build its own law and justice? Or are the law and formal justice, guaranteed by the latter, the features of only the Western model of civilisation and in other regions there are other dominating types of regulator?

I would answer the following to the mentioned questions. Creating common rules in the system of global interaction (and today it is the most important objective of the world community) is possible only within a *legal* approach and on the basis of law as a *universal* regulator. Otherwise, no generally valid and just regulation at the planetary level can be spoken about. However, the recognition of the universal character of law itself does not mean that this common

regulator should be based on a highly individualistic understanding of law, which was formed in the Euro-Atlantic region.

We should admit that the concept of law as a human liberty limited only by the liberty of another person, which appeared in the West, has given a powerful impetus for the development of individual creative energy. But the process of expanding freedom of an individual is gaining such speed that undermines certain fundamental moral limitations, which were laid into the human community and have still ensured its unity. We see it in the situations when doing next step on the way to the destruction of the family institution, discarding moral barriers for creation and market use of the newest technologies relating to the human intrusion in the nature, in case of strengthening of social differentiation, which can lead to an irreversible social degradation of separate groups of population within the States, as well as entire regions of the world in the global space, etc.

Thus, it is essential to form an ideological, more exactly, conceptual and legal counterpoint to the liberal and individualistic version of the legal consciousness, which is strongly promoted by the West as a theoretic basis for legal regulation at the level of international and global relations. We should remember that «the human history is mainly the history of collectivist societies» and propose our own understanding of law taking into consideration this rich experience of collectivism. **From the point of this ideological platform, it is necessary to develop, justify and bring to the level of practical realisation such approach to the understanding of law that would synthesise the ideas of individual freedom and social solidarity**.

It is crucial to emphasise that, besides, this is not about refusing to understand law as a form of *the liberty of a human being* in his social life. After all, liberty, as rightly noted, *«is not only a European but also, in this sense, universal human value».* In this regard, national researchers quite rightly pay attention to the fact that while in the

West the formation and development of law and, respectively, movement for freedom, followed the path of protecting interests of the most powerful and active actors able to recapture their rights from the supreme authorities, in Russia, the law was developed from the need of the society to protect the weakest and *«carried out through the traditions of collectivism of the Russian community»*.

The collectivism inherent to the Russian people, formed and could be said forged by the unkind nature, countless defensive wars, need to consolidate many nations and ethnic groups by *«the common destiny on their land»* (as stated in the preamble to our Constitution), is something that our people could introduce into the joint work on forming the spirit of solidarity and unity, which is necessary to save and develop the mankind. The Constitutional Court of the Russian Federation finds its contribution to this activity by theorising and putting into legal practice the **doctrine of constitutional identity of the country**, which is based on legal interpretation of fundamental elements of the social and cultural identity of the multinational people of the Russian Federation.

Such **«solidaristic approach»** is now necessary in not only the legal theory and practice. It is very revealing that even liberal economists express this kind of ideas with respect to the economic sphere last days. Furthermore, certain leading European politicians speak about the amoralism of the modern financial capitalism. This amoralism is that the financial capitalism with its capacity to make money (huge amount hereof and easy indeed) out of thin air – from financial speculation, «brands» trade, historical rents obtained from the benefits of global labour division etc. – causes a blatant injustice in the distribution of wealth at both domestic and international levels. It is obvious that the capitalistic labour and thrift ethics glorified by Max Weber has become a thing of the past. The present capitalism and consuming society created hereby have been based on completely different values. The ideology of the

militant individualism nurtures these values and the global market tends to impose them on the entire human community.

Is it possible to build legal and moral barriers against the egoism of market monopolies, irrational consumerism in the context of the increasing poverty, powerful instruments of manipulation of the collective consciousness aimed to unwind the consuming boom etc.keeping at the same time the achievements of the market economy? Hopefully, it will be possible. In any case, we should set such problems and try to solve them. Otherwise, a process of dehumanisation, fraught with destruction of the mankind as a common social community or at its worst the complete destruction thereof, can be launched under the guise of fighting for the human rights, liberty of self-realisation etc.

To avoid accusations of exaggeration, I would refer to only two tendencies of the modern scientific and technological development, containing possibilities of an unprecedented breakthrough on the way to guarantee the common welfare, as well as not less enormous risks and threats. The first tendency is the intensive development of technologies allowing to improve physical and intellectual qualities of a human being. The second is the processes of robotisation, computerisation and informatisation of the social production transforming the sphere of labour relations mostly important for human beings. World power elites and scientific and technological community usually evaluate positively these tendencies and make optimistic forecasts based on them. Nevertheless, lawyers mostly seem to be pessimists in such matters.

With regard to the newest technologies relating to the so-called improvement of the human nature, I will not discuss here moral and religious aspects of the problem but note only the main social risks. At this time, the philosophers debate about the limits beyond which the intrusion in human nature becomes critically dangerous. For lawyers the response is obvious: it is an erosion of the free-will phenomenon, which is the foundation of the system of the legal

responsibility of an individual for his actions. Another substantive risk consists in the possibility of destroying those fundamentals of justice the human community is based on. In the modern consuming society, where such technologies are high-demand goods, their uncontrolled use is fraught with an unbridgeable split of the mankind into the elite enriched by all the scientific achievements and mass groups, which will lose all the control over the elite and become an instrument in its hands (i.e. will transform from a subject of history into an object of someone's manipulation).

The second group of problems is social consequences of a massive automatisation, computerisation and robotisation of the production regarding to the fact that millions of people will lose their jobs and not only the material welfare with it, but also the social and legal status, their position as parties to the social contract, opportunities of access to the state social policy through the systems of insurance of social risks, resources of influence on social and political situation etc. An inevitable consequence will also be a sharply decreasing number of the middle class. And that is the social basis the modern law and legal state repose on.

Will the already weakened national States be able to find resources for keeping the social fabric from tearing and help people to survive this revolution break? According to the experts, the situation seems rather alarming so far. Against this background there is a growing tendency of forming a new social class called «precariat» (*precarious* – «unstable»), which covers wide social groups of employees with no social contracts with the State. The attempts of the States to react to this issue only lead to a growing number of bureaucratic structures involved in income redistribution. Under these circumstances, the idea of introducing the so-called unconditional guaranteed income, which provides every citizen with a minimum of means regardless his labour contribution, has become more and more popular. At the moment, such experiment is being carried out in Finland and planned to be so in other certain

States. The outcomes of these experiments are of the utmost interest for the entire world community.

However, it is already obvious that such a measure is quite ambiguous. The fact that many large masses are losing support in the socially significant work and depend on the charity from more successful members of the society is fraught with a substantial moral degradation. Nonetheless, lawyers are fully aware of the fact that any weakening of moral principles inevitably leads to the criminogenic increase. And now it is difficult even to foresee what extends and forms this process can take.

Thus, it will hardly be an exaggeration to state that both named tendencies carry a number of serious risks. The main one is the further unwinding of the «spiral of inequality» with all anti-legal consequences that come with it. It is evident that in the developed countries these processes will be smoother than in the others, however, it is also evident that they will be so due to the common level of welfare. And for the rest of the world such processes will be much more painful. The situation here will also get worse by the fact that many countries could find themselves in an underdog position against the new industrial revolution that has already begun. Due to this revolution the world vanguard will unlimitedly develop its intellectual and productive potential (particularly, by engaging the best «brains» around the world), and the stragglers will have to waste irreplaceable natural resources.

I admit to exaggerate a bit but it is impossible to highlight the essence of the problem without that and therefore, it is impossible to look for solutions. The main conclusion that I would like to draw is that the ideology of individualism does not appear as a proper worldview basis for the modern legal consciousness in the context of the challenges and threats facing the mankind at the present phase of globalisation. The theoretical contours of global law only begin to show up and the development of globalisation processes depends largely on the meaning that fills this notion, on whether they will

take the line of enrichment of the beneficiaries of globalisation at the expense of the rest of the world, whether they will lead to the destruction of the national States with their democratic institutions, social policy, social and cultural identity hereof etc. Or whether the globalisation will contribute to the consolidation of the mankind on the principles of solidarity. That depends among other things on our efforts. The convergence between the legal communities of our countries can considerably contribute to the development of new principles of the just world order. We should not miss this opportunity.

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Prospects for the legal regulation of new technologies in the sphere of digital economy

While in digital economy the technologies are rapidly developing (introduction and massive implementation of cryptocurrencies and blockchain technologies), there are questions of legal regulation that are inevitably raising before states. The relevance of this issue is primarily conditioned by both protection of the national economic sovereignty and need to integrate in the global economy system. It is the legal regulation that helps to maintain the balance between these two divergent phenomena.

1. Cryptomarket

The BRICS format offers an opportunity to study various practices and develop universal principles. The cryptomarket should be brought into a legal framework. However, its regulation requires more information and knowledge about the subject and learning the practice of states and such platforms, where cryptocurrencies had been developed before. It is necessary to involve a wide range of

experts dealing with the research of blockchain and cryptocurrency technologies. There are proposals of Russian professionals on regulation in the sphere of economy and integration of the world experience as well.

2. Situation concerning blockchain technologies and cryptocurrencies in Russia, China and India

Despite the ICO prohibition and cryptocurrency restrictions, China shows its interest in the blockchain technology. At the end of March 2014, the People's Bank of China issued the circular, which stated that by 15 April 2014 Chinese banks and payment systems should get the accounts of 15 Chinese websites selling bitcoins closed. In China, transactions in bitcoins are today allowed for individuals and prohibited for entities.

Although ICO is prohibited in the country and cryptocurrency exchange activities are restricted, the Chinese government shows its interest in the potential of blockchain technology in other spheres. In particular, the Chinese Academy of Information and Communications Technology under the Ministry of Industry and Information Technology of China has launched the research centre for supporting future development of the technology. The new laboratory will conduct researches in the sphere of blockchain and plans also to create a platform for exchanging knowledge among specialists.

The Ministry of Finance of India is preparing a regulatory legal framework for using cryptocurrencies in the country. The Reserve Bank of India has formed a working group for studying possibilities of using cryptocurrencies as a legitimate means of payment.

Russia: at the moment, there are two concepts of further working with finances on blockchains transmitted by the main executors of the Presidential instructions – Ministry of Finance and Central Bank. A) The Central Bank continues to insist that it is premature to work officially with cryptocurrencies and the bitcoin has all the features of a financial pyramid. B) The Ministry of Finance

reasonably evaluates the chances of an immediate regulation of cryptooperations and offers individuals to specify the income from bitcoin operations in tax declarations. Various possible practices of cryptocurrency application, development and use of the blockchain technology, which are being elaborated, are yet short-term measures and should become a forefront or temporary obstacle to rapid global changes. Nevertheless, the technology still finds its way and is somehow unified. We could be a flagship or left behind.

3. It is necessary to establish a working group within the BRICS which would elaborate common unified approaches to the cryptomarket aimed at developing a common economic space

BRICS is the most suitable platform for elaborating universal legal approaches. If we aim to develop the cooperation within the BRICS, including economic cooperation, there should not be such practices when cryptocurrencies are allowed in India but prohibited in China. The regulation approach should be changed, new forms of interaction between the legal systems based on similar regulatory principles should be found.

4. Blockchain implementation – promising tendency of today

Blockchain is a global trend, there will be more and more new projects on it. Both in Russia and in the world. Blockchain can be used in healthcare, education, cadastral registration, construction, for example, in case of protection of the shareholders' interests – almost in all the spheres. Introduction of the blockchain technology, among other things, in state structures and procedures cannot but lead to institutional changes. At the same time, it is essential to take into account that the confidence in the interests of the country and stability of its national financial system being under a reliable protection should become an important attribute of such introduction. Cryptocurrencies are now dangerous, as there are no mechanisms for saving digital tools.

5. To allow cryptocurrencies for charity

There are different approaches to assessing what a cryptocurrency is. Some people see the future global reserve currency in it, others – a product being subject to taxation. Today we should allow the charitable foundations to obtain and manage donations in cryptocurrencies according to the intended purpose. Regardless of the legal classification of the cryptocurrency, it has a certain value, which should be converted into help to the people in need, as in the case of donations. The problem is quite relevant and requires a solution.

6. Modern transformation of the legal sphere?

More often than not are statements made about the new technological revolution liquidating numerous professions, as well as the lawyers' possibility of becoming unemployed. We have to admit indeed that many legal professions will be replaced by new technologies, such as artificial intelligence, blockchain etc. This does not mean that lawyers will not be needed at all. They always will but mainly those who have the competence corresponding to the challenges of the new technological century. Although treaties had been concluded earlier on paper, now more and more often the contracts conditions are being «sewed up» in a specialised «soft». The specialists with the competence of a lawyer and programmer all in one are right now demanded on the market. It is notably relevant in the international trade. Within the cooperation with the legal communities of the BRICS countries, we will learn the experience and offer new educational standards for lawyers (certainly in coordination with the Ministry of Education and Science of the Russian Federation). Today, training lawyers, we should always assess the demand of such specialists in the future. We observe the tendency for years, it is unlikely that something will be changed in our digital and privacy-losing world. In Russia, it has been yet a lack of experts, any minute and penny invested by the BRICS countries into the development of the cyberlegal sphere is worth its weight in gold.

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The mechanism of investment dispute resolution within the BRICS countries

Keywords. BRICS, bilateral investment treaty, investment disputes, ICSID, Washington Convention.

In conditions when all the BRICS countries are committed to structural reforms that will ensure the modernisation of their economies and the development of modern high-tech industries, investment sector becomes particularly urgent. In turn, the investment in the territory of a foreign country is always fraught with certain risks, and the occurrence of disputes between participants of investment activity is often inevitable. In case of circumstances that lead to investment disputes, the injured party usually seeks to restore its violated rights and receive compensation for their losses. The comparative analysis allows to identify general approaches to the dispute settlement and resolution in the category «investor-state» inherent to the BRICS countries in the sphere under study:

1) procedural protective measures that ensure proper dispute settlement involving a foreign investor on the territory of the BRICS countries base on the following regulations:
   – special laws on foreign investment (e.g., Russian Federal Law of July 9, 1999 No.160-FZ «On foreign investments

in the Russian Federation», the Law of Brazil of September 3, 1962 No.4.131 «On foreign capital», etc.), which are a reflection of more common principles fixed by the constitutions of these countries (e.g. art.18 of the Constitution of the China);

– international conventions (e.g., Washington Convention «On the Settlement of Investment Disputes…»);
– bilateral agreements on encouragement and mutual protection of investments, concluded between the Governments of the Contracting countries (e.g. such an agreement of Russia and China of November 9, 2006, of India and Russia of December 23, 1994, etc.).[1]

2) the main source of the contemporary legal regulation of investment relations are international treaties among which we should highlight bilateral investment treaties (further on – BIC), since they have a regulating effect on the investment relationship compensating in such a way shortcomings in the national legislation. Referring to the provisions of one of the relevant bilateral agreements – Agreement between the Government of the Russian Federation and the Government of the Republic of South Africa on the encouragement and mutual protection of investments,[2] we should note that art.9 of the Agreement stipulates the procedure regulating investment disputes, that reflects traditional approach to disputes of this category, which is to ensure that the parties to the dispute seek a peaceful resolution. However, if in the course of negotiations the dispute is not resolved, the investor may firstly apply to the competent

[1] Akhmadova Maryam. Fundamentals of Legal Regulation of Investment in G-20 Countries. // G20 Youth Forum Conference Proceedings, 2014 (2), May 7–11, Garmisch-Partenkirchen, Germany. P. 113–120. URL: http://www.g200youthforum.org/upload/files/Conference_Proceedings_2014.pdf (accessed 05/11/2017)

[2] Concluded in Moscow 23.09.1998. URL: http://investmentpolicyhub.unctad.org/Download/TreatyFile/3436 (accessed: 01/09/2017).

state court of the country where the investments were made.[1] Secondly, he may resort to the international dispute resolution by contacting the institutional arbitration – Arbitration Institute of the Stockholm Chamber of Commerce or creating an *ad hoc* arbitration in accordance with 2010 Arbitration Rules.[2] Jurisprudence treats the creation of such an alternative to state courts traditionally as one of the most important safeguards for the protection of foreign investors, who seek to bring the dispute to the competent authority outside the jurisdiction of the state – recipient of investment.

3) the mechanism regulating the settlement of investment disputes reflected in the BICs concluded between Russia and the BRICS countries is similar but with one exception – the possibility of recourse to International Centre for Settlement of Investment Disputes (further on – ICSID[3]), created by 1965 Washington Convention «On the Settlement of Investment Disputes Between States and Nationals of Other States».[4] Among the BRICS partners this specialised institute of arbitration can potentially be used exclusively to Chinese investors (see art.9 of BIC of Russia and China (together with the Protocol of 09.11.2006).[5] This situation is explained by the fact that only China among the BRICS has become a party to the Washington Convention thus having eliminated the

[1] Here should be noted the low confidence of foreign investors to the domestic courts of the recipient state investment. – See: Tsirina M.A. Features of investment disputes // Bulletin of the Volgograd Academy of the MIA of Russia.2016. No.4 (39). P. 56–62.

[2] Adopted in New York on June 25, 2010. See at: www.uncitral.org/uncitral/ru/uncitral_texts/arbitration/2010Arbitration_rules.html (accessed 05/11/2017)

[3] See at: https://www.icdr.org/ (accessed 05/11/2017)

[4] See at: http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/ (accessed 05/11/2017)

[5] Concluded in Beijing, 09.11.2006. URL: http://www.consultant.ru/document/cons_doc_LAW_125585/ (accessed: 01/09/2017).

opportunity to use its immunity and Russia that has signed but not ratified it yet.

4) for the development of cross-border economic relations even countries historically hostile to arbitration had to allow foreign investors to use «politically neutral and at the same time cost-effective»[1] dispute resolution mechanism. The question in this case is Brazil which insisted on the principle «no foreign arbitration over the sovereign acts of governments» based on «Calvo Doctrine».[2] After centuries of oblivion arbitration in Brazil began to develop as a result of the economic reforms of the 1990s pursued by President F.H. Cardoso. Since this period Brazil has embarked on an active development of arbitration including international commercial arbitration. In particular, in 2001 1996 Arbitration Act[3] was declared constitutional and in 2002 1958 New York Convention «On the Recognition and Enforcement of Foreign Arbitral Awards»[4] was ratified. However the Washington Convention Brazil has not been ratified.
5) in recent years, some countries limit or denounce existing BICs, and South Africa is not an exception. Strategic departure from the practice of concluding such an agreements, where the rights of a foreign investor are protected by the possibility of appeal to international institutional arbitration, can be explained by the possibility of initiating arbitration under

[1] Dutson S., Webster L., Smyth T. International Arbitration Africa Style. URL: http://www.globallegalpost.com/ globalview/international-arbitration-africa-style-82836387/ (accessed: 01/09/2017).

[2] Farkhutdinov I.Z. International investment law and process. Moscow.2014. P. 317.

[3] Law No.9.307/96. The key changes brought into the law the new 2015 Arbitration Act of Brazil – See.: Felipe Sperandio. The Brazilian Arbitration Act 2015 – What's Changed? 26 June 2015. URL: www.mondaq.com/brazil/…/Arbitration…/The+Brazilian+Ar… (accessed: 01/09/2017)

[4] New York, 10 June 1958. URL: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed: 01/09/2017).

ICSID, which often adjudicates in favour of foreign investors. Thus, after the decision of the International Chamber of Commerce in *White Industries Australia Limited v. The Republic of India*, where the Indian company was obliged to pay a record for the country compensation of 4.08 million dollars[1], Indian leadership initiated reviewing of the existing system of bilateral investment cooperation and adoption of the new Model Text for the Indian Bilateral Investment Treaty[2] for reasons of high risks of investment arbitration for the country. In part of the procedure, this Model BIC contains the following changes. Firstly, foreign investors are deprived of the opportunity to appeal the decision of the Supreme Court of India. Secondly, investors are required to exhaust all available domestic mechanisms for the protection of their rights and only three years after beginning of the dispute may submit the claim to international arbitration institution (art.14.4 of the Model Text).

The foregoing allows to conclude that the described by the strokes state of things is a sufficient incentive for further improvement of legal regulation of foreign investments within BRICS countries, including the participation of these countries in existing universal international legal instruments for protection of investments (e.g., by the ratification of the Washington Convention) that in general in our opinion will contribute to creation of a favorable investment climate. At the same time, we believe that the denial or significant restriction of access of foreign investors to international investment arbitration under the BICs of a number of countries under study will negatively affect their investment climate.

[1] White Industries v. Republic of India, Final Award, November 30th, 2011. URL: http://www.italaw.com/cases/documents/1170 (accessed: 18/07/2017)

[2] Model Text for the Indian Bilateral Investment Treaty. URL: https://www.mygov.in/sites/default /files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed: 18.07.2017)

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BRICS: protection of intellectual property and development of digital economy

The BRICS countries have become an increasingly large component of the global economy. In the last ten years, the BRICS countries have accounted for more than one-third of global GDP growth and have grown from one-sixth of the world's economy to almost one-fourth. By 2020 the BRICS countries are expected to account for a one-third of the global economy and contribute about 49% of global GDP growth.

BRICS has been hailed as an «accelerator» in the transformation of the global economic governance system. The member countries have managed to increase their say in major international financial institutions and have been steadily boosting the reform of those institutions. There has been an increase in the representation of the BRICS countries in the IMF and World Bank.

Development and Harmonisation of Legislation on Intellectual Property Protection-International Recognition and Protection of IP Rights

Another area which has seen rapid growth in trade in the BRICS economies is intellectual property rights. The BRICS focus on IP grew at its Annual Summit in Durban, South Africa, in 2012, where the group's trade ministers endorsed a BRICS Trade and Investment Cooperation Agreement, which specifically included a provision for cooperation in Intellectual Property. To move forward for the cooperation among the BRICS IP offices a roadmap dubbed as the Intellectual Property Offices Cooperation Roadmap was agreed upon in the Megaliesburg, South Africa, on May 16, 2013. The roadmap has following goals:

1. Promotion of public awareness of IP in the BRICS countries
2. Examiner exchange programs.
3. Information services to be enhanced by an exchange of patent information, and the best practices provided by each office.
4. Training of Intellectual Property Office Staff.
5. National IP Strategy for enterprises.
6. A review of filing procedures within the group, improvements in office practices, and increased innovation and commercialisation among the countries.
7. Collaboration in international forums.

Each of the BRICS countries is party to World Intellectual Property Organisation (WIPO), the Berne Convention for Protection of Literary and Artistic Works, Paris Convention for the Protection of Industrial Property and is a signatory to the WTO's TRIPS Agreement. For enforcement of intellectual property, a number of measures have been adopted to check infringements and counterfeit goods.

As an important factor for economic growth, intellectual property rights (IPR) are closely linked to international trade development. Recognising that the BRICS countries face many common challenges in

the field of IPR, we note the positive progress made in the establishment of the Intellectual Property Rights Cooperation Mechanism among BRICS (BRICS IPRCM), and we congratulate the successful First Meeting of BRICS IPRCM held on May 23th 2017 in Beijing. With the aim of strengthening and enhancing Intellectual Property (IP) Cooperation, the BRICS countries hereby establish the following general guidelines for implementing the BRICS IPRCM:

1. Sharing and exchanging information on IP legislation and enforcement as well as recent developments, in order to improve the transparency and understanding of IP systems and policies;
2. Studying the trade-related IP issues with a view to promote international trade, sustainable development and inclusive growth;
3. Exploring topics that emerge from global IP development trends and strategies (including topics arising from regional trade agreements), and exchanging opinions over such topics that correspond to the development needs of the BRICS;
4. Promoting involvement of IP stakeholders (including legislative, executive and judicial authorities, as well as academia and business community) in IP cooperation, with a view to improve public IP awareness;
5. Strengthening communication and coordination on IP-related developments within the relevant international organisations with a focus on trade-related aspects as well as other IP issues subject to consensus;
6. Welcoming technical assistance and support from relevant international organisations for the IP cooperation among the BRICS countries;
7. Ensuring coordination and synergy as well as avoiding duplication with other IP-related cooperation activities among the BRICS countries, in particular with the existing cooperation at the level of BRICS Intellectual Property Offices (HIPO); and
8. Working on relevant IP issues based on consensus and in line with mutual interests.

Another Initiative is the BRICS IP Forum called the BIPF. Recognising the need for fresh legal perspectives, five Intellectual Property law firms, Daniel Advogados from Brazil, Gorodissky & Partners from Russia, Remfry & Sagar from India, CCPIT from China and Adams & Adams from South Africa, came together to discuss intellectual property issues of the day in their respective jurisdictions and to brainstorm collectively for suitable responses. Together, these firms form the BRICS IP Forum (BIPF). It was established with the objective of channeling thoughts and formulating recommendations on IP law related questions common and peculiar to the BRICS nations group, the forum is intended to be a think tank. The forum also at times acts as a platform to assist other similarly placed economies, i.e., the developing economies of the world. Through its annual conference meetings, the Forum's intention is to keep industry and intellectual property practitioners worldwide updated on the latest intellectual property policy and law developments in the BRICS countries. The BIPF first met in Gurugram (then Gurgaon), India in November 2008. It has grown with each passing year and subsequent annual meetings have been held in Beijing (China), Rio de Janerio (Brazil), Moscow (Russia), Chicago (USA), Munich (Germany) and Shanghai (China).

Digital Economy in BRICS Nations

The digital economy refers to a broad range of economic activities that include using digitised information and knowledge as the key factor of production, modern information networks as an important activity space, and the effective use of information and communication technology (ICT) as an important driver of productivity growth and economic structural optimisation. Internet, cloud computing, big data, Internet of Things (IoT), fintech and other new digital technologies are used to collect, store, analyse, and share information digitally and

transform social interactions. Digitised, networked and intelligent ICTs enable modern economic activities to be more flexible, agile and smart. The digital economy is experiencing high growth, rapid innovation, and broad application to other economic sectors. It is an increasingly important driver of global economic growth and plays a significant role in accelerating economic development, enhancing productivity of existing industries, cultivating new markets and industries, and achieving inclusive, sustainable growth.

Many advanced economies already have sophisticated digital economies and have extensively exploited the benefits of digitalisation for their economic prosperity and to improve and facilitate lives of their populations.

The BRICS members duly acknowledge the challenges that digital divide imposes on many developing countries. The countries understand the need to bridge the digital divide and address its socio-economic implications to ensure better growth in the nations. In 2015, the BRICS leaders endorsed the framework for BRICS E-commerce Cooperation, which aims to integrate e-commerce markets in the BRICS countries. In 2016, the BRICS Trade Ministers' Communiqué emphasised the importance of cooperation on e-commerce and the BRICS leaders further committed at Goa Declaration, 2016 to strengthen such cooperation.

According to the guiding principles, the following actions were proposed for enhancing cooperation between the member States –

1. The BRICS E-commerce Working Group

To promote the BRICS cooperation on e-commerce, the BRICS E-commerce Working Group could serve as a body to coordinate inter-government cooperation on e-commerce in agreed areas, including on the basis of outcomes from research and joint studies. The Working Group will periodically meet back to back with the CGETI and conduct activities such as exchanging information

including on policy and best practices, providing guidance to the members on enhancing cooperation, and exploring a roadmap for cooperation.

2. **Interaction with the BRICS stakeholders on E-commerce**

To boost business cooperation among members, promote information and technology sharing, and strengthen capacity-building there will be interaction with business sectors and other stakeholders on e-commerce.

3. Undertake research on BRICS E-commerce

Research and joint studies on global trends, current status of e-commerce in the BRICS, dynamism in e-commerce, regulatory and legal frameworks in the BRICS related to e-commerce, existing barriers to cross-border e-commerce among BRICS, the development aspects of e-commerce and recommendations for strengthening e-commerce cooperation within the BRICS. For all research projects, members will review the relevant Terms of Reference (ToR) to be proposed by the presidency or any other member and determine the entity or organisation to which it will be committed.

The BRICS Member States were a participant at 2016 Group of Twenty (G20) Summit held in Hangzhou, China held to discuss efforts to reform global economic governance. At the summit the Member States agreed on the following common principles to promote the development of and cooperation in the digital economy:

a. **Innovation** – Technological innovation in ICTs as well as innovation in ICT-driven economic activities is among the key driving forces of inclusive economic growth and development.
b. **Partnership** – In order to improve cooperation, address common challenges, and advance the global digital economy, closer partnership among G20 members can help share knowledge, information and experiences, so that differences can be narrowed and various interests can be advanced through constructive dialogues.

c. **Synergy** – Since the digital economy touches almost all economic and social sectors and is closely related to other topics particularly innovation and the new industrial revolution, it is the common aspiration of members to create synergy among discussions of these topics in order to avoid duplication and ensure consistency.
d. **Inclusion** – The members should work together with all stakeholders, to bridge all manner of digital divide and foster entrepreneurship, innovation, and economic activity, including further development of content and services in a variety of languages and formats that are accessible to all people, who also need the capabilities and capacities, including media, 3 information and digital literacy skills, to make use of and further develop information and communications technologies.
e. **Open and enabling business environment**- Recognising the critical importance of private sector on digital economy as well as of enabling and transparent legal, regulatory, and policy environments, and fostering open, competitive markets. Recognising the importance of enforcing competition and consumer protection laws in the digital economy, which are conducive to market access, technological innovation in ICTs and the growth of the digital economy.

In line with the above principles, the following broad goals were identified as priorities for cooperation in digital economy, to provide favourable conditions for its development, boost economic growth, and ensure digital inclusion:

a. Expand broadband access and improve quality
b. Promote investment in the ICT Sector
c. Support entrepreneurship and promote digital transformation
d. Encourage e-commerce cooperation
e. Enhance digital inclusion

f. Promote development of MSMEs and their intellectual property

The Digital BRICS Conclave held in Mumbai in the year 2016 was another effort to bring together stakeholders, businesses and civil society from the BRICS nations to generate discussion on four themes related to Internet policies: Institutional Cooperation in Cyberspace, Access and Inclusion, Internet and Pluralistic Governance and the Digital Economy. The Member States shared domestic experiences of their respective countries in keeping the internet safe, data uncompromised and access affordable.

Recently at the 9th BRICS Summit, 2017 in Xiamen, China the leaders of the BRICS Nations issued a joint statement outlining the agendas for this year as well as points the nations agreed to work upon. Digital economy was also one of the agendas discussed by the Nations. The following statement was released at the end of the Summit –

> *«Living in the era of digital economy, we are ready to use opportunities it provides and address challenges it poses for the global growth. We will act on the basis of principles of innovation, partnership, synergy, flexibility, open and favourable business environment, trust and security, protection of consumer rights in order to ensure the conditions for a thriving and dynamic digital economy, that will foster global economic development and benefit everyone.»*

The Nations during the Summit agreed to enhance joint research, development and innovation in ICT including the Internet of Things, Cloud computing, Big Data, Data Analytics, Nanotechnology, Artificial Intelligence and 5G and their innovative applications to elevate the level of ICT infrastructure and connectivity in our countries. They proposed to establish rules for security of ICT infrastructure, data protection and the Internet that can be widely

accepted. The vision was too encourage identification and facilitation of partnership between institutes, organisations, enterprises in the implementation of pilot projects through developing next generation of innovative solutions in the areas of smart cities, health care and energy efficient device, etc.

Prime Minister Narender Modi addressed the BRICS Summit on various issues and said –

> *«India's own far-reaching journey of transformation gives pride of place to our people. We are in mission-mode to eradicate poverty; to ensure health, sanitation, skills, food security, gender equality, energy, education and innovation. National programmes of Clean Ganga, Renewable Energy, Digital India, Smart Cities, Housing for All and Skill India are laying the basis for clean, green and inclusive development. They are also tapping the creative energy of our 800 million.*
>
> *Technology and innovation are the foundations of the next generation of global growth and transformation. India has also found that technology and digital resources are powerful tools in fighting poverty and corruption.*

A strong BRICS partnership on innovation and digital economy can help spur growth, promote transparency and support the Sustainable Development Goals. I would suggest considering a collaborative pilot project under the BRICS framework, including private entrepreneurship.

India has found that technology and digital resources are powerful tools in fighting poverty and corruption. Moving forward, using the springboard of our national experiences, the BRICS countries can deepen partnership for win-win results.»

The vast majority of new internet users that are waiting to be connected are mainly in Asia and Africa. They would be the ones who look towards the BRICS countries to maintain the openness,

resilience, security and stability of the digital realm. Technology is at a stage where having access to health or education is going to hinge upon whether one is digitally connected or not. Opportunity itself becomes a function of whether that connection is on a basic 2G handheld mobile device or on a smart phone using broadband. Therefore it is important to bridge the digital divide, because if not handled properly, can both widen and deepen with every shift in technology.

Consequently, if the digital divide has to be bridged, and bridged across the world, it is for the BRICS countries to take leadership and shape the global agenda with a billion new entrants in mind.

On the diplomatic front, the BRICS countries need to collectively discuss the grouping's convergences on internet governance and cyber norms, and perhaps even offer a consolidated position. In particular, there should be a shared enthusiasm to develop the private sector in their respective digital economies. To help e-tailing giants and digital start-ups expand their operations transnationally, the private sector must be supported by an ecosystem of regulations and norms that can be common across the BRICS economies. Similarly, the BRICS regulators should exchange notes on data protection standards, to ensure that the rights of internet users are protected.

Even if many of the BRICS countries remain separated by distance in the physical world, the digital realm is one where they can virtually strive to be contiguous and continuous – identifying processes and protocols for harmonisation, aligned together for the possibilities of seamless trade, development, and a growth that is universally inclusive.

Growth of Digital Economy in India

Digital India is a campaign launched by the Government of India to ensure that Government services are made available to citizens electronically by improved online infrastructure and by

increasing Internet connectivity or by making the country digitally empowered in the field of technology.

It was launched on 2nd July 2015 by Prime Minister Narendra Modi. The initiative includes plans to connect rural areas with high-speed internet networks. Digital India consists of three core components. They are:

1. Development of secure and stable Digital Infrastructure
2. Delivering government services digitally
3. Universal Digital Literacy

The vision of Digital India programme is inclusive growth in areas of electronic services, products, manufacturing and job opportunities etc. It is both enabler and beneficiary of other key Government of India schemes, such as Bharatmala, Sagarm ala, Dedicated Freight Corridors, Industrial corridors, UDAN-RCS, BharatNet and Make in India. PM Modi at the launch of the Digital India Week, 2016 said –

> *«I dream of a Digital India where High-speed Digital Highways unite the Nation.1.2 billion connected Indians drive innovation. Government is Open – and Governance is Transparent. Government Services are easily and efficiently available to citizens on mobile devices. Government proactively engages with the people through Social Media and quality Education reaches the most inaccessible corners driven by Digital Learning. Farmers are empowered with real-time information to be connected with Global Markets….».*

Recently Sh. Ravi Shankar Prasad, the Law Minister of India, at Hitachi Social Innovation Forum (HSIF) 2017 at New Delhi lauded the digital transformation steps taken by the government and said –

> *«Digital India is more for the poor and underprivileged. It aims to bridge the gap between the digital haves and have-nots by using technology for citizen.»*

Digital India was definitely one of the major steps initiated by the Modi Government, but is not the only one.

India launched Aadhaar in the year 2009 with a goal of giving every Indian a single digital identity in the form of a biometric authenticated 12-digit number. This National Unique Digital Identity System combined the best of the open technologies to build a system that generates a unique number based upon de-duplication of the applicants biometric information, their iris scan and fingerprints. Within 5 years till 2014, almost 600 million had registered voluntarily and obtained their UID numbers. When PM Modi assumed power in 2014 he had not only backed the system developed by the previous Government, but he broadened its scope and amplified its impact.

Among the first actions the Modi government undertook was to launch the Pradhan Mantri Jan–Dhan Yojana (PMJDY, or Jan Dhan). On the very first day that Jan Dhan was implemented, the government created 10 million bank accounts using existing Aadhaar IDs in a paperless manner, at a fraction of the minimum previous customer acquisition costs. Since then, the government has created more than 300 million new, no-frills bank accounts. With an identity to create a bank account, and a bank account to receive funds, the hundreds of millions of people eligible for the receipt of government services in India suddenly had a way to access those services digitally, from beginning to end. In India this digital infrastructure is nicknamed the «JAM» trinity, referring to innovative interlinking of Jan Dhan (low-cost bank accounts), Aadhaar (identity), and mobile numbers.

India is adding almost 1 million smartphone users every year and is on the verge of launching Aadhaar compliant devices with biometric authentication in phones and tablets. The power of the JAM trinity will come into full force when transactions are enabled using Aadhaar and biometric authentication, creating a system that is not only cashless but cardless. Already, a new entrant into telecommunications service in India has succeeded in using the

India Stack to enroll 108 million consumers in 170 days with a totally paperless, mobile-centric manner

By demonetising the five hundred and thousand rupee notes India hoped not just to flush out considerable amounts of black money, but also to encourage a switch to cashless state within the mainstream economy. This new move definitely had a huge impact on the digital marketing horizon in India. It encouraged people to be involved in fewer cash transactions and to use the electronic or plastic money. This was evident from PayTm seeing a threefold growth in its user base since November 2016. Apart from the most obvious boosts in terms of tax income, this move had many benefits in the Indian economy. Some of the obvious beneficiaries of demonetisation are banks, micro-financing companies, NBFCs and digital financial operators. According to digital marketing analysts, India's latest monetary change will be the start of a new economic era with Indians having greater access to the benefits of transacting in a digitally empowered world.

As per a July 2017 report by Mastercard and the Fletcher School at Tufts University in the US, India has emerged as a potentially strong digital economy and been categorised under the «Break Out» segment among 60 countries in an index launched.

There is a World Bank report which says that a 10% increase in broadband penetration (in India) can lead to a 1.4% increase in GDP (gross domestic product), making Internet important for enhancing the growth of the economy. However, this won't be possible without government participation. Regulation is not a driving force for growth, but it can be a roadblock. So, government plays a critical role for creating appropriate policy framework and provide infrastructure and enable a secure and safe environment for digital transactions to take place.

The digital economy provides India a way to start off the journey toward becoming a developed nation without waiting for costly and time-consuming industrial infrastructure investments to bear fruit.

The process of digital disruption – whether led by government or not – creates numerous significant social challenges. Rather than seeking to slow that process to reduce those challenges, India has taken the opposite approach: to not only embrace but accelerate digital disruption, to ensure its full potential for economic and social inclusion is realised.

The reality is that India is moving into the future at an unprecedented rate and the path it is taking to get there is digital.

As India takes over the BRICS presidency, it aims to develop responsive, inclusive and collective solutions. Given the importance that the Government of India gives to its Digital India initiative, there can be no better way to put this in to practice than a Digital BRICS.

Digital Economic Policy in the other BRICS Nations

1. BRAZIL

The government of Brazil is developing several national plans for transformation into a digital economy. In addition, there is several data privacy bills in Congress, closely aligned with the EU framework, and are expected to move forward soon potentially in 2018. Together, these activities will decide the way in which Brazil views cross border data flows and will have a significant impact on businesses.

The Ministry of Science, Technology, Innovation and Communications (MCTIC) announced the public consultation for the Brazilian Strategy for Digital Transformation, 2017. The document will set the guidelines for the «digitalisation» of the Brazilian economy and society in the coming years and aims to create a favorable environment for agriculture, commerce, finance, industries, and transportation and logistics services, through the advancement of digitalisation in productive processes. To make that possible, the project includes improvement in network infrastructure and internet access; research,

development, and innovation; reliability in the digital environment; professional education and training; and the international dimension.

The Brazilian Development Bank (BNDES), in partnership with the Ministry of Science, Technology, Innovation and Communications (MCTIC) and a consortium of companies have been developing a National Internet of Things (IoT) Plan. This is focused on providing analysis of international practices, creating a benchmark of initiatives and public policies that suggests ways in which Internet of Things technologies could be developed in Brazil.

The Information, Communications and Cyber Security Strategy of the Federal Public Administration 2015–2018 was developed by the Institutional Security Cabinet (GSI) and aims to present the strategic guidelines for Information Security and Cyber security planning, as well as to improve the security and resilience of critical infrastructures and national public services by mitigating risks that organisations and society are exposed to. The strategy advocates the establishment of a central body and a national system that will monitor and evaluate the implementation of the national policy. The strategy aligns goals to raise the maturity, and improve training and research on «state-owned cryptographic hardware and algorithms.

2. RUSSIA

Russia, one of the world's most strongest countries has taken a beating on the economic front, and the government is set to revamp the economic structure to bring it in consonance with the global economic developments and hence, to create a digital economy. A report prepared by the Boston Consulting Group reads that the digital economy's share in Russia's GDP can reach 5.6% by 2021, mostly due to digital transformation of industries. To that end, the Russian government is developing a new programme «Digital Economy in Russian Federation», which, it is hoped, shall in contribute in 8 main areas:

- Government Regulation;
- Information Infrastructure;

- Research and Development;
- Human Resources and Education;
- Information Security;
- State Management;
- Smart City;
- Digital Healthcare.

President Putin has ordered that digital economy should be included in the list of the main goals of Russia's strategic development until 2025. The final version of the digital economy development program is said to take into account the support for the development of key digital technologies, including artificial intelligence, robotics, quantum computing, development of information and telecommunications and computing infrastructure, and financial incentives. The experts in the country are consulting those nations which have already achieved creation of digital economies, federal level, regional authorities, and municipal entities, are few of the issues which are impeding a copy-pasted approach.

3. CHINA

China has one of the most active digital-investment and start-up ecosystems in the world. It is in the top three in the world for venture-capital investment in key types of digital technology, including virtual reality, autonomous vehicles, 3-D printing, robotics, drones, and artificial intelligence (AI). China is the world's largest e-commerce market, accounting for more than 40 percent of the value of worldwide e-commerce transactions. It has also become a major global force in mobile payments with 11 times the transaction value of the United States. One in three of the world's 262 unicorns (start-ups valued at over $1 billion) are Chinese, commanding 43 percent of the global value of these companies. China has a rising digital economy, which is equal to 30.3% of GDP or 22.6 trillion yuan ($3.35 trillion) and is driven to a large extent

by leading technology companies Baidu, Alibaba, and Tencent. These companies at the forefront of innovation give credence to the idea that the digital economy will soon become the economy, in the not-too-distant future.

New areas of the digital economy, including the Internet of Things, virtual currencies, financial technology, artificial intelligence, advanced robotics, and big data are expanding rapidly in China. The digital economy is also spreading through traditional sectors such as education, industry, and health care, improving efficiency and adding value in these areas. A large amount of venture capital funds in China are pouring into digital technologies, as the potential is huge.

China's digital economy will help to boost growth and will create diverse investment opportunities in the coming years.

4. SOUTH AFRICA

South Africa's digital economy is the most developed in Africa, and one of the fastest growing in the world. Its speed of growth can be attributed to the rapidly increasing proportion of the population with Internet access, an 86 percent adult mobile phone penetration rate, and a highly developed telecommunications network. The country has made significant strides towards embracing the digital economy and the prospects for its development in the country are good. A key element in this generally positive outlook is the country's high level of investment in information and communications technologies and infrastructure. The South African government has done an admirable job of raising awareness about the importance of the e-commerce and the digital economy, and to encourage public participation in the policy formulation processes. South Africa's role as a leading African and developing world economy places additional burdens on its need to engage in regional and global policy formulation activities in support of the emergence of a new regime for global e-commerce that is not overly hostile to the strategic goals of the developing world.

Conclusion

The BRICS countries demonstrate determination to implement agreed decisions aimed at generating strong, sustainable and inclusive growth of their economies and other developing economies. The BRICS has the potential to strengthen their positions as an important global governance institution. Involvement of major players with a high degree of political influence and technological potential in the development of the digital economy is an important factor in the elaboration of a broader international agenda in this field.

The digital economies of the BRICS countries will crucially determine their overall growth in the coming years. A significant share of the next billion internet users will come from the BRICS, offering the promise of efficient e-governance as well as a vibrant digital marketplace that lifts many from poverty and allow them to a chance to benefit from opportunities offered by this sector. On the other hand, their rapidly growing digital constituencies will require states to maintain a secure and stable cyber-environment. The challenge for the BRICS regulators and the private sector alike will lie in fostering greater access to the Internet while protecting the integrity of data that flows through their networks. International regimes, both in the domain of cyber resilience as well as the regulation of the digital economy, should account for the concerns of emerging economies.

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Principles of economic cooperation of BRICS countries in the light of jus cogens norms of contemporary international law

Key notions: international law, BRICS, principles, economic cooperation, *jus cogens*.

1. The problem of international law principles, especially the fundamental norms of *'jus cogens'*, partially could be deemed as a «gap» in international law theory requiring a prompt scientific investigation. The fact is along with the major (generally recognised) principles of international law, which penetrate into and cover the entire system of its norms (*jus cogens*), there are action and special principles of the international law that serve as the guiding rules of interstate behavior in specific branches of law – branch principles. It is not necessary to underline that every international organisation or integrational community operates on the basis of their charters or other statutes which lay down the provisions having constitutive nature. The cooperation of Brazil, Russia, India, China and South Africa (hereinafter – the BRICS or the BRICS countries), along with other non-formal associations (e.g., G-7, G-8,

«Big Twenty», etc.[1]) in turn are subject to the principles formulated by the respective participants thereto. The list and contention of the given groups of governing rules acting as 'principles' may vary and differentiate depending on their species, legal value and effect. However, the major relevant prerequisite for validity of the same shall be deemed as to meet the requirement of conformity with the fundamental (systemic) principles of international law. In this regard, it is worth to mention that the concept of «basic principles of international law» seems more appropriate for domestic (Russian and former Soviet) doctrine, whereas the term *'jus cogens'* ('mandatory law', 'peremptory norm') is immune predominantly to Western literature and law enforcement.

2. Legal approach to diligent understanding of *jus cogens* and its distinctive features is performed by Vienna Convention on the Law of Treaties dt.of 23 May 1969, applicated to the issue of treaties conflicting with a peremptory norm of general international law (jus cogens) and stating as follows: «a Treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law»; «…. a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm, from which no derogation is permitted and which can be modified only by a subsequent norm of General international law, having the same character» (Article 53)[2].

[1] The legal opinion which considers the BRICS and other similar associations having no elements of institutionalisation and therefore, denying its capacity of being the interstate (intergovernmental) organisations not rarely is expressed in special literature. It seems to be justified (cf.in this regard: Shinkaretskaya G.G. On the legal status of BRICS// Modern law.2015, №10. P. 140 – 145).

[2] Cf.: URL: https://treaties.un.org/doc/Treaties/1980/01/19800127%2000–52%20AM/Ch_XXIII_01.pdf (last date of access – November 12, 2017).

3. Thus, being based on existing varieties in categories of principles inherent to the international law, there is a need for thorough perusal of particular theoretically complicated legal aspect that is important from practical point of view, i.e. that one related to principles of international law as a system – namely, construction of a systematic approach to peremptory rules within international law. This task represents a cornerstone from the view-point of development of international law science and meets the vital requirement of lawful regulation of interstate relationships in modern times, so exacerbating the negative assessments of both the international law and its fundamental principles/the generally recognised principles and norms. Due to the mentionned above, it becomes self-evident the important role played by scholars' in their efforts to analyse the principles related to the interstate cooperation between Brazil, Russia, India, China and South Africa, which *ab initio* aims at the formation of a «polycentric system of international relations and increase of economic interdependence of the States» to ensure the impact which the BRICS countries are capable to effect upon global economic system because of their objective political and economic parameters.
4. According to «The Concept of Russia's participation in BRICS» approved by the President of the Russian Federation yet as in 2013, the BRICS group serves as a tool for strengthening the «Big Twenty» which is the main forum for international economic cooperation of the countries participating therein at the time of drafting the document. Now the BRICS is widely strengthening its performance at capacity of one of main components within bilateral and multilateral economic cooperation between five countries in multiplicity of areas, namely: monetary, financial and trade and economic relationships in industry, energy, science, technology and

innovation, agriculture and other fields. In the trade and economic spheres, the tasks of creating, in particular, more favourable conditions for development of mutual trade and increased investment links, joint operation with the BRICS countries lay on the international organisations, which should promote common interests in the sphere of international trade. Since the economic interaction tends certainly to be the key vector in the BRICS development, all the states of non-formal association are highly interested in formulating a common strategy for economic cooperation and constitute relevant General legal ground in the form of common principles of partnerships.

5. The analysis of actual phase in the development of the BRICS reveals an acute necessity in a concentrated approach to elaboration by participating States of fundamental principles of their cooperation. Based on the statements of political achievements and results declared by passed summits of the Heads of States within the BRICS association *expressis verbis* available in the respective official documents, namely in the Declaration of Xiamen (Xiamen, China) dt.of 4 September, 2017, it is possible to identify the preconditions caused appearance of some of guiding principles governing economic cooperation of the BRICS countries, having been forwarded *prima facie* by practical performance of relationships and therefore set forth in the wording of the respective documents.
6. Thus, the target as proclaimed to implement «deliberate and concerted efforts to build a comprehensive and multi-level dynamics of cooperation» is determined the ***principle of development and multilateralism***. The goal of establishing a more equitable, just, fair, democratic and inclusive international political and economic order that was set forth at the previous summits and stages of cooperation, led to the unambiguous formulation of the ***principles of fairness and***

justice to ensure peace and stability on the international and regional levels, mutual respect and understanding, equality, solidarity, openness, inclusiveness and mutually beneficial cooperation, taking into account the interests, respect for the right of each state to choose ways of development.

7. The ***principles of equality, reciprocity, mutual benefits, autonomy in determining the forms of participation in cooperation*** with other states, as well as ***coordination, integration and partnership*** represent the appropriate reflection of the special (branch) principles of international economic law. At the same time, both the afore-referred principles and the principles of the economic cooperation of the BRICS countries should meet the main criterion of the validity of the legal grounds of interaction, which was mentioned earlier, viz.conformity with peremptory norms of *jus cogens*, constituting the fundamental principles of contemporary international law. This conclusion is being directly stated in the Xiamen Declaration, which provides a «just and equitable international order, with the central role of the United Nations on the basis of the purposes and principles enshrined in the Charter of the United Nations and norms of international law, … commitment to the principles of democracy and the rule of law in international relations».

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Cooperation of the BRICS member states in the sphere of taxation in the context of the New World Order

Keywords: model convention, the BRICS states, taxes, the cooperation of states.

Contemporary World Order is marked by the new balance of powers and priorities that have taken shape on the global political scene. Such a situation implies new global realities being formed under new development patterns and which are taking course against the background of growing complexity of international relations and aggravation of the sanctions policy.

The ongoing changes are calling for the formation of new institutions to determine the trends for the future advancement in international cooperative engagement. One of such important institutions is BRICS, an interstate association, whose aggregate share in the world land mass exceeds 25%, population makes 40% of the world, and whose aggregate gross domestic product (GDP) equals $15,435 trillion USD[1].

According to S.E. Naryshkin, MPs' involvement in the partners' dialogue within the BRICS, as well as their participation in the

[1] Point by Jim O'Neill

discussions on crucial integration issues effectively facilitate progress towards solutions to these issues. The same creates a more solid legal basis for the coverage against possible risks, serves as the key to success in trade, economic, financial and other forms of cooperation among the BRICS member states[1].

The area of concern common for the BRICS member states is their desire to exercise more influence on international taxation policy-making, imposition of tax regimes, targeting national tax base erosion.

Cooperation in taxation within the BRICS framework received an impetus at the Joint Meeting of the BRICS Finance Ministers, that took place in Washington, DC, in April 2012. The meeting resulted in deciding to work out uniform approaches for international taxation, transfer-pricing, preventing tax evasion and promotion of information sharing.

Later, in 2013 the BRICS Heads of Revenue got together in New Delhi to adopt a decision on improving cooperation in such spheres of taxation policy and tax administration as combatting non-compliance and paying an enhanced attention to international cooperation; sharing best practices and capacity building; sharing anti-tax evasion and non-compliance practices, including abuse of treaty benefits and shifting of profits by way of complex multi-layered structures; further development of the BRICS mechanisms to facilitate countering abusive tax avoidance transactions, arrangements, concealment of taxable moneys and property, as well as shelters and schemes, evasion and avoidance; promotion of effective exchange of information; all other problems

[1] Naryshkin S.E., Khabrieva T.Y., Kapustin A.Y., Bevelikova N.V., Toloraya G.D., Rafaljuk E.E., Shulga S.V., Kurbanov R.A., Shvedkova O.V., Belalova A.M., Nanba S.B., Semilutina N.G., Doronina N.G., Akopian O.A., Sinitsin S.A., Zhuravleva O.O., Terschenko L.K., Kalmykova A.V., Puliaeva E.V., Bogolubov S.A., Belikova K.M. BRICS: The Contours Of the Poly-centric World: monograph (edited by T.Y. Khabrieva, Member of the Russian Academy of Sciences, DSc (Law), deputy editor N.V. Bevelikova PhD (Law).- M.: The Institute of Legislation and Comparative Law under the Government of the Russian Federation; ID «Jourispridence», 2015. SPS «Garant».

of common interest and relating to the issues connected with taxation[1].

On 17 May same year at OECD Forum on Tax Administration in Moscow the Member States discussed the structure of the future cooperation between national Tax Administrations and suggested elaborating a common approach to tax issues, which was later declared in the city of Fortaleza in the following language: «… sustainable development and economic growth will be facilitated by taxation of revenue generated in jurisdictions where economic activity takes place». It was also stressed that tax evasion, transnational tax fraud, aggressive tax planning, as well as consequential aggressive evasion are detrimental not only to the world economy, but also to the national BRICS economies[2].

The doctrine incorporates two major view-points regarding to the cooperation between the BRICS tax administrations:

– benefits of the cooperation between the BRICS tax administrations;
– whether the existing cooperation should be acknowledged as a trend in the future successive systems transformations within the BRICs framework.

The questions posed cannot be answered unequivocally as the time span since the foundation of the BRICS in 2006 is too short to report the results of its activity. At the same time, we

[1] See.: Communique of BRICS Heads of Revenue Meeting Issued in New Delhi on 18th January, 2013 URL: http://www.brics.mid.ru/brics.nsf/WEBmitBric/E3AFA90B6DB65DF544257B12004047F

[2] See It.17 of the Fortaleza Declaration. Besides, the countries emphasized their commitment to raise their economic cooperation to a qualitatively new level. (It. 20 the Fortaleza Declaration). The parties envisage establishing a road map for intra-BRICS economic cooperation, as well as «BRICS Economic Cooperation Strategy» and a «Framework of BRICS Closer Economic Partnership», which lay down steps to promote intra-BRICS economic, trade and investment cooperation. The Sherpas of the member-states are instructed to submit their proposal for endorsement by the next BRICS Summit, which will take place in Ufa (Russia) in 2015.

can undoubtedly see positive steps in the development of this interstate association. An illustrative example is IX Summit of the BRICS, where the participants were addressed by V.V. Putin, the President of the Russian Federation, in his article «BRICS: Towards New Horizons of Strategic Partnership», where it was noted, in particular, that: «Our country is interested in promoting economic cooperation within the BRICS «five» format. Considerable practical achievements have recently been reported in this area. Primarily, I would emphasise launching of the New Development Bank (NDB). The NDB has approved seven investment projects in the BRICS countries worth about $1.5 billion USD. This year NDB is to approve the second package of investment projects worth $2,5–3 billion USD in aggregate. I am convinced that their realisation will not only boost our economies, but will also contribute to the integration between our countries»[1].

Speaking about the BRICS development prospects in taxation area, it should be observed that presently there is a base for modernising the effective rules of the OECD Model Tax Convention and for determining the approaches within the framework of closer cooperation in tax administration, inclusive of that in information sphere.

[1] Putin V.V. BRICS: Towards New Horizons of Strategic Partnership URL: http://kremlin.ru/events/president/news/55487

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Cooperation of the Russian Federation with the BRICS countries in the sphere of fight against international crime

The article is devoted to the most important issues of cooperation of the Russian Federation with the BRICS countries in the field of ensuring international security, to the creation of an appropriate legal framework, and to further development of interstate cooperation, especially in the sphere of fight against illicit drug trafficking, illegal migration, information technology crime.

Keywords: the international cooperation, law enforcement, anti-drugs cooperation, migration, information security.

One of the most important priorities in the international work of the Russian Federation as part of the BRICS is implementation of the provisions of the Xiamen Declaration of the Leaders of the BRICS countries, which was adopted on September 4, 2017[1], this is not because of the fact that the BRICS leaders called the second decade

[1] //URL: http://www.kremlin.ru/events/president/news/55515 (date of request: 21.12.2017).

of BRICS cooperation as «golden»[1] in the success of cooperation, but because this Declaration contains a specific program of cooperation among the countries in the fields of economy, culture, trade, military cooperation and the right protection activity.

The Declaration is a legal and detailed international document on intentions to communicate on the widest and most important range of issues.

In addition, in relations with the BRICS member states, the Ministry of Internal Affairs of the Russian Federation is guided by the Concept of the Russian Federation's Participation in the BRICS, approved by the President of the Russian Federation on March 21, 2013[2].

One of the main objectives in the field of cooperation with the BRICS countries on international security issues defined by this document and directly affecting the competence of the Ministry of Internal Affairs of Russia is, first of all, coordination of approaches in the field of fighting against illicit trafficking of drugs, psychotropic substances and their precursors by illegal migration, and ensuring information security.

Uncontrolled migration entails risks associated with the growth of crime, penetration of terrorism and extremism, spread of drugs, infectious diseases causing thereby social and political tensions in society.

The Ministry of Internal Affairs of Russia consistently cooperates with China and India primarily in this direction.

As for the People's Republic of China, there are intergovernmental Agreement on Temporary Work of Citizens of the State in the Territory of Another State adopted on November 3, 2000[3] and Agreement on Cooperation in Combatting Illegal Migration

[1] //URL: http://www.interfax.ru/interview/577022 (date of request: 21.12.2017).

[2] //URL: http://www.kremlin.ru/acts/news/17715 (date of request: 21.12.2017).

[3] Bulletin of international treaties.2001. №7.p. 43 – 48.

from March 22, 2013[1] that are being implemented in relations with the Russian Federation. Two Russian-Chinese joint working groups have been set up to implement these agreements.

The Ministry of Internal Affairs of Russia carries out effective interaction within the cooperation agreements between the two Ministries from November 28, 2001[2] and also in correspondence to the Agreement on Cooperation of the Internal Affairs Bodies and Public Security Authorities of the Cross-border Regions adopted on June 26, 2002[3].

With the Republic of India, Russia has signed in the context of migration issues the intergovernmental Memorandum of Understanding on Combatting Illegal Migration[4], and the updated interdepartmental Agreement on Cooperation[5] on November 27, 2017, which created a modern international legal framework for cooperation in all areas of cooperation and official activities.

Aiming to strengthen the international legal framework for bilateral cooperation in the field of migration, the Ministry of Internal Affairs of Russia has developed and submitted drafts of intergovernmental agreements on temporary work of citizens of one state and on cooperation with illegal migration containing separate provisions on readmission for consideration by their Indian counterparts.

The interaction of the BRICS member states in the field of fighting against illicit trafficking of drugs is carried out on the basis of a number of international treaties, among which, first and foremost, it is necessary to single out the UN Convention against Illicit Traffic In Narcotic Drugs and Psychotropic Substances of

[1] Reference search engine «ConsultantPlus» (the doc.wasn't published).

[2] Reference search engine «ConsultantPlus» (the doc.wasn't published).

[3] Reference search engine «ConsultantPlus» (the doc.wasn't published).

[4] Reference search engine «ConsultantPlus» (the doc.wasn't published).

[5] Reference search engine «ConsultantPlus» (the doc.wasn't published).

December 20, 1988[1], the Convention on Psychotropic Substances of February 21, 1971[2] and Convention on Narcotic Drugs of March 30, 1961, supplemented by the Protocol of March 25, 1972[3].

There is a broad legal framework for the implementation of anti-drugs cooperation at the bilateral level. For example, on March 9, 2016, an interagency memorandum of understanding was signed with South Africa, which relates to fighting against illicit trafficking of drugs, psychotropic substances and their precursors[4].

Practical cooperation is carried out in the format of the Anti-Drug Working Group of BRICS established at the initiative of the Russian Federation in 2015. During the Group's meetings, the representatives of the competent authorities exchange information on the national drug policy, current issues of counteracting illicit drug trafficking, and discuss drug monitoring issues, proposals for the development of anti-drug cooperation.

Taking into account the growing number of new challenges and threats in the world, the development of international cooperation in the field of information security has become extremely relevant.

According to the Ministry of Internal Affairs of Russia sources, over the past 4 years, there has been an almost six fold increase in the number of committed crimes in the sphere of information and telecommunications (from 11000 in 2013 to 65949 in 2016).

Crimes committed in the field of information technologies are, as a rule, trans-boundary, and they can be successfully resisted only in conditions of an effective international cooperation of law enforcement agencies of various states.

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1 Digest of international treaties of the USSR and the Russian Federation, release. XLVII.- M. 1994.p. 133 – 157.

2 Digest of existing treaties, agreements and conventions, concluded by the USSR with foreign states, release. XXXV.- M. 1981.p. 416 – 434.

3 Collection of legislation of Rus.2000. №22.art.2269.

4 Reference search engine «ConsultantPlus» (the doc.wasn't published).

On September 4, 2017, during the IX BRICS Summit in China[1], the President of the Russian Federation Vladimir V. Putin expressed his position on the need for a solid legal and legal framework in the field of international information security.

At the meeting of the Security Council of the Russian Federation on October 26, 2017[2], the Russian President stressed that it is necessary to promote the creation of an information security system more actively, to develop cooperation with partners on global and regional platforms such as the UN, BRICS, SCO, CIS and others.

It seems that one of the most important tasks today is to negotiate with the BRICS partners the issue of drafting an interstate agreement that would allow the member states to establish an effective cooperation in the field of international information security.

1 //URL: http://www.kremlin.ru/acts/news/55515 (date of request: 21.12.2017).

2 //URL: http://www.kremlin.ru/acts/news/50596 (date of request: 21.12.2017).

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What is a private settlement?

Keywords: mediation; confidentiality; court review; settlement agreements

Business entities in South Africa have long used the process of mediation to settle or compromise on a dispute with a party or perhaps disgruntled employee. Mediation, and in fact other forms of dispute resolution including arbitration and negotiation, has often be hailed as an efficient and discreet way of ending a dispute that could otherwise have been a long and costly dispute.

A cornerstone to the mediation process is confidentiality. This aspect of private dispute resolution has made mediation a very attractive form of coming to a settlement as parties are able to keep sensitive and private matters of the courts. The inclusion of a robust confidentially clause may keep private details of the settlement out of the public eye. This paper examines the extent that parties to a mediation settlement may have their information protected post settlement.

It is trite that during the mediation process parties are bound by an agreement not to discuss the process or divulge information to third parties – but does this limitation and right to privacy end? Put

another way – what becomes of confidentiality when post mediation and after a settlement has been agreed upon – the parties now suffer from a kind buyer's remorse and could claim a myriad of allegations – including but not limited to – duress, misrepresentation or undue influence?

In light of the above this paper will look at the idea of mediator immunity privilege in terms of being a witness in legal proceedings and whether such an immunity exists. The issue of whether mediators should be given such immunity due to their quasi-judicial position will also be discussed. This paper aims to explore whether information (such as offers and concessions) from the mediation are admissible in court if the final settlement agreement is in dispute at a later stage.

Finally this paper will look at whether mediations – especially those of a mandatory nature may be subject to legal review.

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Promoting constitutional democracy in the BRICS member states

Introduction:

The subject of discussion for this session deals with several issues which are important for BRICS member states. It touches on stability of constitutional systems, anti-terrorism efforts, countering corruption and security. My concern and the context of my paper focus on the first issue, stability of constitutional systems.

Stability (which encompasses security) of a constitutional system can only be experienced when a constitution establishes permanent institutions with recognised functions and definite rights. Loyalty of the citizens is developed when the powers of its institutions and its political leaders authorised by its constitution are exercised in such a way that it demonstrates care for all its citizens fairly and unbiased.

Before embarking on the discussion of «**promoting**» constitutional democracy one has first to ponder on what is meant by «constitutional» and what is meant by «democracy».

Constitutional:[1]

«Constitutional» implies the structure or framework whereby a certain country and its people are set up and organised through and by law in established *permanent institutions with recognised functions and definite rights.* Such institutions exercise through set rules sovereign power. Hence the rules include all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.

Democracy:

My paper also refers to «democracy». All BRICS member states ascribed to democracy. But what does democracy mean? «Democracy» according to a dictionary definition of the word is stated as being: «a system of government by the whole population or all the eligible members of a state, typically through elected representatives» or «control of an organization or group by the majority of its members».

[1] South African Legal Dictionary

Constitutional democracy:

But what fundamental principles need to be addressed in a constitution to promote stability, security and a sense of a common community in which citizens will feel comfortable and loyal to?

A democratic constitution, whether economically of a socialist or capitalist nature, needs to address the following values to ensure loyalty, stability and security:

Popular sovereignty – the people are the ultimate source of authority;

Majority rule and minor rights – the majority rules but the fundamental rights of the minority are protected;

Limited government – the powers of the government are limited whether written of unwritten;

Institutional and procedural limitations to power – these can include separated and shared powers, checks and balances, due process of the law and leadership through regular elections.

The fundamental values of constitutional democracy reflect a paramount concern with *human dignity and the worth and value of each individual*. The principles of basic rights (life, liberty, employment, health, education), freedom of conscience and expression, privacy and unforced human association, justice, equality and openness are the values a constitution should subscribe to.[1]

I am of the view that loyalty will enhance the citizenship to participate in combating terrorism, and corruption which will lead to security and a stable constitutional democracy. A loyal citizen will report terrorism and corruption.

[1] For a broad discussion on these values see CN Quigley: Constitutional Democracy, Part One: Essential elements – http://www.civiced.org/resources/publications/resource-material

Analysis of Constitutions:

A critical analysis of all constitutions of the BRICS Members is not possible in the timeframe of this discussion. Therefore I am only going to touch on a few aspects of specific constitutions.

The *Constitution of the Republic of South Africa, 1996*, has been described as one of the best models in the world. Delegates are encouraged to make a study of it. It can easily be accessed at www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf. I do not profess that the South African Constitution is without flaws but it is certainly addressing the most important values for a proper constitution. One of the values of the constitution is stated as *supremacy of the Constitution* and the *Rule of Law.*

Chapter 2 of this constitution deals with human rights and indeed in detail. Values such as dignity, equality, freedom, life, privacy, freedom of religion, belief and opinion and many more are enshrined. Should any of these rights be limited it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose. I submit that this chapter of the South African Constitution needs serious consideration by all BRICS members and its legal fraternity.[1]

In the *Constitution of the People's Republic of China, 1982*, reference is made to «socialist modernization» and «develop socialist democracy». But it also refers to the «people's democratic dictatorship». The word «dictatorship» and «democracy» stands in

[1] Constitution of the Republic of South Africa, 1996 – www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf

contrast. This is a paradoxical contrast. In the China constitution provision is made to «persist in reform and opening-up». A further aspect standing out in the China constitution is the fact that reference is made to a specific political party. This seems to limit the citizens' democratic choice of choosing representatives for a set constitutional institution. This is where lawyers can participate in «reform» and to ensure the «opening-up» and in doing so getting citizens to feel comfortable and loyal. It will promote stability and security.[1]

The *Constitution of the Russian Federation* appears to enhance democratic values but Article 11 of the constitution dealing with «state power» might be open to different interpretations and might authorise absolute power to the president. Article 11(1) reads as follows:

«The state power in the Russian Federation shall be *exercised by the President* of the Russian Federation, the Federal Assembly (the Council of the Federation and the State Duma), the Government of the Russian Federation, and the courts of the Russian Federation.»

The constitution states that «any normative legal acts concerning human rights, freedoms and duties of man and citizen may not be used, if they are not officially published for general knowledge» [Article 15(3)]. The precise meaning of this statement is not clear. On the face of it, the statement seems to inhibit the human freedoms of citizens or to prescribe as what citizens can do and what not.

I do not know if I have a misprint of Article 22(2) but it states that a person can be detained for more than 48 hours without a court's injunction. This authorizes a serious intervention in the freedom of the citizens.

[1] Constitution of the People's Republic of China, 1982 – china.usc.edu/constitution-peoples-republic-china-1982

Article 45 of the Russian constitution talks of «everyone shall be free to protect his rights and freedoms by all means not prohibited by law». The implication of this wording is that by law certain rights and freedoms can be limited. The guidelines for such limitations are not clear.[1]

Permanent BRICS committee of legal fraternity:

When one looks at the different constitutions of member states I suggest that we as lawyers need to critically analyse the constitution of each of our member states to assist, as legal fraternity, the governments of our countries to ensure that *constitutional stability is attained and promoted.* Lawyers are dealing with the citizens on grass root level and bear knowledge of daily issues affecting such citizens. *A permanent committee of BRICS members legal fraternities can analyse and advise on specific issues to promote and enhance the different member states' constitutions.* Such an effort, if properly managed by the BRICS members' legal fraternities on a permanent on-going basis, can be a great help to build better relations between BRICS governments and BRICS legal fraternities. Furthermore it will promote constitutional stability as lawyers deal with legal issues effected or caused by the constitution on a daily basis and can give practical solutions to enhance constitutional democracy.

Once the constitutions of the BRICS member states have been analysed to ensure they all comply with constitutional democracy principles, a further study of the implementation and exercise of these principles will be necessary. In many instances (especially if one takes note of media reports) it appears that those in leadership positions find ways and means to circumvent these constitutional democratic principles to exercise their power to the detriment of the people. For example, the popular sovereignty principle is ignored, minority rights are trampled upon and elections are rigged.

[1] The Constitution of the Russian Federation – http://www.constitution.ru/en10003000–02.htm

Conclusion:

The analysis of the constitutions gives but a few examples where lawyers can participate in promoting constitutional democracy. I propose a permanent structure of members of the legal fraternity from each of the BRICS member states to investigate and promote the reform of the constitutions of the BRICS members to enhance loyalty, stability and security and to advise on the implementation and exercise of the constitutional democratic principles.

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Private law within the BRICS countries: contract and legal person in focus

Keywords: BRICS, private law, contract, legal person

1. As a response to some objective change of circumstances (for example, as a result of military action, economic and financial crises, etc.) some unifying ideas emerge and begin to develop in the world. Often industrialised, developing, and, especially, countries with economies in transition, unable to achieve its strategic goals in the struggle for access to markets and resources at the global level, resort to the combined efforts (quite often in the scale of some regions). In this format, the creation of the BRICS initiated in 2006 by the Russian President, is one of the most significant geopolitical events of the beginning of the new century. Since the creation it was perceived as an alternative to the existing world order, the answer to the imbalance of world economics and politics of the beginning of the new century and has become a significant factor in the world politics.

2. Currently in Russia, there is a number of studies of the BRICS from the point of view of economy and law. We decided to focus on the functioning of the key, in our opinion, institutes of the private law, inherent in the trade turnover, which appear to us as the most relevant in the light of the regulation of trade and economic relations, developed by the Russian Federation. They are: 1) a comprehensive coverage of collective forms of doing business (legal entities, contractual associations, transnational corporations) and 2) contractual obligations (in international trade, with consumers, etc.). «Legal person» and «contract» are investigated in the light of maintenance of the competitive market environment with regard to the permitted market dominance, «economic concentrations» and freedom of business activity and methods of investing of the capital in the BRICS countries. «Contract» is investigated with an emphasis on its conclusion, execution and termination within the BRICS countries; the possibility of creating a uniform system of contract law is also under study.[1] So our results are the following.
3. With regard to *forms of doing business* under the legislation of the BRICS countries we investigated the prospects of unification of approaches of «common law» (India & South Africa), «civil law» (Russia & Brazil) and «mixed» (China) legal orders. It is established that the system of legal entities engaged in entrepreneurial activity according to the law of the countries under consideration consists of a limited number of legal entities having one-type – unified – character,

[1] Salient features and prospects of the unification of private law within the BRICS countries: manual / ed.by Ksenia M. Belikova: in 2 vol. – Moscow: Peoples' Friendship University of Russia, 2015 (vol.1 595 p., vol.2 582 p.). URL: http://nkibrics.ru/pages/publications (accessed 12/11/2017); Kozlova N.V., Filippova S. Yu. Civil legal personality: a review of the novels of the Russian Civil code. // Legislation, 2014. No.9. – P. 9–19; Kozlova N.V., Yagelnitsky A.A. Termination of a civil contract in connection with a substantial change of circumstances. // The Moscow University Herald. Series 11: Law. – 2010. – No.3. – P. 35–51.

and that regardless of the term «company» or «society» – the laws of the BRICS countries divide them according to the degree of responsibility of the participants to those with: a) limited liability: a *limited liability company* (Russia), *sociedade limitada* (Brazil), *limited liability company* (LLC in China & India), b) liability limited by shares – *public and non-public joint-stock company; business partnership* (Russia), *sociedade anónima* in the form of *companhia aberta и companhia* (Brazil), *company limited by shares* (Ltd. by shares in the PRC, India), *public* and *private company* («Limited» or «Ltd.» and «Proprietary limited» or «(Pty) Ltd.» in South Africa respectively), c) liability limited by guarantee: *company limited by guarantee* (Ltd.by guarantee in China and India). This classification is based on the fact that legal entities are divided into profit making and non-profit making organisations. The distinction between them can be traced in the definition of their objectives. The lack of profit as the main objective, however, is not a criterion for qualification of the organisation as a non-profit, because the need to find sources of stable funding for many non-profit organisations making them to be engaged, although with restrictions, in income-generating activities (profit)[1]. Laws of all the BRICS countries also require to indicate a measure of responsibility of the participants in the name (title) of the company. It is revealed that despite the used different terminology, the authorised capital of the companies / societies with liability limited by shares (b) is formed by public subscription, whereas the capital of companies with limited liability (a) and with liability limited by guarantee (c) is formed by private subscription, when the capital is simply

[1] Kozlova N.V. Some problems of civil legal status of non-profit making organisations in the Russian Federation. // Economy and law. – 2017. No.9. – P. 32–49.

divided into shares. According to the law of the countries under consideration, the issue of shares must be registered (by Brazilian Commission for the securities market; Federal service of the Russian Federation for financial markets; Bureau for registration of joint stock companies of the state of India; China Securities Regulatory Commission under the State Council (of the PRC); Stock Exchange of Johannesburg, South Africa). It has been set that a two-element system of corporate governance of business entities (General meeting and Board of Directors) is common for all types of companies (a, b, c) in India and South Africa and for companies of type (a) and (b) in Russia, China and Brazil. For some of companies of type (b) – public, open, etc. – of Russia, China and Brazil a tree-element system of corporate governance (General meeting, Board of Directors and Supervisory Board) is typical. It is noticed that the national peculiarities, including those established by the laws the BRICS countries, required a quorum at General meetings and number of votes for decision-making; likewise the composition, competence and responsibility of the Board of Directors, the composition of the Supervisory Board. National peculiarities of legal regulation of business activities of companies (societies) are manifested in different conditions of formation of the authorised capital (as for terms, volumes and types of payment, including at the time of the registration), in the number of permitted by law participants.

4. Historically developed differences in the concepts of a contract prevailing in *common law* and *civil law* countries are now subject to the dynamic effect of unification. Exactly from this point of view we have analysed the provisions of the national legislation of the BRICS countries with regard to the «treaty» and came to the following conclusions. During the study,

the following general principles of contract law practiced within the BRICS countries have been revealed: freedom of contract with regard to legal equality, mutual consent, good faith of the parties and their compliance with the applicable legislation and the public interests. The peculiarities of the modern national doctrines of contract law are investigated and can be summarised as follows. In Brazil, the concept of «contract» is not specifically formulated, whereas transactions (contracts) are governed by the provisions of the Civil Code on Obligations. The latter is distinct and divided into the obligations to provide things (certain and uncertain); to do or not to do something; divisible and indivisible; joint and several and alternative. In relation to the contracts, the acting Civil Code gives force to their social function and extends the principle of solidarism to them. In Russia, main provisions regulating contracts are concentrated (as in Brazil) in the General part of the Law of obligation within the Civil code, where a «contract» is defined as an *agreement* of persons aimed at establishment, modification or termination of civil rights and obligations. In India, various doctrinal interpretations of the concept of a «contract» have been by now reflected in the Contract act in force in a common definition according to which a «contract» is an agreement enforceable by law. According to the doctrine of China, «contract» means an *agreement* between equal subjects aimed at the establishment, change and termination of civil rights and duties. The SAR does not have any specific law of contracts. The order that governs the entrance, completion and termination of contracts is determined by the precedents, laws and provisions of contractual relationships. The laws of SAR have many different meanings of contract that have been given concrete definitions through the concept of «agreement». For example, contract is an agreement of mutual

rights and obligations. At the same time, there exist three concepts that explain the substance of a contract: *Will Theory* (a contract being governed by the will of its parties, entered under mutual agreement); *Application Theory* (contracts not being the presence of coincident wills of parties, but their external expressions manifested in their actions); *Assumption Theory* (contract is based on the intentions of the parties reasonably assumed as mutual intentions). However, it is generally accepted that the contract cannot be one-sided, it is a legal action with the legal consequences of the intentions of the parties and with the promise of the parties with regard to the implementation of a number of obligations.

Thus, our study shows that BRICS countries have much in common in approaches to the legal regulation of private law. These similarities should be used for the expansion of relations between our countries, deepening cooperation and filling it with new content.

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Legal framework of the labour relations with a foreign element within the BRICS countries

Keywords: BRICS, labour relations, foreign element

1. BRICS (Brazil, Russia, India, China, South Africa) came to reality in 2006 and since then has become an acting force on the world arena. Its development reflects an objective trend of the world development towards a multi-polar system of international relations and increasing economic interdependence. In such a system non-institutional structures of global governance and network diplomacy are increasingly used.

It should be noted that when it comes to unification of states that do not have common borders, as a rule, the key idea of consolidation is a creation on a contractual basis of military alliances (e.g., «Rome-Berlin-Tokyo» Axis, the anti-Hitler Coalition), but there are also exceptions (for example, Cuba in the Council for Mutual Economic Assistance (CMEA).

BRICS being, according to some researchers, a quasi-organisation and in the same row with such international associations as: Arctic Council, Big Eight, etc. Anyway the BRIC, and later on BRICS, objectively have to date opportunities for cooperation in order to form common positions on both key aspects of the international financial system and policy.

2. Currently in Russia there is a number of studies of the BRICS.[1] Our study contributes these researches. We focused on the issues of legal regulation of labour relations with a foreign element within the BRICS countries. The point is that at the current stage of development of the world economy the impact of globalisation leads to the increase of the flows of cross-border movement of labour, its inclusion in the turnover of goods and services, that causes in its turn the need for legal regulation of these relations in the format of involvement in the labour process of 4 categories of employees that can be employed in each of the BRICS countries: they are – the situation when 1) the employee is a citizen of the Russian Federation, 2) the employee is a citizen of the host country (one of the BRICS countries), 3) the employee is a citizen of other countries (e.g., Japanese working in China or Brazil), 4) person with dual citizenship. In this format, our attention is concentrated on such issues as: problems of application of national, regional and international conflict-of-laws provisions in the sphere of labour relations within the BRICS countries; the question of the choice of law applicable to labour relations with the participation of employees from the BRICS countries; issues of labour dispute-settlement with participation of a foreign element within the BRICS countries, etc.[2]

3. According to our research we have found out that:

– The states approach on the issue of usage or non-usage of international law within the BRICS countries drastically

[1] «The new direction of Russian foreign policy and foreign economic cooperation in the BRICS (Edited by S.P. Glinkina, et al. – Moscow, 2014. – 220 p.); «Legal aspects of the BRICS» (a collection of papers, Faculty of law, Higher School of Economy. – St. Petersburg, 2011. – 240 p.).

[2] Belikova K.M. Legal regulation of labour relations with a foreign element within the BRICS countries: Study Guide. – Moscow, RUDN, 2017. – 256 p. URL: http://nkibrics.ru/pages/publications (accessed 12/11/2017); Gaykhman V.L., Dmitrieva I.K. Employment law: Textbook for universities. Moscow: Yurayt, 2011.

affects the purview of private international law in such a way that the recognition of the priority of the norms of duly ratified international treaties and agreements expands the possibilities for the application of international legal acts in the sphere of private law, whereas the idea of the necessity of their primary «transformation» (as, for example, in China) makes their application to the discretion of the state authorities of a country.

This situation confirms the idea that the main and most important source of private international law is the national law: each state, including the BRICS countries, has its own laws and through the system of conflict-of-laws rules determines the regulation of private law relations of cross-border nature, and only the rule of law provides restrictions on the use of foreign law. We believe this to be true to life also with respect to labour relations, although the labour relationship are based on the unity of private and public principles.

– In case of solving conflict-of-laws problems in labour law relations with regard to conflict of labour laws rules of BRICS countries connecting factor – the principle of the place of work – the country where an employee normally performs his or her employment duties (*lex locus contractus*, e.g., South Africa, China) – is mostly and commonly used being supplementyd by the law of the place of conclusion of the contract (*lex locus contractus*, e.g., SAR). Such approaches, however, inevitably face with some opposing ideas on territoriality (e.g., South Africa) or extra-territoriality (e.g., Brazil) of national laws. And the admissibility of application of national treatment (national regime) for foreigners (eg., Brazil, Russia, South Africa) legitimately justified based on the idea of equality of rights of citizens of a certain state and foreign citizens on its territory.

– As for the tendency to establish multilateral conflict-of-laws provisions at the regional level, this idea in practical terms is leveled. In this regard, the solution of application of conflict-of-law regulation in labour relations involving foreigners is the most acceptable on the way of use of *in favorem* principle, corresponding to the legal nature of labour rights, which should be practically applicable in such a way that the parties' choice of the law applicable to the employment contract, shall not lead to the deterioration of working conditions of the employee compared with the mandatory provisions of the law, which would be applicable in the absence of such a choice, and this choice should be made by the employee deliberately in writing and at least at the conclusion of their labour contract.
– With respect to the settlement of labour disputes with participation of foreign element within the BRICS countries taking into account the example of Brazil and China it is revealed that, in line with different views on the desirability and importance of the litigation or conciliation-arbitration proceedings, Brazil and China now recognise the reasonableness and effectiveness of the both mentioned procedures for settling labour disputes as a means of social management and control.

In Brazil, the system of labour justice is seen as a method of separation of labour law (including through regulatory means in the form of a special act) in the context of the deepening of its further autonomy. However, the basis of this isolation is shaken by the trend to the actual admissibility of alternative ways of settlement of labour disputes (conflicts). Whereas in China along with the tradition-based ideas of Confucianism that rely on the power of persuasion in opposition to the force of law, first of all, there is an increased confidence to the role of law in the area under study, and secondly, to the role of the court in dispute settlement.

– The analysis of the Russian labour legislation allowed to establish, that the scope of application of Russian labour law is governed by the general principle national regime given to foreign citizens, stateless persons, organisations established or founded by them or with their participation, and its application is clearly insufficient because of the diversity of the employment relationship in modern conditions. Thus, in multinational companies employees formally conclude labour contracts and enter into labour relations with a Russian legal entity, which is part of a TNC, whereas in fact the level of wages, other working conditions, personnel policies, etc. are determined by the parent company. It is not clear then, for instance, how can be guaranteed the right of a Russian worker to participate in collective negotiations conducted by the company in general.

Filling of the mentioned and other gaps is crucial for normal economic cooperation with foreign partners. One of the possible prospects of solving problems with regard to the existing mechanism of legal regulation of labour relations with a foreign element, is the interaction of States in associations and forums like the BRICS, which with time, may develop acts (documents) similar to the CIS Agreement on mutual recognition of rights to compensation of harm, caused to the employee (1994), and other similar acts.

One or more studies would not be able to outline legal framework of different relations within the BRICS countries with a necessary breadth. In the consideration and study of these issues, the authors see prospects of their further work.

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Combatting corruption and unethical behaviour in conducting legal transactions

Keywords: Corruption Unethical Behaviour Legal Transactions International Corruption

1 Introduction

1.1 The roots of corruption spread far and wide within the corporate world and within the ranks of government, particularly state owned enterprises. Most corporate transactions and government enterprise will require legal assistance. As such, it can be accepted that corruption and the legal world do collide. Corruption and unethical practices are problems of a vast magnitude and it is toxic to the prosperity, integrity and health of business and therefore the legal profession. A business – legal relationship has the fertile potential for corruption and unethical behaviour to prosper. The presence of large commercial transactions and the requirements for a specified legislative framework which would provide for maximum profit, can give rise to the temptation to collude and conclude corrupt deals.

It is easy to fall into the 'unethical and corruption' trap when you are faced with conflicts of interest, 'doing the right thing' becomes an option rather the standard.

1.2 This type of behaviour, whether intentional or unintentional, is a cause for widespread concern as 'international corruption' finds its way into the legal profession.

1.3 This paper will provide a general overview of corruption and unethical practices as well as the factors which contribute to such unprincipled behaviour. Focus will thereafter shift to the prospective solutions to combatting such behaviour in legal transactions.

2 Corruption and unethical behaviour

2.1 Corruption and unethical behaviour are common terms and although they exist independently, they also exist in a symbiotic interrelationship. When you partake in transactions which consist of acts such as bribery or money-laundering, your corrupt actions are deemed to also be unethical. Many are ignorant to the fact that such devious behaviour would be of international concern. They usually are under the impression that it is a concern confined to a particular country. This is a false perception as most corrupt and unethical behaviour is common on an international level and often there are links.

2.2 In legal transactions, corrupt dealings arise out of a tripartite relationship where the legal practitioner is required to act as the middle man or agent on behalf of his client. In these instances a client may ask his lawyer to establish a legal structure which may appear to be lawful, but which is actually used to money-launder and in these transactions the lawyer acts as the intermediary.[1]

[1] Lindner S «Integrity issues relating to lawyers and law firms» (2014).

3 Factors conducive to corruption

3.1 There are various factors which contribute to corruption in legal transactions. Common factors include financial incentives where participants are focused on personal gain as well as the lack of independence where clients may even deceive their legal representatives in order to receive assistance with legal transactions which, unbeknownst to the lawyer, involves corrupt dealings. One of the essential factors which needs to be addressed is the lack of knowledge which legal practitioners have of key international anti-corruption instruments. A survey conducted in 2010 by the International Bar Association illustrates the lack of knowledge which individuals, particularly lawyers have, pertaining to the key international anti-corruption instruments.[1]

3.2 Lawyers easily fall into the trap of corruption as a result of their lack of knowledge of anti-corruption legal frameworks in foreign jurisdictions. The problem here is that the risk for corruption and unethical behaviour suddenly increases as lawyers are not aware of international obligations surrounding the issues such as foreign bribery.[2] It is of utmost importance that potential solutions be provided in order to alleviate the rapid growth of corrupt and unethical behaviour.

4 The way forward

4.1 It is easy to become fixated on punishing the corrupt, however, this is not necessarily the only way forward in order to combat

[1] IBA, OECD and UNODC «Risk and Threats of Corruption and the Legal Profession – Survey 2010».

[2] Lindner S «Integrity issues relating to lawyers and law firms» (2014).

corruption. Yes criminal sanctions are important but in order to successfully prevent and minimise corrupt and unethical behaviour, a more holistic approach is necessary. This holistic approach may require various legal organisations to focus on what they can do to combat such behaviour. This would require them to focus on underlying issues which are not dealt with by criminal sanctions.

4.2 International organisations such as Law Societies, should focus on promoting, launching and developing anti-corruption and unethical behaviour initiatives in their respective companies.

4.3 The focus should be on factors such as devising an integral plan, raising awareness of both international and domestic anti-corruption legal frameworks as well as national and professional policies which exist to minimise corruption and unethical behaviour. It is important to have a strategy moving forward. Law Societies and other legal organisations need to establish an effective plan which will curb corruption and unethical behaviour. The range of opinions and views of skilled and experienced individuals could potentially lead to the best outcome.

4.4 Awareness can be raised by relying on various avenues such as advertising, websites, social media and other relevant information resources. This ensures that an active approach is taken towards combatting such intolerable behaviour. In addition to raising awareness, current and future legal practitioners should be educated on the anti-corruption legislative frameworks in foreign jurisdictions. In ensuring the foregoing, the Law Societies should focus on providing guidance and technical assistance with the implementation of anti-corruption measures.

5 Conclusion

5.1 There is no solution provided which guarantees the prevention of corruption and unethical behaviour. It has been a concern for many years and it remains a growing concern. Having said that, it remains essential to consider ways in which corrupt behaviour can be minimised but it will never be eradicated completely. It is suggested above that perhaps a starting point is for Law Societies and other legal organisations to focus on what they can do to assist with addressing the concern.

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Reflections on the innovation of international intellectual property law in cooperation with the BRICS

The international intellectual property legal system is the product of industrial civilisation. The system conforms to the requirements of industrial civilisation, protects the interests of the owners, and promotes the internationalisation of intellectual property rights, which has been universally recognised and respected by the world.

At present, the core of the international legal system of intellectual property rights is the principle of national treatment, the principle of novelty protection, the priority system and the international application and protection system.

However, the existing international intellectual property legal system has been unable to meet the requirements of the times, facing challenges and changes. These challenges have both the expansion of traditional intellectual property rights, but also the challenges and changes in information, math, large data and intelligence.

The BRICS countries should work together and jointly innovate the international intellectual property legal system, in the new era of co-issued the voice of the BRIC countries, for the international intellectual property changes to provide our program for the international community to provide new international public goods.

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Mutual enforcement of choice-of-court agreement and foreign judgments in BRICS countries: the benefits of the Hague Convention on Choice of Court Agreements

On 12 September 2017, the People's Republic of China (PRC) signed the Hague Convention on Choice of Court Agreements (Convention). The Convention, in force since 1 October 2015, seeks to provide certainty in cross-border litigation by allowing parties to choose the exclusive court in which any disputes arising under a commercial agreement will be resolved. Courts of member states must accordingly respect exclusive jurisdiction clauses in commercial agreements by staying proceedings in favour of the courts of other member states. They must also recognise and enforce judgments of the courts of other member states, subject to certain limited exceptions.

The PRC needs to ratify the Convention before it becomes a member state and bound by the terms of the Convention. Once

the PRC formally joins the Convention, there will be increased opportunities for the recognition of Chinese court judgments internationally and vice versa.

The Convention currently has three parties: Mexico, the European Union and Singapore. The Convention binds all EU member states except Denmark by virtue of the EU's approval. The United States of America and Ukraine have also signed the Convention but have not ratified it.

The Chinese Ministry of Foreign Affairs announced, on the same day as the PRC signed the Convention, that the PRC would «study the approval of the Convention as a priority, so that the Convention can become effective for the PRC as soon as possible«. It appears likely, therefore, that the PRC will ratify and become a party to the Convention in the near future.

The objectives of the convention are quite simple: to promote international trade and investment through enhanced judicial cooperation in civil and commercial matters. The convention ensures that courts in contracting states exercise jurisdiction consistent with any exclusive choice of court agreement that exists between the parties to a dispute, and creates a framework for the recognition and enforcement of judgements arising from such agreements. The convention applies in international cases to exclusive choice of court agreements concluded in civil and commercial matters where the parties to a contract have concluded a dispute resolution clause which specifies that a particular court should hear and resolve disputes under the contract.

The Convention applies to «international cases». The definition of international is based on the circumstances of the case – the default position is that the case is international unless the parties are resident in the same member state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that state.

The proposed ratification of the convention by China will impose three key obligations on China as a party to the convention:

specifically that a Chinese court designated in a choice of court agreement must exercise jurisdiction to decide the dispute in which the agreement applies; a Chinese court not designated in the choice of court agreement must decline to exercise jurisdiction in the dispute; and judgements given by a foreign court pursuant to a choice of court agreement made by the parties must be recognised and enforced by a Chinese court. So these are the three core obligations.

Accession to the convention is advantageous to the BRICS countries for a number of reasons: implementing the convention will create certainty for the BRICS and foreign litigants in the conduct of international transactions and will reduce the risk of unnecessary delays and costs occasioned by parallel proceedings in different jurisdictions, and where the parties have undertaken to refer a dispute between them to a particular court, they will be held to that agreement. A further benefit of the BRICS countries becoming parties to the convention is that more foreign judgements will be capable of recognition and enforcement in native courts and, correspondingly, a great number of native judgements will be capable of recognition and enforcement in other contracting states.

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Legal basis for stable and fare multipolar world order

1. After the end of the cold war, there was a unique situation when all in the world accepted a certain set of West politological and international legal concepts. They captured the minds. Became the mainstream. Took the dominant positions. Although they were often poorly reasoned. Lopsided. Tendentious. Pulled out of a hat. As, for example, the concept of the end of history or advent of liberal order.
2. Despite common perceptions, there have never been a unipolar world. The balance of power catastrophically swung towards the United States. That is all. But that is quite another matter. The US and EU tried to take advantage of Russia's weakness and of China's absorption into solving national problems to form a unipolar and one-party world, so that the others would accept that only the former determine what the provisions of international law consist in, when and who shall follow these rules, when and who may dispense with them. They

did not succeed. The institutional, regulatory and real world order has survived.

3. The basis of the modern world is that Russia and China are permanent members of the UN Security Council, along with three Western powers. Without their support and consent, no questions of peace and war can be legally resolved. The legitimate decisions on using force and enforcement measures can be made only by the UN Security Council. All countries have undertaken to respect them.
4. The basis of the modern world is that Russia and China are legally members of the nuclear club. The military and political potential in their disposal is the guarantee against dictatorship, hegemony, arbitrariness in international relations. This potential can and should be utilised to stabilise international relations.
5. Besides the UN, institutional expression of a multipolar world order is the Group of Twenty, BRICS, SCO and other world structures created by Russia, China, India, Brazil and South Africa or with the participation hereof. Strengthening of these institutions will make the world more just, sustainable and equitable.
6. Catechism of the modern world order is the UN Charter and international law formed on its basis. The classical international law defends equality of cultures and civilisations. Non-interference in the internal affairs. Nonuse of force. Primacy of international cooperation over unilateralism. It is in our interest to stop undermining the existing international law, strict observance of international legality and cooperation for the sake of its uniform understanding and application.
7. From this perspective, it is important for the BRICS countries to remove step by step the distortions of the world economy. To very carefully keep an eye on protectionism

practices, disregarding its international obligations, various restrictions unilaterally imposed. The prospect is behind creating an Association of international and integration law of the BRICS countries. We should check out the intellectual property and competition law, all the international treaties collection in order to take into account new challenges and opportunities.

In search of open and at the same time well protected internal legal order

For some time now Russia has been carrying out a number of major geopolitical projects. They are development of an integration community within Eurasian Economic Union, establishment of free trade zones between EEU and a large group of Greater Eurasia states, involvement of the widest possible range of participants in pursuing of the Comprehensive Greater Eurasian Partnership initiative.

China in turn attaches primary importance to forming common economic spaces with countries and regions of Asia, Africa, Latin America and even Europe. Combination of freedom of trade and granting preferential legal regimes to partners, realisation of large-scale infrastructural projects throughout the world and granting generous credits to the states working together with China are their distinctive features.

The roles playing by Moscow and Beijing in global economics and politics are different. China has a huge economic might. Russia has military and political one. However, it is extremely important for both global development centres to solve the same problem – to maintain the openness of their internal legal systems. It is necessary that business of the states-partners should feel comfortable on their domestic markets, plan and predict their activities, easily adapt to the rules of the game established on them. It is equally important for setting up regulation models within common spaces, which would be helpful for rapprochement and joint work and not vice versa.

Meanwhile, legal regulation of the domestic markets of both powers should not be toothless. It should protect state structures, business, human capital from undue pressure from the outside, blackmail, compulsion. It should protect both countries societies

from accepting values and standards they do not share and are fraught with negative consequences for internal development, which threatens societies with destabilisation. It should create a barrier against any coercive measures to make them fulfill obligations which they had not taken upon themselves and are not respected by others.

In this context, a lot has recently been done in Russia. Major changes have happened with regard to perception of numerous legal issues, conceptual framework, and current legislation. However, much is being done retrospectively, retroactively and fragmentary. The systematisation of strengthening of the national legal order requires the following: 1) to change completely the past legislation that has been giving undue advantages to foreign manufacturers of goods and services; 2) to reform the domestic law in such a way that it would be more profitable to export goods of deep and ultra-deep processing and high additional value, not raw materials or semi-products; 3) to create a necessary legal basis for an effective technical assistance for partners, which would gain real long-term profits; 4) to reconfigure the international cooperation in the sphere of legal harmonisation and rapprochement so as to make it equal and mutually beneficial, focus it on a convergence; 5) to create a legal safety network, which would prevent the external monopolisation of the evaluation and interpretation of the national law, and impulses to change it.

Finding an optimal balance between the demand for an open legal system and need for a reliable protection of the national legal order is the challenge faced by both Russia and China and all the BRICS countries. It is reasonable to seek this balance jointly, respecting common interests without going too far with the change towards too extensive and powerful protection mechanisms.

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The convergence of business laws and the economic and trade cooperation among BRICS countries

It has been 21 years since the BRICS countries began to cooperate under the principle of «openness and transparency, solidarity and mutual assistance, deepening cooperation and seeking common development». With the spirit of openness, tolerance, cooperation and win-win, the BRICS cooperation mechanism has been widely recognised by the international community. At the same time, the risks associated with the BRICS cooperation mechanism have gradually attracted attention. With further development of cooperation, the BRICS countries should pay attention to legal cooperation, actively promote the convergence of business laws of the BRICS countries, and improve the overall legal consciousness of all members in order to eliminate risks, seek mutually beneficial and win-win situation in economic and trade cooperation, and achieve long-term and stable cooperation.

1. Legal convergence is an important assurance measure to push forward the cooperation mechanism of the BRICS countries.

(1) Legal convergence is the main means to eliminate the conflicts in economic and trade cooperation among the BRICS countries

Legal convergence can diminish the differences among the legal systems of the BRICS countries, reduce the legal risks associated with economic and trade cooperation, and provide a mechanism for economic and trade conflict resolution. It is an important means to eliminate the conflicts in economic and trade cooperation among the BRICS countries.

All of the BRICS members are important emerging powers, whose mainstay industries are traditional ones. They share similarities in terms of their labour market, foreign trade and policies for attracting foreign investment, etc., resulting in similar comparative competitive advantages. Thus, economic conflicts of the members have been exacerbated. In the past two decades, the trade friction among the BRICS countries has never ceased. In order to resolve the conflicts, the BRICS countries have made a series of efforts, including the execution of the «Treaty for the Establishment of a BRICS Contingent Reserve Arrangement» and the establishment of the BRICS New Development Bank, etc. The importance of legal cooperation has been recognised through the effort to establish consensus by multilateral treaties. However, it has not been widely promoted. Moreover, the treaty deals with merely special issues within a limited scope, failing to truly resolve the economic and trade conflicts. In the future, the BRICS countries should promote the legal convergence of the members to eliminate conflicts.

(2) Legal convergence is the basis for ensuring the stability of the BRICS cooperation mechanism.

Stability is one of the major features of the law, with the objective of setting up a system. Therefore the establishment of a comprehensive legal system of the convergent laws cannot only offer guidance for the settlement of economic and trade disputes, but also provide more opportunities for the full development of the BRICS cooperation mechanism so as to ensure the stability of the BRICS cooperation mechanism and push the BRICS cooperation mechanism toward maturity.

At the Ninth BRICS Summit held in Xiamen in September this year, China put forward the concept of «BRICS Plus» in an attempt to expand dialogue between the BRICS countries and other developing countries. It is praiseworthy that this initiative is in line with the «Belt and Road» initiative currently promoted by China, both of which are aimed at deepening international economic cooperation. But like the «Belt and Road» initiative, this initiative has to face the legal risk dilemma due to the involvement of a variety of countries with different legal systems. Therefore, in order to implement the «BRICS Plus» to expand the scope of the BRICS cooperation mechanism in terms of its applicable projects or even nations, we must attach importance to legal cooperation to minimise the risk of intensifying conflict that may be triggered by the expansion of the BRICS cooperation mechanism.

2. The historical evolution of legal convergence made the inevitable choice for the BRICS countries.

As an economic cooperation strategy, the BRICS cooperation mechanism is more than just an international economic and political collaboration. It is also a legal collaboration. Human history shows that legal cooperation and convergence is the inevitable evolution for the development of economic and trade cooperation.

The law is the key to ensure political and economic cooperation no matter either in the colonial era or in the era of «one superpower and multi great powers». Portugal, Spain, and the United Kingdom in the early days, France and Germany in modern times, and the United States in the contemporary era had all incorporated legal cooperation with their economic and trade exportation from the very beginning so that the systems and ideas of these countries were exported through legal cooperation. Based on a system and value identity, the great nations established a sense of law identity. As a result, the international economic and trade cooperation conflict

could be resolved under the framework of legal convergence by virtue of the continuation of common legal values, even if the economic and trade output and the regime control broke down due to changes of situation.

The realisation of economic globalisation after World War II also relied on the law. After World War II, the United States played a leading role in formulating a series of uniform rules for international trade, which cultivated the legal convention of «making rules before conducting any transactions, and determining rules if there are any conflicts» for international economic and trade cooperation. Namely, the international trade would not be carried out until unified rules had been reached and were to be strictly observed in the process of trade; and trade conflicts would be solved by courts or arbitration with credibility. The legal cooperation did not only enable various countries around the world to achieve rapid economic growth after World War II through the mutual benefit and win-win mode, but also ensured the world's peace and development.

By the 1990s, it became popular around the world to enhance economic cooperation by means of regional legal convergence. In relation to regional cooperation, the European Union (EU), which was formed upon the unification of the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community after World War II, was committed to developing convergent laws through the joint participation of its member states. Economic and trade barriers among the EU countries were greatly eliminated as a result of the proactive legal convergence, resulting in EU becoming one of the most important economic powers the world.

The African Union countries also signed the «Treaty for the Harmonisation of Business Laws in African» in October 1993, and established the Organisation for the Harmonisation of Business Law in Africa consisting up to today of 17 member states. The uniform business laws are directly applicable in the member states upon

effectiveness and any provisions of the member states' domestic law in conflict with the uniform business laws shall not apply.[1]

At present, Asian countries led by Singapore are actively promoting the unification of business laws, and they have launched the Asian Business Law Institute in an attempt to draw on the models of American law schools and European law institutes to foster legal cooperation in Asia and achieve the convergence of business laws. The ASEAN region is also planning to set up a law coordination institute in order to promote the legal convergence of the ASEAN countries.

Therefore, to ensure the development of international economic and trade cooperation by means of legal convergence is not only a wisdom gained from history, but also a response to the current world trends. The BRICS cooperation mechanism cannot ignore legal issues, and legal cooperation and convergence is the route going forward. The BRICS countries need to form legal consensus through legal cooperation, develop common legal rules, and jointly build a resolution mechanism for trade conflicts so as to ensure long-term and sustainable cooperation.

3. The legal convergence of the BRICS countries should be centered on the business law convergence, and should be implemented in a planned and step-by-step manner.

Commercial law is the focus of the legal convergence of the BRICS countries. According to a research by PWC, an internationally renowned consultancy firm, the «biggest obstacle» for the growth of international companies in the entire Asia-Pacific region for the past three consecutive years was the conflict in commercial rules among different countries. This is the case for the Asia-Pacific region. And the same holds true for the BRICS countries with an emphasis on

[1] [USA] Claire Moore Dickerson, ed. *Unified Business Laws for Africa: Common Law Perspectives on OHADA*. Trans. Zhu Weidong. China University of Political Science and Law Press, 2014.41.

economic and trade cooperation. Systemising commercial law is a long-term development strategy for a nation. It serves not only as a basis for maintaining the economic stability, but also an important guarantee for international economic cooperation. With respect to the legal convergence of the BRICS countries, special attention should be paid to the cooperation of commercial legal systems.

In order to achieve the convergence of business law, the BRICS countries need to promote commercial legal cooperation in a planned and step-by-step manner.

Firstly, the BRICS countries should establish confidence in their own domestic laws. In spite of their varied economic growth speeds and different international roles, all of BRICS members should actively participate in the convergence of business laws and establish confidence in their own national laws. Only on such a basis could a converged text of business laws be drafted, recognised and promoted by the members to the maximum extent possible. Therefore, the BRICS countries should actively demonstrate their own legal achievements and publicise their legal and legislative experiences to other members to create a positive atmosphere for legal exchange and cooperation, with particular attention to the exchange and cooperation concerning the legislative experience and techniques in the emerging business areas so as to meet the development needs of international economic and trade cooperation.

Secondly, a plan for legal cooperation is necessary for the BRICS countries to enable business law convergence, similar to the fact that a legislative schedule is required for parliamentary activities. Therefore, the BRICS countries should reach a legislative planning agreement, and systematically organise and study the existing cooperation agreements and treaties in order to eliminate repetition and conflicts, fill in the gaps, and develop a legal cooperation framework that is systematic, scientific and feasible.

Thirdly, in order to ensure the smooth development of their business law convergence, the BRICS countries can learn from

the other regions by establishing institutions for commercial law convergence to undertake the task of research and formulation of unified commercial laws and oversee the execution of business law convergence so as to foster the legal cooperation among the BRICS countries.

Fourthly, to educate and train the people of the BRICS countries is indispensable for the realisation of business law convergence. For this purpose, the BRICS countries should strengthen legal academic exchanges, including the exchange of students, devising policies for scholarships, and joint cultivation of transnational talents, especially specialised legal talents proficient in non-major languages in order to create an international talent pool for the implementation of legal cooperation. At the same time, all member countries should also encourage their judicial practitioners, including judges and lawyers, to undertake legal culture exchange in order to put the legal cooperation into effect at the judicial practice level. In addition, we must also strengthen the education of businessmen, helping businessmen to cultivate the habit of abiding by law in cross-border trades and resorting to legal means when in dispute.

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Responsibility of juridical persons in the sphere of combating terrorism, corruption and drug-trafficking in BRICS countries

Keywords : terrorism, corruption, drug dealing, criminal liability of juridical persons, administrative responsibility of juridical persons.

In the modern world, domestic stability depends mostly on the efficiency of combating global terrorism, corruption and drug-dealing at the national level, as well as on the development of international cooperation in the abovementioned sphere.

The specified types of crimes got new quality characteristics at the turn of Millennium. Today terrorism, corruption and drug-dealing often connect with the activity of various legal entities. Moreover it may happen that juridical persons themselves become real beneficiaries, on whose behalf and at whose expense the abovementioned crimes are committed.

As a result came changes in domestic laws that expanded the scope of persons liable for terrorism, corruption and drug-dealing. Formerly the subjects of these offences were only physical persons,

now in many countries including all the BRICS countries juridical persons bear either criminal or administrative responsibility therefor.

International treaties that foreseen passing of national laws on responsibility of juridical persons came into being.

So, the necessity to hold responsibility of juridical persons for commitment of terror offences was enshrined in the International Convention for the Suppression of the Financing of Terrorism adopted by the UN in 1999, the Council of Europe Convention on the Prevention of Terrorism (2005), the SCO Convention against Terrorism (2009) and other international treaties.

Responsibility of this kind for corrupt crimes is provided by the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the OECD in 1997, the UN Convention against Transnational Organised Crime (2000) and against Corruption (2003) as well by other international treaties.

International drug control conventions (Single Convention on Narcotic Drugs of 1961 (with amendments made by Protocol of 1972), Convention on Psychotropic Substances of 1971 and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988) have no provisions concerning responsibility of juridical persons for drug-related crimes.

However, providing such actions of juridical persons as criminal we are able to take into consideration other treaties, such as Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005.

Due to the abovementioned international treaties, it is possible to organise an international cooperation to charge juridical persons with the specified offences. It is much more complicated to hold them administratively liable.

Noting the importance of responsibility of juridical persons not only for the purposes of combating terrorism, corruption and drug-trafficking but also for the economic development under

market relations based on fair business practice, in the interest of business and economic cooperation among the BRICS countries it is extremely necessary to change good practices of combating crimes committed by legal entities.

It is also highly important to join the efforts of scholars to study corporate crimes as the social reality and the cumulative offence in order to make suggestions concerning the single decision of the BRICS countries to combat this type of crimes.

Cooperation would promote the interaction of legal systems in the BRICS countries on the way to fair global public order that would ensure the stable political, social and economic development of the BRICS countries.

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Institutional arbitration as an efficient means of business disputes resolution and an important factor of investment attractiveness of a jurisdiction. Russian experience and further ways of development

A. Permanent arbitral institutions (PAIs) within the meaning of the new Russian law on arbitration

On 1 September 2016, a new arbitration law in Russia came into force. According to its provisions, all Russian and foreign permanent arbitral institutions (**PAI**) wishing to administer institutional arbitration in Russia shall obtain an authorisation from the Russian Government. This was done in order to dispose of hundreds of «pocket» and bad-faith arbitral institutions which impartiality was highly questionable.

As regards Russian PAIs, the law introduced several requirements:

(i) the PAI shall be established by a non-profit organisation (**NPO**);

(ii) arbitration rules of the PAI, its list of arbitrators and the procedure for appointment and challenge of arbitrators shall fully comply with the arbitration legislation;

(iii) the documents on the founders and directors of the NPO shall be authentic;

(iv) the NPO establishing the PAI shall be reputable and its financial capabilities suffice to guarantee a high-quality administration of arbitration.

The official status of a PAI provides certain advantages:

- only PAIs are entitled to administer arbitration of corporate disputes involving Russian companies (incl. M&A disputes arising from SPAs);
- the parties that refer disputes to a PAI may enter into so-called direct (special) arbitration agreements that allow to «fine-tune» their arbitration;
- an arbitral tribunal in the arbitration administered by a PAI is entitled to apply to a state court in order to seek assistance in obtaining evidence.

As of today, only four arbitral institutions in Russia have PAI status:

- ICAC at the Chamber of Commerce and Industry of Russia;
- MAC at the Chamber of Commerce and Industry of Russia;
- Arbitration Center at Russian Union of Industrialists and Entrepreneurs;
- Arbitration Center at the Institute of Modern Arbitration (IMA).

A1. First requirement: PAIs shall be established by a non-commercial organisation

This requirement was introduced in order to dispose of arbitral institutions created by large and influential commercial entities. While concluding commercial contracts such entities induced their counterparties to refer disputes arising of the contracts to the arbitral institutions established by them. Arbitrators included in the list of such institutions (who most often decided in favour of

these large entities) were eventually deemed to lack independence and impartiality.

In order to put an end on this predetermined and biased arbitration, the new Law on Arbitration requires that arbitral institutions are established only by non-profit organisations. It is also required that such organisation shall perform activities aimed at development and promotion of arbitration and also have reputable founders. These requirements seeks to ensure that arbitration is administered in an independent way without arbitral institutions being dependent on one of the parties to arbitration.

A2. Second requirement: appointment and challenge of arbitrators shall be considered collectively by an appointing committee

The new Russian Law on Arbitration requires that all questions relating to the appointment, challenge and termination of arbitrators' mandate are considered collectively by an appointing committee that shall consist of not less them 5 (five) members. Such questions are alternatively allowed to be considered by an individual body within PAI, but subject to the additional requirement that decisions of such individual body could be appealed within the appointing committee. No less than 2/3 of the appointing committee are required to be elected by the individuals included in the list of arbitrators of a PAI.

A3. Third requirement: half of the recommended list of arbitrators shall be composed of experienced arbitrators/judges

The new Law on Arbitration requires that a recommended list of arbitrators is halfway composed of individuals who possess 10 years of experience as arbitrators or state courts judges resolving civil disputes. Meanwhile one third of the list shall comprise individuals with Russian equivalent of Ph. D. who are officially specialised in civil law or civil procedure. PAIs are not precluded from maintaining certain additional databases composing of practitioners interested in serving as arbitrators.

A4. Forth requirement: arbitration rules shall comply with the provisions of the new Law on Arbitration

The Russian Law on Arbitration requires arbitration rules of PAIs to comply with its provisions. Given that some of the provisions of the law are quite restrictive, it is essential for Russian PAIs to counterbalance them with the best worldwide practices.

Arbitration reform became a reason for the leading Russian arbitral institutions to revise and improve their arbitration rules.

For example, Arbitration Rules 2017 of the Arbitration Center at the Institute of Modern Arbitration address such burning topics in arbitration as arbitration of multiple claims; consolidation of arbitrations; joinder and intervention.

B. Arbitrability of corporate disputes

Starting from 1 February 2017 the majority of corporate disputes involving Russian companies are allowed to be referred to arbitration administered by PAIs with a seat of arbitration in Russia. There are now two types of arbitrable corporate disputes under the existing legislation: so-called «conditionally» and «unconditionally» arbitrable corporate disputes.

Disputes arising out of M&A transactions, for example, are «unconditionally» arbitrable, meaning that they are not required to be arbitrated in accordance with special rules on arbitration of corporate disputes.

«Conditionally» arbitrable corporate disputes, on the contrary, are allowed to be arbitrated only in accordance with special rules. «Conditionally» arbitrable corporate disputes are, for example, those arising out of the incorporation, reorganisation and liquidation of Russian legal entities as well as disputes related to the appointment or election, termination and suspension of powers and the liability of persons who are/were members of the management and control bodies of Russian legal entities, etc.

The arbitration clause in regard of such disputes shall be concluded by all the shareholders of the company and the company itself or can be included in the charter of the company by unanimous decision of the shareholders.

C. Further Steps and Conclusion

The reform of the Russian arbitration law is only the first step and a lot is to be done in order to develop Russia as the proarbitration jurisdiction. First of all, it is necessary to develop education in the field of arbitration, develop Russian and International Moot Courts. For example, Institute of Modern Arbitration supports Russian pre-moots of two international investment arbitration moot courts and arranges on Russian moot court on arbitration of corporate disputes. The trainings for arbitrators shall be also held regularly in order to enhance the level of arbitration. Proarbitration approach of the state courts is also very important and the arbitral institutions and arbitrators shall work hard to keep the highest standards and respect from the state courts. It is also necessary to follow the dynamic developments in international arbitration (such as, for example third party funding) and make the relevant legislative amendments, when necessary.

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Modern trends of development of financial control in the BRICS countries

Keywords: financial control, public financial control in market economy, its goals, public interest in financial control, international principals of financial control.

Cooperation of the BRICS countries leads to a closer interaction of their financial control authorities. Nowadays the financial control is aimed at economic incentives, reasonable and economical usage of labour, financial and natural resources, reduction of nonproductive costs and losses, revealing and preventing corruption.

As experience of various states shows, loosening of public financial control in market economy leads to serious negative social processes which create a threat to national security. In the course of financial activities, an important guarantee of a social bias in economic and financial policy of a state will be enhancement of financial control in general.

Now the financial control has acquiered new characteristics, goals, principles, forms. It is carried out not only by those existing before but also by newly-organised financial authorities. The goals

for our states are to carry out the financial policy successfully, to use public financial resources effectively. Therefore, the following is required:

- cooperation of public financial control authorities among the BRICS countries and with the international organisations;
- establishment of a co-ordinated financial control authorities structure and single information system for them;
- tough control to ensure compliance with the law in the course of foreign exchange, export-import and other international transactions, and also of performance of international financial obligations of the states;
- combat against money laundering and terrorism financing;
- creation of a single system of monitoring over financial operations as an informational basis for financial control;
- establishment of a uniform methodology (standards) and methods of control for all the participants of public financial control in the BRICS countries and criteria for generalising the results of control events etc.

The variety of financial control forms leads to its unification of implementation principles. The world community has developed main, universal principles of the public financial control set out in the Lima Declaration INTOSAI which the BRICS countries are signatories to. They are: independence, objectivity, competence, transparency.

Independence of control shall be provided by: a) autonomy of the financial control authorities; b) longer terms of office of the heads of financial control authorities compared with the parliament terms of office; c) formalisation of their status in the Constitution.

Objectivity and competence imply financial control authorities' compliance with the legislation, their professionalism on the basis of the auditing standards.

Transparency means permanent communication of financial control authorities with the public and mass media.

Enacting laws which directly or indirectly affect the system of financial control the state follows the aforesaid principles. Meanwhile, every state has its own particular characteristics of control procedures.

The Lima Declaration is a fundamental document which takes into consideration both the differences in the financial control systems and the place of financial control in different countries. The preamble of the Lima Declaration reads: «Whereas such institutions become even more necessary because the state has expanded its activities into social and economic sectors and thus operates beyond the limits of the traditional financial framework.» The Declaration emphasises that establishing control is an essential element of public finance management as such management implies accountability to public.

Pursuant to the provisions of the Lima Declaration, control is not an end itself but an indispensable part of a regulatory system. The latter reveals deviations from the accepted standards and violations of the principles of legality, efficiency and economy of financial resources early enough, which makes it possible to take relevant corrective action and if necessary to make those accountable accept responsibility, obtain damages for the losses the state incurred and meanwhile work out and carry out measures aimed at preventing such breaches in the future (Section 1).

To sum up, the following purposes of public financial control can be indicated: specific and proper use of public funds and public property; state economy management in compliance with the law; administrative rule-making activities; proper reporting to state public body authorities and the general public by the way of publishing the results of audits; provision of the necessary corrections; imposing legal responsibility on those accountable; obtaining damages for the loss the state incurred; elaboration and implementation measures that prevent the breaches in the future.

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Possibility and prospect of public private partnership (PPP) legal cooperation in BRICS

Before 2004, the Brazilian government carries out PPP projects mainly based on the Procurement Law and the Concession Law. In 2004, Brazil promulgated the first unified PPP Law, which made a comprehensive legal provision for PPP. In 2014, Brazil amended the «PPP Act», which stipulated that all levels of government should use 5% of their net fiscal revenue to invest in PPP projects. In 2016, Brazil added a federal government department to improve the domestic PPP model. Since 2005, Russia's PPP legislation has undergone far-reaching reforms. In 2005, the Federal Concession Law, the Investment Fund Regulations and departmental regulations, effectively promoted the development of PPP mode in Russia. Federal and local governments have established advisory committees, PPP forums and other institutions to coordinate and co-ordinate the PPP market, reduce transaction costs and encourage competition among social capital. In July 2015, the latest introduction of the Public-Private Partnership Law, which fills the vacancy of the PPP system,

provides more model options and legal protection for PPP projects. The PPP system of India mainly stipulates in the industry legislation in various independent infrastructure areas, such as electricity law, port law and so on. The government also publishes a series of guidance documents and PPP reference books to provide procedures and methodological guidance for project identification, feasibility studies, procurement and operations. In 2011, the Economic Affairs Bureau of the Ministry of Finance drafted the «PPP National Policy» to build a central-level legislative framework to strengthen the guidance of PPP norms and improve the efficiency of project development.

I. The present situation and review of PPP Legislation in the BRICS. South Africa has developed a series of institutional frameworks in the field of PPP. In 1999, the Public Finance Management Act (PFMA) was enacted to clarify the management of national and local financial organisations. In 2000, the «PPP Project Fiscal Management Regulations» was promulgated and a special department of PPP was set up within the Ministry of Finance. South Africa has successfully implemented 26 PPP projects and 50 projects at various stages of the PPP project are being advanced.

In China, the 2002 «Government Procurement Law» and the 1999 «Tendering and Bidding Law» play a leading role in standardising PPP at this stage. In 2014, the Ministry of Finance issued the «Guidelines on the Operation of the Government and Social Capital Cooperation Mode (Trial)». The NDRC issued the «Guidance on Government and Social Capital Cooperation» to standardise the operation process of PPP projects and strengthen the entire process of PPP contract management.

In 2015, the Ministry of Finance issued the «PPP value evaluation guidelines (Trial)». In 2016, the NDRC and the CSRC jointly issued the Circular on Promoting the Securitisation of Asset and Securitisation of the Government and Social Capital Cooperation (PPP) Project in the Traditional Infrastructure Sector. In 2017,

the State Council launched the drafting of the Regulations on Cooperation between Government and Social Capital.

The possibility of legal cooperation in the BRICS includes the following points: (1) The BRICS countries have the legal demands of government and social capital cooperation; (2) The BRICS countries PPP legislation are started around this century and was in the exploratory phase; (3) The BRICS PPP law has a common value pursuit, the basic principles and normative focus: A. through cooperation, co-governance, to achieve win-win and sharing is our value goals; B. The basic principle of PPP law is the common governance and reasonable wind of public-private cooperation, Risk-sharing and the preferential protection of the interests; C. PPP legal norms focus on: operational processes, value for money evaluation, financial affordability demonstration, social capital procurement, contract management, identify the roles and responsibilities of the participants; (4) Based on mutual learning, we will further optimise the allocation of resources, jointly improve the level of social governance, economic management, and ultimately meet the national demand for public goods.

We have following advices for the PPP Legal Cooperation in the BRICS: (1) To strengthen the comparative study of PPP legal system in the BRICS countries; (2) Further investigate the major problems and causes of the implementation of PPP law and policy; (3) It is recommended that the BRICS countries, through consultation, jointly develop the BRICS PPP Legal Cooperation Agreement or the BRICS PPP Guide, and strengthen coordination to address the common problems we face; (4) Promote bilateral or multilateral cooperation in the field of implementation with the cooperation of PPP law.

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Countering global terrorism, anti-corruption and international legal cooperation mechanisms in the field of BRICS security

Key concepts

BRICS as an interstate association *sui generis.*

International legal mechanism of cooperation of BRICS countries for the prevention of global terrorism.

Prioritising directions and forms of international cooperation between Russia and BRICS countries in the sphere of countering corruption.

Development, multilateral and bilateral agreements on return of criminal assets by the BRICS countries.

BRICS is an interstate association *sui generis* and its main features are absence of the Charter and other organisational and legal

characteristics of an international intergovernmental organisation (IIO).

The main mission of the BRICS is the development of a mutually beneficial cooperation and dialogue between countries and peoples. Lawyers of the BRICS Member States can and should contribute to the solution of this problem, because it is impossible to imagine a highly developed international cooperation at the interstate level and at the level of business, different organisations and institutions without the law and its tools.

Despite its youth, the BRICS is actively involved in solving world's problems as a tool for building a multipolar world. Realising the importance of the new world order challenges and emergence of common threats for the BRICS and its Member States, first of all, we should analyse the problem of combating global terrorism and corruption.

Appearance of the global terrorism is a grave violation of the law and morals; it is the threats to the human rights and interests, to the life and health of many people; and it may cause the erosion of economic and social progress. That is why the identification, **prediction and mitigation of terrorist threats** are the key areas of cooperation of the BRICS countries.

One of the most important factors in the development of the global terrorism is connected to the increase of the role of various civic associations and transnational organisations, including the BRICS countries. The possibilities of such associations are used by the terrorist underground to weaken the national state institutions which are responsible for the society security.

The legal framework for combating international terrorist acts is formed already in the legislation of the BRICS Member States (Federal Law «On countering terrorism» 2006, the PRS Law «On combating terrorism» 2016, etc.). At the same time, current trends in the terrorist activity call for new legislative solutions. The PRC Law «On the security of the Internet» of 2016 attracts much

attention; it contains a prohibition against propaganda of terrorism and extremism in the Internet.

Such legislative reaction to the renewal of terrorist activities' forms should be developed in an international legal mechanism of cooperation of the BRICS countries, for prevention of the global terrorism, including the implementation of legal, organisational and methodological measures on the basis of international treaties (interstate, intergovernmental and international treaties of interdepartmental nature).

Discussions of the global terrorism problem within the summits of heads of the BRICS Member States and scientific forums in these countries shows an awareness of its relevance and the desire to find a way out of the situation. Since the strategy of global terrorism is based on the overall rejection of civilised norms of behavior, scientific approaches to identification and prediction of terrorist threats represent a range of directions: legal, technical, organisational, managerial and analytical. With this in mind, currently there is a need for the establishment of an international mechanism for cooperation in the sphere of ensuring the security of our countries from the consequences of the global terrorist activity.

For the Russian Federation the cooperation with the BRICS Member States **on anticorruption** is of great interest. The possible priority areas and specific forms of international cooperation of the Russian Federation and the BRICS countries in the sphere of anticorruption include the following areas:

Firstly, the identification, search and return of assets obtained from the corruption offences. With this aim we can propose the development of a **draft international treaty «On international cooperation in the field of search and return of assets obtained by criminal means»**. It is also necessary to continue workong on improving the existing multilateral and bilateral agreements in this area.

Secondly, the prevention of corruption in private sector organisations through the development of common approaches to

the systems of internal compliance and creation of mechanisms for their implementation in practice.

Thirdly, the development of various forms of cooperation between Russian scientific and expert organisations and specialised scientific institutions of the BRICS Member States. For example, since 2012 the Institute of Legislation and Comparative Law under the Government of the Russian Federation (hereinafter – the Institute) holds annually the Eurasian Anti-corruption Forum. This Forum consolidates the scientific community and practitioners not only from the CIS and the Eurasian Economic Union, but also from other regions of the world. For the improvement of the effectiveness we conclude bilateral agreements on scientific cooperation with scientific institutions of the BRICS countries. For example, in 2016 the Institute signed the Memorandum on Cooperation with the National Anticorruption Centre of the Institute of Sociology of the Chinese Academy of Social Sciences. The Institute suggests the scientific centres of the BRICS countries participating in organising this Forum. We can also join efforts of the scientific centres of the BRICS countries to develop BRICS anti-corruption concepts (or strategies) and transmit them to the official organs of this interstate association.

International cooperation in the field of security determines the need to establish more clear legal boundaries and comprehensive dialogue to achieve sustainable peace and ensure BRICS development goals. The solution of these problems requires the joint efforts and a comprehensive, coordinated approach of the BRICS countries at the universal level (UN and other universal international forums and organisations) and the development of bilateral and multilateral legal mechanisms for cooperation within BRICS. Professional legal community of the BRICS countries has the necessary potential to not only maintain, but also initiate international legal design in the field of international security.

In this regard, we can offer the development and conclusion of a number of multilateral and bilateral treaties between the BRICS

countries on combating money laundering and financing of terrorism. A promising direction is the development of international legal mechanisms to join the efforts of the BRICS countries with the aim to improve the international standards in AML/CFT sphere and in the sphere of combating financing of terrorism. Cooperation in the field of training for the national AML/CFT system needs to be activated.

The idea of developing the institutional bases of cooperation of the BRICS countries in the sphere of AML/CFT is especially noteworthy. In particular, it is necessary to develop an international legal instrument as the basis for establishing the Council of BRICS aimed to counter money laundering and financing of terrorism.

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Rule of law and fight against terrorism: UN experience and BRICS perspectives

Key concepts

Fight against international terrorism encompasses three areas of international legal activity: law-making, legal enforcement, and enforcement.

Rule of law in international relations – basis of the international legal order and a more peaceful, prosperous and just world order.

UN Security Council and fight against terrorism: individual (targeted) sanctions and principle of the protection of human rights.

BRICS and fight against international terrorism: support of UN activities and development of cooperation between the States parties.

From the point of view of the international law, the fight against terrorism covers several areas of the legal activity – international law-making (development and adoption of international instruments aimed at combating terrorism in specific areas of human activities, i.e. air transport, maritime transport, etc.); law enforcement, which is to implement the provisions of international conventions by States, international organisations and other subjects of international law;

and Law enforcement in a narrow sense, meaning application of international law by national or international courts.

International law-making in combating terrorism is developing very actively, both at universal and regional levels. The United Nations developed and adopted 12 international conventions and 3 additional Protocols. Continues the elaboration of a Comprehensive Convention on combating international terrorism proposed by India and initiated by Russia. Some regional international organisations also adopted multilateral Conventions on the suppression of terrorism (Council of Europe, CIS, The Shanghai cooperation organisation, etc). In addition, the States also enter in bilateral agreements on cooperation relating to the fight against terrorism.

Features of the implementation of anti-terrorist conventions and their judicial enforcement are determined by the fact that international law theory and practice consider terrorism as a crime of an international character. Accordingly, the international treaties provide for cooperation between States in preventing, combating and punishment of persons committing terrorist acts. On the basis of these conventions States provide each other with the assistance in the extradition of criminals (obligation aut dedere, aut judicare) and other criminal proceedings. In other words, the main burden for bringing to justice those who are responsible for committing international crimes is born by States and national justice. All the doctrinal proposals and practical attempts of establishing an international judicial organ to prosecute the terrorists did not succeed.

Rule of law in international relations is the basis of the international legal order and a more peaceful, prosperous and just world order. In the Declaration of the High-level Meeting of the UN General Assembly on the Rule of Law at National and International Levels adopted on 24 September 2012 (hereinafter the «Declaration»), the UN Members States expressed their consent to be guided by the rule of law in their collective action in the context of challenges and opportunities. They reiterated strong and unequivocal condemnation of terrorism in all

its forms and manifestations, committed by whomever, wherever and for whatever purposes that were practiced since it had been one of the most serious threats to international peace and security. However, the Declaration stressed that the measures taken to combat terrorism should comply with the States obligations under international law including the UN Charter, in particular, its purposes, principles and norms in the field of human rights.

The UN Security Council has the primary responsibility for the maintenance of international peace and security. The international community's recognition of the terrorism as one of the most serious threats to international peace and security prompted the UN Security Council, functioning under the UN Charter, to take measures on countering terrorism. This was reflected in dozens of resolutions, in particular Resolution 1269 of 19 October 1999 and Resolution 1373 of 28 September 2001. Based on these and other resolutions of the UN Security Council not only a wide range of mandatory for all States measures was developed, but also a mechanism for monitoring their implementation by States was established.

It should be emphasised that anti-terrorist activities of the UN have shown an interesting trend of modern international law: the human personality has appeared with an increasing rate within the scope of international law and competence of international organisations, primarily the UN. In my opinion, that makes modern international law fundamentally different from classical international law. Therefore, expands the scope of one of the fundamental principles of contemporary international law – the principle of the protection of human rights.

In the process of its anti-terrorist activities, the UN Security Council proposed to adopt so-called individual sanctions or otherwise targeted sanctions against particular individuals and entities. The sanctions are aimed to improve the effectiveness of coercive measures of UN Security Council and minimise their negative consequences for the population of States respecting the

measures that were taken against it. These entities (falling in the so-called sanction lists of the UN Security Council) are subject to the restrictions in the form of freezing of assets, travel bans and arms embargoes that are implemented in the national legislation of the concerned States.

In Europe the implementation of UN Security Council targeted sanctions faced their appeal in the national courts of a number of States and international judicial bodies (the Court of the European Union, the European Court of Human Rights) and Treaty Bodies of the UN (in particular, the UN Committee on Human Rights). Relevant jurisprudence has generated heated debate in the international law doctrine and this is not surprising, since the conflict raised fundamental questions of international law.

Such problems include the following. For example, in international legal doctrine there is a well-known conception of peremptory (jus cogens) norms having priority over the other provisions of international law. The fundamental human rights are recognised as peremptory norms of international law in the international law doctrine. This raises very interesting legal question whether a peremptory norm of international law may oblige the international organisations and their bodies, in particular the UN Security Council, including situations when it carries out its functions on monitoring the States fulfilling of international obligations. The question of the relationship between the States obligations under the UN Charter and obligations arising from peremptory norms of international law is discussed sometimes. Is the State entitled to justify its refusal to comply with a peremptory norm of international law with reference to the need to comply with UN Security Council decisions, the obligation thereof (Art.103 of the UN Charter)?

Despite the controversial nature of the considered problem States while conducting their anti-terrorist policy shall obviously take into account the obligation to respect human rights.

The BRICS member states have expressed their willingness to cooperate in countering international terrorism. The proposals on creating an institutional and regulatory framework for such cooperation are under consideration. As the Russian Federation participates in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, in the process of preparing relevant law-making and legislative initiatives it is necessary to take into account one of the most important requirements of the rule-of-law principle to promote universal respect for observance and protection of all human rights and fundamental freedoms, which are universal and indivisible core values and principles of the United Nations.

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The place of BRICS in changing world law order

Keywords: BRICS, globalisation, world law order, integration

For a correct understanding of the position of BRICS and the processes occurring in it, it is necessary to analyse the constantly changing integration situation in the modern world.

The legal regulation of integration processes in various parts of the world today is in fact an attempt to control the processes of globalisation that determine the future of Mankind by legal means. Thus, integration (economic, political, defense, transport-logistical, educational, scientific and-in the field of information, interregional, in one or another sphere of social relations) has become simultaneously a manifestation, a form of development and at the same time an instrument for regulating globalisation in the modern world.

The BRICS states constitute one third of the Earth's territory, 42% of its population and 31% of the world's GDP. The BRICS de facto performs the functions of an international organisation[1] with a clearly expressed great integration perspective. Each of the 5 countries belonging to this organisation is the leader of an

[1] To date, de jure the BRICS is not yet an integration organisation and it is not even a finalised international organisation, but this influential kind of «interest club» of world significance has a clearly integrative direction and great prospects.

important integration organisation of its region. It covers 4 continents. Therefore, it is expedient to consider the BRICS through the prism of world development of integration processes and integration law.

Integration can be partial, complex, complete in terms of depth and intensity of connections, and on the spatial scale – it may acquire interregional and even global character. The option of combining or simultaneously combining two or more integration unions is regarded as «integration of integrations»[1] – a particularly promising and large-scale example of integration.

The next round of accelerated strategic integration on a global scale was caused by the somewhat unexpected success of the integration processes with participation of Russia, which was manifested with the formation and development of the BRICS, and also in the post-Soviet space in the form of the Customs Union, and especially with the appearance in 2015 of the Eurasian Economic Union[2].

The United States, hoping to determine the course of the globalisation process with relatively veiled methods, decided to respond to this on the «integration front» more openly. To do this, they initiated the Ukrainian tragedy, clearly showed the dependence of the European Union on the United States. This country is intensively creating hotbeds of tension along the entire perimeter of Russia's state borders (Ukraine, Turkey, Transnistria, Nagorno-Karabakh, Central Asian republics …). The United States is trying to complicate the situation in the Eurasian Economic Union member states (Belarus, Kazakhstan, Armenia, Kyrgyzstan) and in countries that are friendly to Russia, (Syria, Cuba, Venezuela, Argentina, Mongolia, Vietnam, etc.). The United States sharply

[1] See Integratsionnoe pravo. Uchebnik. Onv.red. S. Yu. Kashkin. Moscow: Prospekt, 2017 P. 55–66.

[2] See S. Yu. Kashkin, A.O. Chetverikov Pravo Evrazijskogo Ekonomicheskogo Sojuza. Moscow: Prospekt, 2015.

accelerated the creation of integration organisations with its direct participation and domination in order to limit the opportunities for expanding and deepening of the integration development of our country and its allies.

So, to the existing NAFTA integration organisation (a free trade zone between the USA, Canada and Mexico), on October 5, 2015 the Trans-Pacific partnership including 12 countries of the Asia-Pacific basin was added. This partnership accounts for 40% of the world trade turnover.

US President D. Trump announced of America's withdrawal from the Trans-Pacific Partnership. In my deep conviction, he would rather change some elements of the form of this integration association, or amend the treaty than really refuse to use such an effective multi-purpose political, economic and legal mechanism of organisation of the US dominance in the Pacific basin and the world as a whole. Without USA the PRC may become the main force of this ripe for closer integration region. By the way, it is hardly strategically promising for Russia's defense, political and economic interests in this region.

The European Union under the American pressure became weaker and in many respects has lost its face. Today the United States is trying to create the Transatlantic partnership as a free trade zone between the US and the EU. It accounts for 60% of the world's gross domestic product and 33% of the world trade turnover. The creation of this partnership can ultimately subordinate the EU to the US.

It is necessary to recognise that the withdrawal of Great Britain from the EU significantly weakens the position of the European Union in negotiations with the US on the Transatlantic partnership. Both partnerships, headed by the United States, may cover 2/3 of the total turnover of world trade by 2018.

In addition to these transoceanic partnerships, the US plans to implement by 2020 another important integration project. It will include the use of supranational law, which significantly

restricts the sovereignty of states. This is the Agreement on Trade in Services. More than 50 countries of the world are involved in highly confidential negotiations on it. It can finally void the WTO and is aimed at achieving the economic global domination of the United States. Neither Russia nor China is dedicated to these plans.

In the field of defense integration, Trump announced the intention of the US to create an analogue of NATO in the Middle East.

Thus, against the backdrop of these events, a very concrete plan for the creation of a global pro-American network of integration groupings is being highlighted, designed to surround the Russian Federation with a new «iron curtain», this time constructed not just from hostile states, but US-led integration unions.

It is impossible to believe that Trump's concern to «make America strong again», together with a sharp increase in military spending, may lead to a rejection of world domination plans – this process and the wide application of integration mechanisms, including the integration of integrations, are inseparable from each other!

Recently, another global integration project, initiated by the second world economy, the PRC, was widely voiced. This is the Chinese initiative «One Belt, One Road». It unites the projects «Economic belt of the Silk Road» and «Silk Road of the XXI century», put forward by President Xi Jinping in September 2013. According to Beijing's plans, in the future, new trade routes, industrial parks, economic and transport corridors connecting more than 60 countries should be created.

Vladimir Putin said about the need for a large Eurasian partnership, which will connect Asia and Europe. Its formation is possible due to the addition of the potentials of such integration formats as the Eurasian Economic Union, One Belt, One Road, the Shanghai Cooperation Organisation, the Association of Southeast Asian Nations. In May 2015, at a summit in Moscow, Vladimir Putin and Xi Jinping agreed on combining two economic initiatives: the Eurasian Economic Union and the Economic belt of the Silk Road.

Another of the most promising integration projects could be the essential degeneration of the BRICS. Today it still looks more like a kind of «club» of five developing economies of the 4 continents, to some extent confronting the seven highly developed economies of G-7. Each of its representatives are the leading members of the important integration organisations from 4 continents. The transformation of the BRICS from the «integration embryo» into a kind of globally oriented integration of integrations could create a real counterbalance to American globalism and make the globalisation process more fair and democratic.

However, for this, the BRICS must first turn into a full-fledged integration organisation with genuine elements of supranational law. To this end, like the Monnet-Schumann communitarian plan for the EU, this union must find its own constructive ideology, formulate a common goal, find the «inalienable interests» of states (and integration organisations) to satisfy the interests of citizens of all these very different states, to determine the specific stages of development, as well as to create institutions for the management of the new Union. At the same time, for the effectiveness of this process, Member States must be ready to transfer to the Union a number of important previously held powers. This process of the formation of a new integration law and order may be complex and comparatively long, but it is very logical.

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International law aspects to fight terrorism in 21st century

An increasing number of international terrorism activities poses a threat to the lives of people around the world, and also threatens the peace and security of all states. The statement on countering international terrorism adopted on September 23, 1999 by foreign ministers of the five permanent member states of the UN Security Council emphasised the vital importance to strengthen the international cooperation under the auspices of the United Nations in order to fight against terrorism in all its manifestations. Such cooperation should be firmly based on the principles of the UN Charter and the rules of international law {1).

On September 28, 2001, a 4385th meeting of the UN Security Council took place and resulted in the adoption of the comprehensive Resolution No.1373 (2001). It provided for measures and strategies to counter international terrorism. Paragraph 6 of the Resolution also established the Counter-Terrorism Committee

to monitor the implementation of the Resolution with necessary experts, and the UN Security Council called upon all the States to provide information on the measures they had taken in this regard. (2) The resolution also called for the suppression of financing terrorism and improved international cooperation in combatting terrorism.(3)

On 12 November 2001, the UNSC adopted the Resolution 1377 (2001) stating that «international terrorism is one of the most serious threats to international peace and security in the 21st century».(4)

As an example, a number of measures to fight against terrorism undertaken within the Commonwealth of Independent Member States (CIS) can be cited. In June 1999, the Treaty on Cooperation of the Commonwealth of Independent Member States on combatting terrorism was signed. The Treaty constitutes a legal basis for the implementation of the cooperation of the Commonwealth member states in the prevention, detection, suppression and investigation of terrorist acts.

The anti-terrorist Centre of the CIS member states has started functioning since December 1, 2000. Russia actively supported the measures taken by the world community to combat international terrorism. On January 10, 2002, the President of the Russian Federation signed the Decree No.6 «On Measures to Implement UN Security Council Resolution 1373 of September 28, 2001».

According to the paragraph 1 of the Decree, «the federal bodies of state power and state authorities of the constituent entities of the Russian Federation should proceed in their activities within the limits of their respective powers from the necessity:

- to prevent and suppress the financing of terrorist acts;
- to take necessary measures to prevent terrorist acts, including the acts warned about by other states through exchange of information.

One of the central questions is how the international community or individual states define the notion of «terrorism». The international principles of combatting terrorism, as enshrined in the UNSC main conventions and resolutions, bind states to combat terrorism, although there is no comprehensive definition of this term. This creates not only difficulties for the ability of states to determine the level of compliance with these conventions and resolutions, but also affects other areas.

The difference between the elements contained in the definitions of the «terrorism» under the domestic law of states creates difficulties both in matters of extradition and mutual legal assistance. This could potentially lead to inability of the international community to respond to certain acts of terrorism because of the lack of a generally accepted definition of this term.

A draft comprehensive convention on international terrorism continues to be on elaboration, which was entrusted in 2001 to the Ad Hoc Committee established by UN General Assembly Resolution 51/210.(5) The drafting process of the Convention raised controversial issues concerning the definition of «terrorist crimes» (art.2) and the exceptions to it(art.18) (6). The proposed comprehensive definition in article 2 is considered in detail and deals with real threats, attempts, accomplices and other parties, as well as organisation of terrorist acts crimes.

A number of documents uses a triple criterion to determine what actions (in the absence of a comprehensive definition) should be considered as terrorist, which is achieved by linking this term to the provisions of existing conventions on terrorism:

The UNSC Resolution 1566 (2004), as well as the Report of the High-level Panel on Threats, Challenges and Change submitted to the UN Secretary-General, also refers to actions prohibited under existing conventions on various aspects of terrorism. (7)

It calls upon all the states to cooperate in the fight against terrorism and to prevent and punish the acts having in common the following three characteristics:

a) acts (including acts against civilians) committed with the intent to cause death or serious damage to health and to seize hostages;
b) acts that cannot be justified by any considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also aimed at inducing a state of terror among the general public or a group of people or individuals, to intimidate the population or force the government or an international organisation to commit an act or refrain from doing it; and
(c) acts that constitute crimes in the context of the meaning set by international conventions and protocols relating to terrorism and are defined as crimes in such conventions and protocols. The wording of «any act» in addition to the acts already mentioned in existing conventions on various aspects of terrorism, seems insufficient, because not all the acts covered by these conventions, including the Tokyo Convention, will be of a terrorist nature. It should also be noted that neither the European Convention on the Prevention of Terrorism nor the International Convention for the Suppression of the Financing of Terrorism contain references to the Tokyo Convention.

This cumulative approach serves as a guarantee of the fact that only acts of a terrorist nature are qualified as such. It should also be stressed that not all the acts being crimes under domestic or international law are acts of terrorism or should be qualified as such.(8)

It should be noted that latest publications of Russian scientists rightly emphasise the fact that when developing legal measures to combat terrorism, the term «terrorism» is often interpreted either too narrowly or, on the contrary, very broadly, and sometimes terrorism is confused with other large-scale and dangerous social phenomena, associated with the

use of violence, which, however, are not terrorist (sabotage, wrecking, organised crime, subversion).

It is important to ensure that the term «terrorism» in its use should limited to actions that are indeed of a terrorist nature. A «triple criterion» of acts that need to be prevented in the course of the fight against terrorism, and must be punishable if could not be prevented, has the advantage that the currently agreed definitions of crimes relating to various aspects of terrorism make it possible to establish an appropriate threshold as a result of the requirement that such crimes should be committed with an intent to cause death or serious damage to human health or to take hostages in order to cause a state of horror, intimidate the population or compel a government or an international organisation to do or refrain from doing certain actions.

The following solution could be suggested to referring to the triple aggregate criterion recommended in Resolution 1566 (2004). Only the incitement to actions (which in themselves correspond to these three characteristics) should be interpreted as an «incitement to terrorism». A universal, comprehensive and concrete definition of terrorism would mostly facilitate the solution of the problems arising from the absence thereof.

References

(1) The Statement of the Ministers of Foreign Affairs of the five permanent states of the UN Security Council of 23 September 1999 on combatting international terrorism.

(2) S.C. Res.1373 para.6, U.N. Doc. S/RES/1373 (Sept.28, 2001).

(3) S.C. Res.1373 para.3c, U.N. Doc. S/RES/1373 (Sept.28, 2001).

(4) S.C. Res.1377 preamble, U.N. Doc. S/RES/1377 (Nov.12, 2001).

(5) G.A. Res.51/210, para.9, U.N. Doc. A/RES/51/210 (Dec.17, 1996).

(6) 6th Committee Report to the UNGA. Measures to Eliminate International Terrorism, Doc. A/59/894 (2005).

(7) S.C. Res.1566 para.3, 164d U.N. Doc. S/RES/1566 (Sept.28, 2001); G.A. Res.59/565, para.164d U.N. Doc. A/RES/59/565 (Dec.2, 2004).

(8) ECOSOC 'Promotion and protection of human rights' U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005), p.15; see also Petrishchev V. Ye. Some Problems of the Antiterrorist Legislation in the Light of the International Legislation // Commonly Recognized Principles and Rules of International Law and International Treaties in the Practice of Constitutional Justice (Proceedings of the All-Russian Conference) M., 2002, p.447.

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International commercial and investment treaty dispute resolution on BRICS institutional platform: neutrality with inclusiveness

Concept Note

The BRICS is often criticised for its failure to go beyond aspirational statements and not producing any binding protocols amongst themselves. Perhaps this is due to failure of understanding that the BRICS is unlike other Organisations and need not even aim to do that. BRICS is a platform that signifies the shift in global economic power and is meant to redefine the global rule making processes and institutions.

Again, the diversity of legal, economic and governance models, language, culture as well as geographical dispersion is cited against the viability of the BRICS as a cohesive group. However, what is not realised that this diversity is the core strength for the BRICS to lead the formation of a new world economic order, as it provides a natural template of diversity and inclusiveness.

China and India are well positioned to be the engines of global economic growth and are amongst the fastest growing large economies. Russia has its own geo-political and economic strengths. Brazil has been a natural leader in policy innovation and design in South and Latin America, besides being the largest economy in the region. South Africa, despite challenges, shares the same characteristics in Africa. Irrespective of global economic cycles each of the BRICS are here to stay for the long run as major players with most important feature common to all-enormous and formidable human capital.

One of the most concrete and viable visible outcomes of the BRICS can be in the form of creation of a platform and institution of excellence for international commercial and investment treaty dispute resolution. This is also a ground ripe for the BRICS to rope in other emerging economies.

China has exploded the myth that groundbreaking innovation and technology can come only from the West and economies integrated with it and has emerged at the cutting edge of Artificial Intelligence revolution, which was being thought of as a major tool to shift the economic balance back to the Western world. India a leader in IT services and poised to retain and fire up its growth trajectory is moving fast towards a digital revolution and is fast accumulating resources to be at the cutting edge of innovation and technology. Both China and India are making significant gains in fight against corruption and for using technology and policy innovations for transparent and effective governance and are carrying out extensive and aggressive reforms. Brazil's independent institutions are driving the fight against corruption. Commodity market is cyclical and when it rebounds Brazil and Russia will have renewed strength to fund their economic expansion at a greater pace.

The position about dispute resolution where it is presented that the capacity, standards and frameworks of a fair and acceptable

international commercial dispute resolution can exist only in the West or through their cloning in other jurisdictions is no longer acceptable. It is almost a monopoly market, which is thriving because of lack of alternative and a very tightly knit network of arbitrators and practitioners and law firms.

The BRICS Legal Forum is well positioned to create acceptable structures of neutrality and fairness with elaborate structures of inclusiveness and capacity building for excellence in alternate dispute resolution in the emerging economies.

Establishing a world class institution for alternate dispute resolution requires an excellent set of rules, fair, transparent and efficient governance structure and institutional design and a pool of eminent arbitrators. But this by itself does not result in creation of a successful institution. The diverse legal regimes of the BRICS makes it a unique platform to allow for building capacity to adjudicate disputes with diverse choice of governing law and a pool of arbitrators from diverse backgrounds and nationalities. Both common law and civil law templates get accommodated in the diverse paradigm of the BRICS and all BRICS members can build and add capacities around themselves by including human resource from other regional emerging economies.

The BRICS can leverage its existing individual economic plans and institutions it has built to encourage the choice of BRICS institution for dispute resolution in the agreements negotiated by private parties who receive funding or projects from these institutions. New Development Bank and Asian Infrastructure Investment Bank can be roped in to encourage the choice of BRICS Dispute Resolution Institution for various agreements where governments, private contractors or sub contractors are parties in the projects funded by them. We may remember that the World Bank carried out intensive capacity building projects around the globe generally to create market for alternate dispute resolution and enforcement of contract under various rule of law projects promoted and funded by it.

The BRICS Legal Forum can keep the institutional costs down and encourage use of less expensive local law firms. Outbound investment by the BRICS countries and economic development projects in their respective areas of influence and outreach are candidates for finding institutional structures of fair, neutral, inexpensive dispute resolution in the BRICS. In fact once BRICS presents a viable solution in the form of establishing an Institution of Excellence, it has the potential to become a natural choice. In fact, this has a real potential to underline and define the relevance of BRICS itself–what each of the BRICS countries cannot possibly achieve individually can achieve together as BRICS.

In the last two three years, many meaningful changes have been brought in by China, India and Russia to strengthen their commercial dispute resolution laws. Supreme Court of China has released collection of various opinions and guidance in 2015 to strengthen the alternate dispute resolution and execution of foreign awards. India has during the same time amended its arbitration act to remove various hurdles and to speed up arbitrations and enforcement and has passed commercial courts act. Russia has amended its arbitration law and has strengthened the institutions. Brazil and South Africa has excellent pool of arbitrators and robust institutions.

Individually, it will take decades for each member state to make its institutions a hub of international arbitration, but together as BRICS the objective is eminently achievable.

In the area of Bilateral Investment Treaty Dispute Resolution, the EU is trying to create a scope for creation of an international court for deciding bilateral treaty disputes. However, majority of investments are going to come from non-EU countries and a majority of recipients will also not be from EU, UK or US and Canada. BRICS is again the right place to create an Institution to resolves disputes to begin with where none of the treaty parties belongs to the regions or places where current dispute resolution regimes are operated.

There is a need to bring the promotion and establishment of BRICS international commercial dispute resolution platform on the policy radar of the New Development Bank as it will facilitate its core objectives and serve to strengthen the relevance and outreach of the bank.

Proposal of the Bar Association of India for Discussion, Consideration and adoption after suitable modifications as part of the proposed Moscow declaration.

After preliminary discussions in a very positive atmosphere with the China Law Society, which is to come up with its feedback, the Bar Association of India is proposing the following steps to build upon the initiatives launched at Shanghai and New Delhi Legal Fora in the form of Shanghai and New Delhi Centres and the proposed Moscow Centre.

- In New Delhi, Shanghai initiative was taken forward by including emerging economies in the BRICS international dispute resolution framework by mooting New Delhi Centre for International Dispute Resolution for BRICS and Emerging Economies.
- In order for the initiative to succeed it is now proposed that all centres to be eventually established in all 5 BRICS countries will have a common set of rules, fees structure, governing board and the panel of arbitrators.
- It is further proposed that the governing board may to start with have 75 per cent members from the BRICS countries and 25 per cent from other emerging economies spread globally to establish the BRICS as fulcrum of inclusive structures.
- Similarly, the panel of arbitrators should have a mix of representation of the BRICS countries (50–75 per cent) and from outside BRICS, but not generally from jurisdictions that dominate the current arbitration regimes.
- The Governing Board may have nominees of major stakeholder Organisations like the New Development Bank, Asia Infrastructure Investment Bank and BRICS Business

Forum and the Junior BRICS Sherpa from each country to consolidate its identity as a BRICS body.

- Each centre may continue to have its own local management board for local administrative and day to day running purposes for each centre as the international board will basically be concerned with finalising and amending the Rules and procedures, fixing fees, selecting and appointing panel of arbitrators and overall policy aspects.
- Each member organisation may nominate three representatives each by December 31, 2017 to constitute the Drafting Committee for Framing Rules for the BRICS Dispute Resolution Centres with power to co-opt members/experts and to circulate the rules by June 30, 2018. One of the member bodies can be nominated to provide secretarial assistance to the drafting committee.
- Every two months, starting from January 2018, a committee of 10 members, two each to be nominated by December 31, 2017, in coordination with BRICS Sherpas from each country, will visit a member state to promote the concept with stakeholders as also explore possibility of participating and speaking at the international events on trade, economics, investment and dispute resolution. The committee may have powers to nominate representatives to participate in events where members are not available.
- A mid year Forum Meeting on Dispute Resolution may be held with wider stakeholder participation preferably after draft rules are available. After that in quick succession in each jurisdiction member organisation may have its own event for creating a sense of involvement with stake holders and obtain their suggestions.
- At the next Legal Forum, preliminary steps to Form the International Governing Board and Arbitrators Panel may be formalised.

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Strengthen BRICS tax cooperation to promote economic linkage development

Keywords: tax cooperation, double taxation relief, BEPS, legal certainty, inclusive cooperation framework.

The leaders of the BRICS announced in September 2017 in their Declaration of the Ninth BRICS Summit to «strengthen tax cooperation to increase BRICS contribution to setting international tax rules and provide, according to each country's priorities, effective and sustainable technical assistance to other developing countries».[1] This announcement reveals a two-fold aim of the BRICS through participating in international tax affairs as a group: firstly, to shift their roles from the «rules followers» into the «rules makers» with respect to setting up international tax rules; and secondly, to build a closer tie with developing countries through providing them with technical assistance. In order to implement this tax cooperation strategy, the 5th Meeting of the Head of BRICS Tax Authorities enacted an agenda consisting of three pillars: double taxation relief, counterfeiting tax evasion and avoidance, and providing more

[1] Paragraph 34 of the BRICS Leaders Xiamen Declaration, published on 8 September 2017, available at website: https://brics2017.org/English/Documents/Summit/201709/t20170908_2021.html, last accessed on 11, October, 2017.

legal certainty.[1] This agenda seems to be same in substance with the global tax governance project, which was proposed by the OECD in its BEPS initiative and has been carried out throughout the world after being endorsed by the G20 in 2013.

However, the tax cooperation of the BRICS should not be of the same interest or approach with the OECD. The BRICS are viewed as representatives of the developing countries, which call for allocating more taxing right to source state, instead of residence state. Therefore the interest of the BRICS tax cooperation should be very different from the OECD at the outset, and the measures taken by the BRICS for counterfeiting tax avoidance activities should also be different from the ones proposed by the OECD in the BEPS action plans. The BRICS are of a substantial interest in attracting foreign capital and technologies from multinational companies which should not be driven away by those aggressive anti-tax avoidance measures. The last but not the least agenda, i.e. providing legal certainty to taxpayers, would also be as broad as to include concluding advance pricing agreements, improving the current mutual agreement procedure, and even discussing possibility of using tax arbitration.

Furthermore, from the institutions perspective, the BRICS can set up an inclusive cooperation framework to invite both developed countries and developing countries into some of their cooperation programs. And the best approach to include other developing countries into this framework is to provide them with technical assistance in capacity-building. Eventually, the vision of the BRICS in strengthening their tax cooperation is to promote their economic linkage development.

[1] Announcement of the 5th Head of the BRICS Tax Authorities, published on 27 July 2017, available at http://www.chinatax.gov.cn/n810219/n810744/n2732433/index.html, last accessed on 11 October 2017.

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RMB internationalisation

Keywords: RMB Internationalisation, Belt and Road Initiative, BRICS

Since the late-2000, China began to seek the RMB internationalisation, including establishing dim sum bond market, expanding the use of RMB in the cross border trade settlement (e.g. setting up the PBOC RMB cross-border payment system), increasing the capital account convertibility (e.g. Shanghai-Hong Kong Stock Connection program, RQFII, RQDII, QDII2), facilitating the RMB international cooperation (e.g. bilateral currency swap) and liberating the RMB interest rate and foreign exchange rate. Since the RMB internationalisation, not only China but all countries using the RMB benefit from such program, especially after the 2008 financial crises, where China is trying to provide the world an alternative international currency substituting the US dollars to avoid the risks associated with the US.

In recent years, China is developing another international strategy, namely Belt and Road Initiative, focusing on connectivity and cooperation between Eurasian countries, mainly on the infrastructure constructions in these countries. With this strategy, the countries cooperating with China will bridge the infrastructure gap with the help of China and will accelerate their domestic economic growth. In the cooperation, China may supply its technology, capital, human resources, etc.to launch various projects in the countries which are willing to cooperate with China.

We estimate the RMB internationalisation may further develop given the launch of the Belt and Road Initiative because Belt and Road Initiative will offer to the foreign countries not only the cross-border trade from China but also the outbound investments and financings from China (e.g. various infrastructure projects construction, large volume of RMB capital injection or RMB outbound loan, bulk commodity transactions, E-commerce, etc.) and such various outbound investments and financings will enable to expand the use and reservation of RMB in the overseas market. Accordingly, more and more use and reservation of RMB will also facilitate the development of the Belt and Road Initiative since all projects in the Belt and Road Initiative may be supported by China domestic currency instead of the international currencies, which will avoid foreign exchange risks and reduce the cost of investments and financings.

We have previously explored how to expand the RMB internationalisation in BRICS (e.g. expanding the use of RMB in BRICS, expanding the RMB settlement and clearing banks, expanding currency swap volume, expanding the currency swap from bilateral to multilateral, etc.) so that BRICS may take benefits from the China RMB internationalisation program, e.g. BRICS may increase the trade and financing cooperation by using RMB.

Now, to further expand the cooperation and opportunities among BRICS, BRICS may take the advantage of the RMB internationalisation in BRICS so that BRICS may launch more and more projects, in particular the projects in the Belt and Road Initiative. We therefore propose: (i) expanding RMB bond market among BRICS and setting a uniform RMB bond offering rules or standards among BRICS, e.g. the BRICS companies may make RMB bond offering in China or their domestic bond markets so as to raise the RMB funds, since the RMB internationalisation, China is always pushing forward the RMB bond market in the domestic and

overseas, now the domestic RMB bond market develops very well and is more and more open to foreign companies, but the overseas RMB bond market still needs to be further developed in order to facilitate the flow of RMB in the overseas market; (ii) expanding the use of RMB in the outbound investments and financings, to achieve this purpose, BRICS may explore to further cooperate on the legislature of cross-border infrastructure constructions, like the BOT laws and regulations.

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The perfection of legal protection system for Belt & Road initiative

Keywords: Perfection Legal Protection System BRICS

Since Chinese President Xi Jinping first proposed to co-construct the Silk Road Economic Belt and 21-Century Maritime Silk Road in 2013, the Belt and Road initiative has received enormous attention and active responses from international society. In the following 4 years, the construction of the B&R Initiative, which has achieved important progress worldwide and vigorously contributed to the revival of the world economy, will continue to fuel the world development and will become one of the most profound international economic cooperation paradigm. However, it is well acknowledged that the B&R construction needs the protection of a fine legal system, the establishment and enforcement of which require the top-down design and should ensure the well coordination of international law and domestic law.

On the international level, the B&R legal protection system comprises existing both multilateral and bilateral trade and investment treaties between china and relevant countries or regions. China and B&R countries should abide by and enforce these rules

in the construction of B&R. In addition, considering the special conditions of B&R, China and B&R countries should incorporate the latest development of international economic rules to innovate the present international legal systems. Specifically, the reform of the present international trade system should focus on trade facilitation, the renewal of the international investment system should be oriented to enhance B&R countries' infrastructure construction, and the innovation of the international financial system should make use of Asia Infrastructure Investment Bank, Silk Road Fund and other development financial institutions. The above international legal systems will ensure the smooth construction of B&R on the international level.

Investment is an important part of B&R construction and the main method by which Chinese enterprises cooperate with B&R countries. Thus it is vital to protect investors' interests and prevent investment risks. Investor-state arbitration is a widely-used legal mechanism and should be made full use to protect investors' interests. There are two systems of investor-state arbitration: one is the ICSID arbitration which has already been resorted to by Chinese corporations; the other is ad hoc arbitration, which has been stipulated in many international investment treaties and allow investors to refer to ad hoc tribunals against host states.

Recently, several developed B&R countries have frequently launched the so-called high-standard security investigation against investments by Chinese enterprises. In trade area, China's non-market economy status has been repeatedly referred to launch unfair anti-dumping and anti-duty measures against Chinese enterprises. Consequently, Chinese enterprises have suffered a great deal. We should ponder and deal with these risks seriously from the legal perspective. Enforceable and efficient measures of both international and domestic law should be adopted to protect lawful rights and interests of Chinese enterprises that have taken part in the B&R construction.

On the domestic level, B&R legal system should contain two aspects. One is the establishment and perfection of the economic legal institutions concerning to foreign factors that are closely relevant to B&R construction, the other is China and B&R countries' foreign civil and commercial law systems and judicial application.

Since the establishment of Shanghai free trade zone(FTZ)in 2013, through deepening open-up or innovation experiments in the FTZ, China has preliminarily set up a new trade and investment legal system, featured with pre-market access national treatment and non-conforming measure list(negative list). In August 2016, Chinese government decided to establish another 7 FTZs respectively in Province Liaoning, Zhejiang, Henan, Hubei, Sichuan, Shanxi（陕西） and Chongqing municipality, the aim to gain important lessons through various experiments with different focuses and to promote the economic reform in the whole country. China should not only transform FTZ successful reform experiences into domestic laws and bilateral free trade agreements in good time, but also revise Foreign Trade Law and Foreign Enterprise Law as soon as possible. In the meantime, China's FTZs need to adopt new international rules made during B&R construction. In this way, China FTZ institution can interact with B&R legislation actively and sustainably.

China and B&R countries' foreign civil and commercial law systems and judicial application are extremely significant to reduce legal risks and enhance investors' confidence in B&R construction. In the foreign civil and commercial law area, Chinese judicial authorities, on the one hand, reform the present system and adjudicate cases relating to B&R construction to protect all market actors' legal rights and balance interests between Chinese and foreign nationals. On the other hand, Chinese judicial authorities have actively cooperated with B&R countries' relevant parts to progress judicial assistance, resolve jurisdictional conflicts and parallel litigations, and enhance the recognition and enforcement of foreign

judgments and verdicts. As a result, Chinese domestic judicial environment is very friendly to B&R construction.

In July 2015, Chinese Supreme People's Court promulgated <Supreme People's Court's Opinions on Providing Judicial Service and Safeguard for Belt and Road Construction>, in short «the Opinions». Considering B&R construction's special conditions and Chinese practice, the Opinions adopted advanced international judicial ideas and incorporated many new rules related to jurisdiction, judicial reciprocity, application of international treaties and international customs, ascertainment of foreign law, judicial review of foreign arbitration verdicts, and so on. In this way, the Opinions well reflected China's determination and confidence to legalise the B&R construction openly and inclusively. Apart from self-efforts, China should also broadcast its foreign civil and commercial legal system and judicial system to B&R countries via various ways. Besides, making use of present judicial cooperation methods, China and B&R countries should establish aB&R judicial forum to enrich B&R domestic rules and to discuss and coordinate judicial assistance and other legal problems.

Dispute settlement mechanism is indispensable in B&R legal system. Without a fair and efficient mechanism, the B&R construction would not be able to develop stably in the long run. Establishing the B&R dispute settlement mechanism needs to combine international dispute settlement mechanism and domestic judicial system coherently. First of all, China and many B&R countries are members of WTO and Washington Treaty. WTO dispute settlement mechanism and ICSID mechanism established by Washington Treaty could be used to settle B&R-related disputes. Second, free trade agreements and bilateral investment treaties between china and several B&R countries also contain dispute settlement mechanisms that should be made full use of. When everything is ready, especially when B&R countries have reached consensus, the innovative B&R dispute settlement mechanism should be co-founded.

Domestic judicial system is vital for dispute settlement between civil actors and recognition and enforcement of foreign commercial and investment arbitration verdicts. B&R countries should cooperate with each other widely to coordinate domestic judicial systems.

In a word, B&R initiative has become an important engine of world economy. Only constituting a reasonable legal protection system and keeping a stable and predictive legal environment, can ensure that B&R construction develop sustainably, stably, and healthily.

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Legal challenges of the digital economy and intellectual property to ensure its competitiveness

Keywords: intellectual property, digital economy, competitiveness

In the framework of strengthening the integration of development of member States of the EAEC on the script «Own centre of power» and in accordance with the Main directions of industrial cooperation within the EEU (the Decision of the Eurasian intergovernmental Council No.9 dated on 8.9.2015) on the market «industries of the future» 30% allocated to the sector of information and communication technologies (ICT), which at present, according to the EEC, has not been formed.

Under the digital economy is proposed to understand the production and circulation of goods, services and Finance with a primary use of digital technologies with high added value from the commercialisation of intellectual property.

In context of the digital economy in the Eurasian economic Union in 2016–2017.g. adopted more than 60 decisions of the EEC Board, including the governments of the member States of the EAEC and the EEC before 1.12.2017 is proposed to develop the main directions of the digital agenda of the EEU until 2025.

According to the Strategy of information society development in Russian Federation to 2017 – 2030, the emergence of digital economy related to the national interests of Russia, including providing leadership in these markets.

In conditions when the global market of intellectual property in the 21st century has grown 4 times and more than 15% of GDP, the national markets for intellectual property in the countries of the EEU remained at the same level (less than 1%). In the transition to a digital economy the share of value added from intellectual property in the pricing of the goods, services and Finance will only increase, which in turn will enhance competition in this area.

According to the analysis of these documents and practice their execution, identified group of intellectual property risks requiring priority measures in the field of information security from the outside, as the EEC the Eurasian economic Union, the CIS Executive Committee and the national competent authorities:

- the formation of transboundary space of trust;
- build integrated information system with the integration of national information resources in all sectors of the economy (IMS EEU);
- the use of foreign software for the development of domestic computer programs;
- differentiation of the approaches to protection against unfair competition in the field of intellectual property and combating counterfeiting with regard to private and public interests. Private interests of foreign TNCs must be protected on a reimbursable basis.

In the framework of the transition to a digital economy at the national and Eurasian levels, while ensuring its competitiveness and leadership in these markets, the choice is determined by two main ways. Either we will stay the same buyers of software and ICT from foreign right holders, either will ensure realisation of the national scientific and technological potential and will be able to enter the national, Eurasian, and then on the international market as sellers of a fundamentally new digital equipment and technologies of the sixth technological order.

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Why strong top-down design presents the WTO TRIPS reforms with a dilemma?

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Keywords: Intellectual property rights (IPRs); World Trade Organisation (WTO); Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), BRICS

Intellectual properties (IPs) or intellectual property rights (IPRs) have a considerable economic and legal importance in international trade. IP-intensive imports and exports, IP royalties and licence fees, IP-related content downloads and cross-board deliveries demonstrate the significance of IPRs.[1] In retrospect, there are two major policy orientations of IPR protection and enforcement, *i.e.*, the strong one and the weak one. What should be mentioned is that, to some extent, the so-called «weak» protection of IPRs concerns sometimes «could not» but not «would not». In other words, certain weak IP protection is a systemic imperfection of IP protection and enforcement in certain members of the WTO, including the BRICS sourcing from their special levels of economic and social development, rather than an intentional policy alternative.

Without contradiction, legal culture should be an integral part of the whole ethical culture. On the patent context under the TRIPS, established in the Uruguay Round of multilateral trade negotiations under the GATT (namely, the forerunner of the WTO), we can read between the lines that patent protection is one of the outstanding objectives under the TRIPS. Part III which is entitled «Enforcement of Intellectual Property Rights», sets forth the general obligations for IPR enforcement. Article 41 thereof reads:

> «1.Members shall ensure that enforcement procedures as specified in this Part are available under their law *so as to permit effective action against any act of infringement of intellectual property rights* covered by this Agreement, including expeditious

[1] **WTO doc., *Trade Policy Review, Report by the Secretariat, United States*, WT/TPR/S/307/Rev.1, p.88.**

> remedies to prevent infringements and remedies which constitute a deterrent to further infringements. ……..» (Emphasis added)

Apparently, the «protection» is the core of the cultural ethics of the current international intellectual property system. Of these general obligations that the WTO members shall assume, the first and foremost concern is to protect IPR, whereas boosting transfer of the patent technology and following-up innovation is not specifically mentioned in Part III of the TRIPS. Moreover, «economics is simply too blunt a tool»[1] to discipline the most appropriate scope and boundary of IPR protection, and the blockage being solely based on a financial stake is no better than balancing the pros and cons of all situations as far as the IPR benefits are concerned. Innovation and development are no doubt the contemporary common needs of WTO members, but it needs stressing that intellectual monopoly with excessive IP protection would also retard innovation and development.[2] How to determine the most suitable levels of IPR protection is a complex and comprehensive issue, rather than a single and simple economic one.[3] In fact, it can also be learnt through the discussion in Section II (A), *infra* about the developing history of the US's IP regime, that both strong and weak IPR protection are played in turn as a primary governmental guideline and exist in reciprocal dependence.

Certainly, it is instrumental to review the worldwide IPR systems in a less arbitrary manner to achieve a significant breakthrough

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[1] Yen A., Restoring the Natural Law: Copyright as Labor and Possession, 51 *Ohio State Law Journal* 517 (1990).

[2] Richard A. Spinello, A case for intellectual property rights, 13 *Ethics Inf. Technol.*277–281 (2011).

[3] For an interesting discussion of the complexity in finding 'legislative balance', see Druzin, B., Restraining the Hand of Law: A conceptual Framework to shrink the Size of Law, 117 *W. Virginia Law Review* 100 (2014) (positing a model to help policymakers find the correct balance between regulatory over-invasiveness and insufficient regulation).

concerning the future TRIPS reform and perfection in the fields of compulsory licensing, parallel imports, inappropriate patenting, biopiracy, geographical indication, «non-violation» complaint, technology transfer, IPR enforcement and so on,[1] in view of a cautionary tale of fifth extension having been declared by General Council on 2 December 2015 of the period for acceptance by WTO members of the Protocol Amending the TRIPS Agreement, in which Article 31bis (i.e. a new additional article after Article 31) is inserted into the TRIPS and allows pharmaceutical products made under compulsory licences to be exported to countries lacking production capacity.[2]

The major discussed contents in this paper are: Section II illuminates how the United States has gradually fixed the mode of strong IPR protection and led engagement on global strong IPR protection issues, including through its own trade policy tools and multilateral structure, *e.g.*, the negotiation on TRIPS and the Dispute Settlement Mechanism (DSM) under the Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU). Section III analyses the conflicts between the strong mode and week one in the BRICS in IPR Protection and enforcement. These conflicts are connected closely to the retaliation mechanism under the WTO Dispute Settlement Mechanism (DSM). Section IV discloses that the choice of strong IPR protection mode or weak one involves

[1] WTO doc., *Current issues in intellectual property*, updated 07 Dec.2011, https://www.wto.org/english/tratop_e/trips_e/trips_issues_e.htm (accessed May 20, 2017).

[2] According to the Protocol Amending the TRIPS Agreement, the period for acceptances by WTO Members of the Protocol Amending the TRIPS Agreement referred to in paragraph 2 of the TRIPS Amendment Decision and paragraph 3 of the Protocol, and extended by the 2013 Extension Decision, «shall be further extended until 31 December 2017 or such later date as may be decided by the Ministerial Conference». For more details, see WTO doc., *2015: Decision to extend deadline for accepting TRIPS Agreement amendment*, WT/L/965, dated 2 Dec.2015, https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm (accessed May 20, 2017).

a dilemma. This section tells that WTO consensus decision-making system calls for certain flexibility in treating divergent IPR protection levels among all the WTO Members. The final Section (Section V) is a conclusion.

Bob Dylan, an American singer-songwriter who was awarded the 2016 Nobel Prize in Literature,[1] wrote a thought-provoking song entitled «Blowing in the Wind». The first two lines of its lyrics read as follows:

«How many roads must a man walk down before you call him a man? How many seas must a white dove sail before she sleeps in the sand?»

If these two questions were asked in the IPR-related context, the answer would be «when the target destining for catching up with the leading country has been finally successful» in view of current global unbalanced innovation infrastructure and economic development. Anyway, it is rational to conclude that «a country's IPR regime likely coevolves with its economy» and that «countries try to alter their IPR regime in response to changing needs».[2] Whether the IPR regime is perfect or not does not depend on the purpose and objective expressed with such ambiguous wordings as «adequate and effective», «fair and equitable» and so forth, but on its acceptable degree in practice. With the emergence and development of the American innovation economy and also some encouragement from other advanced industrialised countries with

[1] Laura Smith-Spark, *Bob Dylan wins 2016 Nobel Prize for Literature*, http://edition.cnn.com/2016/10/13/world/nobel-prize-literature/index.html? adkey=bn (accessed March 1, 2017).

[2] Dieter Ernst, *Indigenous Innovation and Globalization–the Challenge for China's Standardization Strategy*, a joint publication of the US Institute on Global Conflict and Cooperation and the East-West Center, p.9, http://www.eastwestcenter.org/system/tdf/private/ernstindigenousinnovation.pdf? file=1&type=node&id=32939 (accessed March 1, 2017).

like minds, great changes with a more aggressive pose have taken place in its IPR laws, policies, and practices. However, seeing the laborious progress of the Doha Round Agenda over a long period of time,[1] it will be of exemplary significance if the current TRIPS reforms will escape from the dilemma which focuses strictly on strong IPR protection and enforcement.

[1] Frank Altemöller, A Future for Multilateralism? New Regionalism, Counter-Multilateralism and perspectives for the World Trade System after the Bali Ministerial Conference 10 *Global Trade and Customs Journal* 42 (2015).

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Perspectives on the regulation of smart contracts in Brazil and Russia

Keywords: contract law, legal tech, smart contracts, BRICS.

1. Throughout the last decades, one of the latest developments in contract law is related to the possibility of implementation of obligations mediated by technological means, particularly those drafted in digital protocols and their enforcement by decentralised autonomous organisations[1]. The promising concept of smart contracts and blockchains technologies is intended to create a whole new reality connecting parties in complex contractual chains across the globe[2]. It has evoked attention as a powerful factor for trust leveraging of contractual arrangements, especially in emerging economies, where the lack of fast-paced regulatory systems could

[1] See the primordial works in this field. SZABO, N. *Smart contracts*.1994, *Contracts with Bearer*.1997, *Formalizing and Securing Relationships on Public Networks*.1997 and *A Formal Language for Analyzing Contracts*.2002. [Electronic resourse] Available at website of Faculty of Phonetics – University of Amsterdam: Http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/index.html.

[2] When the blockchain technologies were created an operational environment emerged, at least in theory, to smart contracts be used, for instance, with cryptocurrencies and in a wide range of industries, including communications, IT and internet-of-things. For in-depth analysis of wider range of applications, see: WALPORT, M. *Distributed Ledger Technology: beyond block chain A report by the UK Government Chief Scientific Adviser.* The National Archives. London, 2016.

be an obstacle to capital attraction, investments and faster economic progress[1]. In Russia, blockchain technologies have flourished in a myriad of initiatives involving from small high-tech companies to large banks, corporations and the Russian government[2]. In its turn, Brazil has recently moved towards a more transparent regulation of internet-related[3] subjects and the Central Bank has acknowledged with deeper interest the development of blockchain technologies[4]. Moreover, the BRICS states consider cryptocurrencies as an alternative to create a new exchange system that could enable more equitable commercial and financial transactions among those countries[5].

However, these new technologies bring along questions which trigger complex regulatory consequences to contract law. Examining the outcome from the interaction between traditional concepts, as regulatory principles of contract law and the implementation of digital legal frameworks, the core questions addressed in this short paper concern: i) the problem of the legal definition of smart contracts and ii) the range of regulatory instruments applicable in Brazil and Russia.

2. Some attempts have been made to determine the legal definition of smart contracts so that the matter could progress

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1 MILLER, M. S., STIEGLER, M. *The digital path. Smart contracts and the third world.* Markets, Information and Communication. Austrian Perspectives on the Internet Economy.2003.

2 SCHEVCHENKO, M., URIVSKIY, A. *Blockchain activities in Russia.* Report Russian Technical Committee TC 26.2017.

3 See the Brazilian Law n.12.965 from 23.04.2014 which establishes the principles, guarantees, rights and obligations for the use of Internet in Brazil.

4 CAVALCANTE NETO, A. A. *et all. Distributed ledger technical research in Central Bank of Brazil.* Positioning report. Central Bank of Brazil. Brasilia, 2017.

5 See KUZNETSOV, V. A., YAKUBOV, A.V. I*nternational Criptocurrency (Bitcoin) Regulation in Diverse International Jurisdictions.* Dengy y Kredit.n.3, p.20, 2016 (in Russian) and JAYA J. *Application of Blockchain for Intra-BRICS Financial Transactions.* BRICS Research Center. HSRC, 2017.

into the legislative level in Russia[1]. The discussion concentrates on whether smart contracts could be considered as a special type of legally binding agreement or would be used as technical system for supporting contract obligations. In Brazil, questions arise about the differentiation of smart contracts and other forms of electronic contracts already used for e-commerce purposes[2].

According to some scholars, a smart contract is a species of contract that exists in the form of program code implemented on a blockchain platform, which ensures the autonomy and self-fulfillment of the contract terms upon the occurrence of predetermined circumstances[3]. The definition reflects the «hybrid model for the integration of smart contracts» in present contract law in Russia. Therefore, as a special type of contract, it could theoretically establish a legally binding agreement between parts in which rights and obligations would be totally written in machine-readable language and all the terms and conditions would be executed automatically by the software itself. However, despite the fact that developments in the field of the translation of legal terms into smart programs are moving at a rapid pace, a plausible application of autonomous agreement has not been possible so far, especially considering the phases of contract, for example, the resolution of internal or external disputes, in which case the presence of some third party would be necessary. In any case, from this point of view, smart contracts in Russia should be regulated by the

[1] SAVELYEV, A. *Contract law 2.0*: *'Smart' contracts as the beginning of the end of classic contract law.* Information & Communication Technology Law.vol 26, p.116, 2017 and KUZNETSOV, V. A. *et all*. *Future Scenarios of Legal Regulation of Cryptocurrencies in Russia.* Dengy y Kredit.n.7, p.52, 2017 (in Russian).

[2] For example contracts involving parts interconnected by a single system EDI (*Electronic Data Interchange*).

[3] SAVELYEV, A. *cit.*, p.116.

traditional forms of contracts presented in the Civil Code[1] and their implementation to real-life modalities of agreements, such as sales of goods, rental and leasing, partnerships, etc.would depend, however, on the utilisation of cryptocurrencies and operational distributed ledger systems[2].

On the other hand, smart contracts could be considered just as a software registered in a distributed ledger which enforces the automatic performance of contractual obligations or other significant legal acts. Those who defend the «separated model for integration of smart contracts in contract law» understand smart contracts as technical means of enforcing certain provisions in agreements[3], thus it could be submitted to traditional regulation, but making use of blockchain and distributed ledgers as support systems. It means that if the parties decide to submit their rights and obligations' performance to a smart contract, its activity (as a subsidiary method of securing obligations) would occur inside of a principal conventional contract[4].

Although in Brazil electronic contracts lack a dedicated regulation, scholars tend to apply the principle of «functional equivalence», which considers the electronic commerce (therefore

[1] See Part Two of the Civil Code of the Russian Federation, Section IV. Particular Kinds of Obligations. RUSSIAN FEDERATION. *Civil Code of Russian Federation.* Law N. 14-FZ of 26.01.1996. Amendments of 28.03.2017.

[2] This paper does not intend to extinguish the possibilities of discussion on the matter of the legal nature of smart contracts. Some theoretical developments on the field of legal person could extend the conception of smart contracts into the field of «i-person» or to be considered as «i-agents». For more examples, see: LING TSUI, S. F. *et all. A Lawyer's introduction to smart contracts.* Scientia Nobilitat, Lask, p.4, 2014.

[3] For example: TYLKANOV, A. *Smart contracts – contracts or technical resources?* zakon ru, 07.04.2017. [Electronic resourse] Available at website: https://zakon.ru/blog/2017/4/7/smart-kontrakty_dogovory_ili_tehnicheskie_sredstva #_ftn3 (in Russian).

[4] Here could be applied the art.329 of Russian Civil Code: Ways of Securing the Execution of Obligations 1. The execution of obligations may be secured by forfeit, pledge, retention of the debtor's property, suretyship, independent guarantee, earnest money, security payment and in other ways provided for by law or contract.

any virtual agreement) as legally equivalent to the traditional physical form of contract[1]. According to art.425 of the Brazilian Civil Code, no electronic contract needs to present a specific form[2], however some basic requirements involving consumers are found in the Decree n.7.962 of 15.03.2013[3].

In conclusion, based on this brief analysis, it is possible to observe no major obstacles to the regulation of smart contracts with traditional instruments of contract law in the Brazilian and Russian jurisdiction. Nevertheless, the absence of dedicated norms could lead to conflicting judicial application of the current legislation.

[1] LAWAND, Jorge José. *Teoria geral dos contratos eletrônicos*. São Paulo: Editora Juarez de Oliveira, 2003, p.43.

[2] Art.425: It is permissible for the parties to settle atypical contracts, observing the general norms established in this Code. BRAZIL. *Brazilian Civil Code*. Law n.10.406 of 10.01.2002.

[3] However, this Decree is applicable only to B2C (*Business to Consumer*) agreements.

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Common standards of BRICS Contract Law. Present status and development opportunities

Keywords: BRICS – contract law – common principles – comparative law – legal approximation – BRICS+

The importance of commercial transactions in the BRICS countries is increasing tremendously yet differences in the contract law among these countries can cause misunderstandings and disputes. The rapid development of the BRICS instruments (and the legal implications of their use) suggests the need to address common legal issues which could harm the continued development of the BRICS economies. Contract law represents one of the core areas where this process can take place.

Addressing the legal issues within the BRICS discourse requires a comprehensive comparative approach to explore the different solutions provided by each member country, to focus on similarities and convergences. This process will ultimately reduce legal obstacles and indirect costs of cross-border transactions by assuring legal coordination, offering a transparent and predictable legal environment for such

transactions, and creating a foundation for the future adoption of common legal instruments.

The presentation will introduce the Principles of BRICS Contract Law (PBCL) Project, where the principles will be produced by identifying and understanding the similarities and differences existing among the BRICS countries in terms of sources, form and substance of applied contract law. The analysis of contract law will not be conducted by contract law in general, but the different areas of contract law will be considered separately. In order to generate a significant and scientifically viable result, the research team will use other models in search of similar objectives (e.g. UNIDROIT principles of International Commercial Contracts, EU Common Frame of Reference, Principles of European Contract Law, and Principles of Asian Contract Law). Only Brazil, China and Russia were represented in the UNIDROIT working group, which means the UNIDROIT Principles cannot be used in the BRICS ambit. The PBCL serves to fill this gap.

The presentation will illustrate the status of the project aiming at producing the PBCL, its methodology and possible results. Then the presentation will consider the implication that the BRICS+ idea emerged at the last Xiamen BRICS summit could have on the project, and how this could represent a further opportunity for the development of the project itself.

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Development of arbitration for sports in the BRICS countries: problems and perspectives

Keywords: Sports arbitration, CAS, sports disputes, international sports movement, doping, arbitration agreement (clause).

The modern period of the development of the international sports movement, where national sports organisations of the BRICS countries are active members, is characterised by an increased quantity of legal conflicts. That is exactly why the questions of improving the existing international dispute resolution mechanism in the sphere of sports and creating brand-new efficient elements within BRICS are getting more and more important.

Firstly, it is reasonable to highlight general features of the mechanism of sports dispute resolution, functioning both within each BRICS member state and at the international level. The following features are included into this mechanism:

– Significant autonomy from governmental dispute resolution systems in the BRICS member states;

– Complication of international and (or) foreign element, which can cause a conflict of jurisdictions;
– Preferential pre-trial proceedings in dispute resolution process;
– Presence of both international and domestic specialised arbitration courts for sports, which are more preferable than the public system of justice;
– Existence of a specific international market of forensic and arbitration representation in the sphere of professional sports, which is in the process of formation.

Existence of the abovementioned features, as well as the presence of a significant commercial and business element in both international sports and Olympic movement equally determine the leading role of the specialised arbitration for sports among other procedings for sports dispute resolution. Nevertheless, the most important institution of arbitration in the sphere of sports and for the national sports organisations of the BRICS countries is the Court of Arbitration for Sport in Lausanne (CAS / TAS), which was established and is functioning in accordance with the Swiss law and does not have any head offices at the territory of the BRICS member states.

This actual monopoly position of the CAS in the sphere of international arbitration for sports is explained by the fact that it was established by the leading bodies of World Olympic Movement (IOC, ANOC, International Associations of Winter and Summer Olympic Sports), as well as by the existence of appropriate agreements between the CAS and International Sports Federations, IOC, IPC and WADA, finally.

Therefore, all organisations leading national sports movements in the BRICS member states, are forced to nonalternativelly choose the CAS as a platform for disputes resolution, including doping cases and disputes with no foreign elements but having an internal (national) nature.

Meanwhile, CAS proceedings at some point do not comply with the arbitration international standards, set by the model laws of the UN Commission on International Trade Law (UNCITRAL), and have significant following disadvantages, including:

1. There is no arbitration clause or agreement between the parties in its traditional comprehension on the CAS autorisation to resolve disputes. The CAS ad hoc and anti-doping procedures both show it more evidently.

This means that an athlete in the process of signing an application form and other documents determing his/her opportunity to participate in the competition, is forced to make a choice in favour of the CAS as an arbitration institution that is competent to administer all the disputes arised during the Olympic Games and other major international sports events or in connection with their conduct.

2. CAS arbitrators examining a particular dispute usually do not meet independence requirements from both the International Council for Sport (ICAS), the body responsible for the CAS funding, appointing its arbitrators and performing other administrative functions, and IOC or the International Federation, which is a party of the dispute and at the same time the founder of ICAS.

Unfortunately, the problem of CAS arbitrators' independence is systematic, and all the devisions of the Lausanne court suffer from it in one way or another. However, it is important to mention that in the CAS devisions, while working during the Olympic Games and other major sports events, the parties are deprived of the right to form a panel of arbitrators for resolving a particular dispute, as required by the UNCITRAL Arbitration Rules. The president of the relevant CAS devision who is simultaneously a member of the ICAS is autorised to do so.

3. The CAS procedure for disputes resolution itself has crucial disadvantages before and during the Olympic Games and other mega-events in sports.

Particularly, the arbitration function of the CAS Anti-Doping devision administrates disputes over a possible violation of anti-doping rules

during the Olympic Games is reduced to a mechanical confirmation of an unfavourable result of an accredited WADA laboratory and automatic suspension of an athlete from participation in competitions.

As follows from the practice of the Anti-Doping devision, the panel of arbitrators does not establish new facts on the case, does not determine their significance for the dispute matter, and does not resolve issues of law, particularly, questions of WADA code rules interpretation and enforcement.

In other words, nowadays, during the period of the Olympic Games, athletes representing the BRICS countries are completely deprived of the right to carry out fair and impartial hearings with issuing a timely and well-grounded decision, which can be appealed as stipulated in Art.8 of the WADA Code.

It is reasonable to point out here that the disadvantages of the CAS proceedings on dispute resolution related to preparing and holding mega-events in sports, requirements to participate in them and appealing sports results have been of the high importance for the BRICS member states, where the recent Olympic Games took place (Beijing-2008, Sochi-2014, and Rio-2016).

From our perspective, one of possible solutions of the abovementioned problem of exclusive jurisdiction of the CAS in International practice of sports disputes resolution and motivation to improve existing arbitration proceedings is the creation and development of national arbitrations for sports in each BRICS member states. A maximum possible variety of sports disputes shall be transferred to the abovementioned arbitration courts in accordance with the rules of international sports organisations, which will contribute to the development of both national sports law and legislation of the BRICS countries, domestic market of legal services in the field of sports and improve their quality.

Thus, the Russian Federation has already taken significant steps in that direction. Particularly, a regulatory and legal framework for the creation and functioning of a national specialised court of

arbitration for sports that meets international standards has been developed, and therefore, the amendments have been implemented into the Federal Law «On Physical Culture and Sport in the Russian Federation[1]».

The Brazil's experience also deserves a special consideration among the BRICS member states, as this country has developed not only a codified legislation in the sphere of sports dispute resolution, but also a full-fledged system of sports judicial bodies.

As a final point, there is an interesting opportunity to create a single arbitration centre for sports within the BRICS countries having offices in each participating country, with an appropriate development in conclusion arbitration agreements between international sports organisations. Not only for the BRICS member states, but for the sports movement of all developing countries this so-called «arbitration centre for sports» is able to become an alternative to the CAS, which has its head offices in the United States and Australia, but does not have any of them within the territory of the BRICS member states.

[1] Federal Law of December 4, 2007 No.329-FZ «On Physical Culture and Sport in the Russian Federation»

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Regionalising multilateralism: BRICS as a model for global cooperation

Multilateral forms of organising international cooperation have a long history, probably dating back to the creation of International Telecommunication Union (ITU) in 1865 and the General Postal Union in 1874 (since 1878 Universal Postal Union (UPU)). It has widened in scope during the 20th century especially with the creation of the United Nations Organization (UNO) based on the United Nations Charter in 1945. Unfortunately, the universality of the United Nations Organization suffered a serious setback with the failure of the International Trade Organization (ITO), which led to the provisional entry into force of the General Agreement of Tariffs and Trade (GATT 1947) in 1948. While the creation of the World Trade Organization (WTO) had eventually reinforced the universality of the multilateral regulation of international trade cooperation at least in terms of scope. However, it did not succeed in establishing the originally planned ties with the United Nations Organization, which may be directly causal for the lingering trade linkage debate or inability of the WTO to address many of the important pairs of «trade and …» problems, such as trade and environment, trade and culture or trade

and development to mention but three. The inability of the WTO and the UN to separately address serious global regulatory challenges has led to a parallel trend of shifting the focus from multilateral to regional forms of cooperation and, possibly, integration.

Nowadays, global statistics reveal an exponential growth in regional trade agreements (RTAs), with more than 400 notifications of RTAs received since the creation of the WTO in 1995. Meanwhile it is no longer just the process of European integration under the aegis of the European Economic Community in 1958 (and later the European Union), North American cooperation in the form of the North American Free Trade Agreement (NAFTA) of 1993, or the Asia-Pacific Economic Cooperation (APEC) forum initiated in 1989 that are competing models for the optimal organisation of economic cooperation. Nowadays, many more RTAs are being negotiated and their scope increasingly being expanded to cover also trade-related or so-called non-trade concerns. In sum, this trend also raises the crucial question about the best possible regulatory approaches chosen for the different objectives to be realised by them.

Against this backdrop, the present paper aims to critically assess the advent of the BRICS Countries (Brazil, Russia, India, China, and South Africa) on the global scene with its first summit held in Yekaterinburg in 2009. The BRICS Countries exact legal form of cooperation has not yet bet determined and, while the BRICS self-characterisation is one of a 'dialogue and cooperation platform', their cooperation was also described as a 'multi-centre legal network' or a 'coalition of variable geometry'. Thus, the relatively young history of the cooperation between the BRICS countries provides an opportunity to critically analyze and discuss the optimal forms of cooperation, both regionally and multilaterally or locally and globally, in the early 21st century. At the same time, it will also try to highlight some of the principal challenges facing both the BRICS dialogue and cooperation platform and global governance in the future.

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Towards a single BRICS arbitral mechanism

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Representatives of Law Society of South Africa,
Members of the China-Africa Joint Arbitration Centre,
Members of the Forum for China-Africa Cooperation,
Distinguished Guests,
Ladies and Gentlemen,

I'm extremely honoured to be part of the **IV BRICS LEGAL FORUM 2017 RUSSIA.**

I stand before you, this Morning, representing Arbitration Foundation of Southern Africa (AFSA), as well as the CAJAC Johannesburg Centre. The China-Africa Joint Arbitration Centre (CAJAC) Johannesburg Centre. I am a member of

CAJAC – Johannesburg Board of Directors, an International Arbitrator, an Acting Judge of the High Court of South Africa and a practising Senior Counsel in the Republic of South Africa.

I must explain that CAJAC-Johannesburg is one of the five operating Centres which constitute the China-Africa Joint Arbitral Mechanism.

I draw this to your attention because the CAJAC project is in many ways an important prototype for the BRICS Arbitral Mechanism.

Both AFSA and CAJAC have had an opportunity to consider the Concept Note submitted by Mr. Kumar of the Bar Association of India, as well as the proposals made for establishing the Professional Committee for BRICS Dispute Resolution.

Both AFSA and CAJAC agree with the sentiments expressed in the Concept Note and endorse the proposals concerning the proposed BRICS Dispute Resolution.

There is a wealth of legal and arbitral expertise within the BRICS countries; there are highly efficient arbitration institutions operating there, and there is no reason why we cannot harness the resources and the potential available in the BRICS countries to establish a BRICS Arbitral Mechanism which will serve the specific needs of BRICS, as well as the needs of emerging nations.

The proposals which we endorse are foundational to achieving a shared vision; it is the greatest contribution which the legal communities of the BRICS nations can make and I trust that these proposals will carry the unanimous endorsement of this Conference.

Lastly, as AFSA and CAJAC-Johannesburg, we are looking forward to being a significant part of the **V BRICS LEGAL FORUM 2018, REPUBLIC OF SOUTH AFRICA.**

I thank you Ladies and Gentlemen.

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Promoting the effectiveness, access to, and independence of international tribunals in Africa: a brief overview

Introduction

Many positive steps toward promoting the effectiveness of and access to, international tribunals in Africa have been taken. However, mechanisms established face severe limitations and challenges which ultimately affect adequate access and the independence of these tribunals. The withdrawal from the ICC by three African states further exacerbates the situation, even though two states have since revoked these intentions to withdraw. This short article aims to broadly discuss the international tribunals available to African citizens and to briefly advise on the current effectiveness, access to, and independence of these mechanisms.

Court of Justice of the Economic Community of West African States (ECOWAS)

ECOWAS consists of 15 West African member states and created the Community Court of Justice (CCJ). Individuals are

allowed to initiate proceedings against ECOWAS member states in front of the CCJ. It is also permitted to hear cases relating to the violation of human rights. However, the CCJ unfortunately only has jurisdiction over its 15 member states. This, and the fact that most cases heard only relate to electoral disputes in Nigeria, calls into question the true scope of access and the court's effectiveness.[1]

Court of Justice of the East African Community (EACJ)

The EACJ has jurisdiction over matters relating to the interpretation and application of the 2002 Treaty for the Establishment of the East African Community, and any other matter pertaining to an Act related to the latter treaty.[2] It is however an ongoing debate as to whether the EACJ's jurisdiction will be extended to deal with human rights violations.

Court of Justice of the Economic Community of Central African States (ECCAS)

This mechanism currently exists solely on paper.[3] Many resolutions and directives have been adopted regarding the formation of this court but to date, nothing has materialised.[4]

Tribunal of the Southern African Development Community (SADC Tribunal)

The SADC Tribunal became fully operational in 2005.[5] Its broad jurisdiction over international principles ultimately led to the tribunal's suspension in 2010.[6] It is still non-operational.

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[1] ECOWAS (2012).

[2] African International Courts and Tribunals (2016) Available at www.aict-cita.org: http://www.aict-tia.org/courts_subreg/amu/amu_home.html.

[3] African International Courts and Tribunals (2016).

[4] African International Courts and Tribunals (2016).

[5] African International Courts and Tribunals (2016).

[6] International Justice Resource Centre: South African Development Community Tribunal.

The African Court for Human and Peoples' Rights (ACHPR)

The ACHPR was established in 2004.[1] Thirty states have since ratified this Protocol, leading to the operational functioning of the court. The court may hear cases related to the interpretation and application of the African Charter, the Court's Protocol, and any additional human rights treaties ratified by the relevant member states.[2] The court is also empowered to deliver advisory opinions on matters within its jurisdiction.[3]

Unlike the other mechanisms within Africa, the ACHPR does not suffer from a lack of referred cases.[4] However, the challenge this court faces is in the submission of article 34(6) Declarations in terms of the Protocol to the ACHPR. Although 30 states have ratified the Protocol, a minimal amount of states submitted 34(6) Declarations. These Declarations grant the court jurisdiction over human rights complaints brought to court by an individual from a member state. Without this Declaration citizens from member states do not have the right to directly approach the court.

The enforceability of ACHPR judgments have also been brought into question since Rwanda withdrew its 34(6) Declaration in 2016 due to a judgment granted against it.

The African Court of Justice and Human Rights (ACJHR)

The ACJHR will only become fully operational when at least 15 member states ratify the Protocol on the African Court of Justice

[1] African International Courts and Tribunals (2016).

[2] African Commission on Human and Peoples Rights(2016).

[3] African Commission on Human and Peoples Rights(2016).

[4] African Commission on Human and Peoples Rights(2016).

and Human rights in 2008.[1] To date, only five member states have ratified the protocol.[2]

In 2014 the African Union also adopted the further Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol). This Protocol seeks to expand the jurisdiction of the ACJHR to include crimes under international law and transnational crimes. It sets out an ambitious list of 14 international crimes which would form part of the ACJHR's jurisdiction. This will be a massive expansion of jurisdiction over international crimes in Africa.

Immediate issues of concern however, are that its scope is too broad, it will require too many judges with specialised knowledge, the budget will be large, and deterrence is undermined by the immunity clause. Article 46A *bis* of the Malabo Protocol provides for the immunity of sitting heads of state and high ranking government officials during their tenure. This is troublesome as the current precedent is that there is no immunity for heads of state in terms of international law.[3] This raises concerns as to the court's independence and effectiveness.

The International Criminal Court

The ICC has investigated many cases from the African continent, including the infamous issuing of the arrest warrant for sitting head of state, President Al-Bashir. The ICC has jurisdiction over all four core crimes. As far as international courts and tribunals are concerned, the ICC has significant experience and expertise in investigating and prosecuting these crimes. This gives it an important advantage in the adequate investigation and prosecution of international crimes, and ensuring justice for the victims.

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[1] Nam J.F. W. «Jurisdictional conflicts between the ICC and the African Union: Solution to the Dilemma» 2015–2016 *Denver Journal of International Law and Policy* 41 at 44.

[2] Nam (2015–2016).

[3] *Prosecutor v Charles Ghankay Taylor* (2014, May 31) Case No SCSL-2003-01-I Appeals Chamber SCSL.

Conclusion

Although it is clear from the above that there is a definite movement toward promoting access to international tribunals, the challenges highlighted overshadow the positive steps already taken. The existence and successful functioning of international tribunals ultimately depend on the proper support from states, promotion of respect for these tribunals and what they stand for, and ensuring access to individuals.

Even though many mechanisms have been developed and citizens have access to different tribunals, the powers of these tribunals remain limited. As discussed above, most courts currently in existence are limited in power by only being able to hear cases from certain states and to only preside over certain subject matters. It seems that these courts constantly fall short of the jurisdiction needed to effectively function and be independent.

The further drive toward withdrawal from the ICC (a well-functioning international tribunal) in favour of mechanisms such as the ACJHR is also worrying. Especially when considering the inclusion of the immunity clause applicable to heads to state and senior government officials. The latter and a clear unwillingness to give powers to courts to hear matters from individuals suggest that the functioning mechanisms have severe issues with independence.

There is no doubt that progress is being made, however at this stage it cannot be definitively said that Africa is effectively promoting effectiveness of international tribunals. The effectiveness of these tribunals ultimately rely on access and independence, both of which are severely limited by the current status of case referrals, jurisdiction and restrictions placed on these tribunals by member states.

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Improvement of customs collaboration legal mechanism of BRICS countries

Keywords: BRICS, customs cooperation, integration processes, customs procedures in mutual trade, formation of legal framework.

One of the key questions of any association of countries is the organisation of customs collaboration in order to encourage the development of mutual trade. Customs cooperation development in the BRICS format makes it possible to significantly improve the quality of customs control and processing of documents, to simplify customs procedures.

For that purpose, it is initially necessary to provide the development of informational exchange between the customs services of the BRICS countries about goods and transports transferred in a mutual trade. The mutual acknowledgement of customs control results is an important task. Another essential task is the development in the sphere of law-enforcement activity. The exchange of statistics is crucial for the general assessment of the situation, as statistical data on export and import from one country to another, as a rule, is different.

Since 2013 the customs cooperation in the BRICS format has been at the very beginning of its formation and it can be described as non-contentious.

The formation of legal framework is beginning gradually. For organisational purposes the Statute of Committee on customs partnership of the BRICS countries was signed in an Indian city Goa on the 16th of October in 2016. That means that a permanent body for addressing particular issues and the development of customs collaboration on the whole has been created. Simultaneously the project of the intergovernmental agreement of the BRICS countries on cooperation and assistance in customs issues is being considered for approval at an expert level.

The formation of the mechanism responsible for the development of customs cooperation is being promoted. The Customs Cooperation Committee was established as a platform and, speaking about the ideological field, BRICS Strategic Programme on Customs Cooperation was signed (September the 4th, 2017, Xiamen, PRC).

The Committee is a permanent cooperative body of the the BRICS countries and it is intended to ensure coordination of interaction between customs services of the BRICS countries in the field of customs.

BRICS Strategic Program on Customs Cooperation is designed to consolidate the strategic framework of cooperation between the customs services of the BRICS countries; the cooperation is aimed at simplification of customs procedures in mutual trade, convergence of customs administration rules and procedures, the use of uniform approaches to information exchange and the use of cutting-edge information technologies.

«3M» concept is the guiding principle of such strategic cooperation – mutual exchange of information, mutual acknowledgement of the customs control results and mutual assistance in law enforcement.

The customs administrations of the BRICS countries ought to study the possibility of the cooperation within domestic legislation, exchange information and experience relating to customs offences.

A very important provision of the programme is the possibility of the customs administrations of the BRICS countries to exchange information, to conduct common research on collectively revealed risk profiles and also to discuss the possibility to carry out joint analysis of risks and to determine the priority aims. The customs administrations of the BRICS countries also should carry out the exchange of technologies, experience and knowledge in terms of risk management, its analysis and revelation in certain cases.

The programme also sets forth the necessity to study new trends in the global economy relating to customs registration, the necessity to work for the benefit of adoption of «Road map» in order to adapt to the new changes. The customs administrations of the BRICS countries should strive to work in the direction of the digital customs office creation, performance of the BRICS framework programme on the «one-stop» system and to give a support to new business forms including the sphere of digital commerce providing a fluent process of customs registration. The created mechanism will also give a possibility for the mutual exchange of the operating standards, practice and experience of the «one-stop» mechanism implementation with other international organisations, what therefore will enhance the aspiration to make a contribution to international customs community. The customs administrations of the BRICS countries ought to study the possibility of cooperation in respect of harmonisation of the data model in line with the existing model in WCO for the security of informative cooperation and realisation of the «one-stop» mechanism.

The next step of the development of the legal basis of customs cooperation should be the Intergovernmental agreement of the BRICS countries on the cooperation and mutual aid on the customs issues.

The agreement provisions the cooperation of the parties in the most crucial matters. The parties to a contract intent to provide each other with the help in order to prevent costumes breaches, investigations and the effort to struggle with them in order to

apply the proper legislation, provide and simplify the effective trade of international trade chain supply and also simplify the common strategy generations and the expertise of development tools through its customs administrations. The coordination of positions is provided in the course of control of calculation and collection of customs payments in the exercise of customs control.

Statistics data exchange regarding international economic activities will be considered for the control of import-export tendencies, analysis of bilateral trade dynamics and implementation of procedures for strengthening economic cooperation.

The parties assume the mutual simplification of the procedures built on the principles of transparency, efficiency, harmonisation and consistency of trade procedure; promotion of international standards and compliance with multilateral valid instruments, use of information technology and introduction of the risk management system. An important section of the agreement and, actually, the most difficult one will be consolidation of the agreed positions in terms of the definition of the customs value of goods.

The integration processes in the frameworks of customs cooperation are always difficult. The member countries are associated by their own national interests and be the features of economic development, numerous bilateral agreements, regional and global international agreements. All in all, with the successful development of such cooperation, the advantage and benefit are obvious both for each party and for all the participants.

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Blockchain – an effective mechanism for stimulating economic cooperation for BRICS countries

Keywords: blockchain, cryptocurrency, crypto-economics, trust network, decentralised, smart contract

What is the blockchain?

Blockchain is the technology for building a decentralised registry (or 'ledger').

In the blockchain you can store records of bank transfers, documents, contracts, legal rights, patents, and so on.

There is no central trust authority in the blockchain, which would ensure the safety and correctness of this information. The trust in blockchain is ensured by the inherent properties of the blockchain network, based on mathematics, cryptography and game theory.

The primary blockchain properties, which extends the current internet experience, are:

1) Trust relationship between the parties transmitting data in the blockchain is formed on the basis of mathematics. Prior to the appearance of the blockchain, trust was secured by personal acquaintance, organisation's fame and other subjective indicators, which are often overlooked. Blockchain changed this paradigm, largely influencing the notion of «trust» in the digital world. Confidence in the blockchain is formed mathematically, with the participation of a large number of participants, reaching an agreement (consensus), that is, it is objective, not subjective.
2) Transparency of interaction and safety of information on computers distributed around the globe and, generally speaking, not trusting each other.
3) Possibility of fulfilling pre-determined agreements (smart contracts) between parties that do not trust each other or have diverse interests

Successful Blockchain Applications

The developed projects in the field of blockchain can be identified in several areas:

1) Cryptocurrency is the very first and most successful application of the blockchain. The network of the first cryptocurrency – bitcoin – was the first confirmation of the applicability of the blockchain ideas, and is still the most significant application of it.

2) Registries on the blockchain are being introduced in many areas of activity, where openness, reliability and the decentralised trust are needed. We can say that in such registers «data belong to the people». They are organised at various levels – worldwide, the scale of the country, enterprise or community:

- Georgia introduced a register of storage of property rights (an analogue of the Russian regalata) on the basis of a blockchain;
- Diamond miners in Africa store data on more than 2 million diamonds in the blockchain and trace them from mining to cutting and selling;
- Estonia keeps data on citizens in a decentralised blockchan registry, on the way to a «digital passport».

3) **Ensuring the fulfillment** of obligations based on smart contracts. For example, lawyers are looking for ways to transfer legal relationships to smart contracts in the blockchain network. Outstanding feature of smart contracts is that they are executed even in the event of conflicting interests of the parties that originally participated in it.
4) **Cooperation** and crowd-funding networks. Blockchain enables to involve the active community of participants in projects that need expert or financial support. This property is actively used by many startups, which issue their own cryptocurrency (tokens) and conduct their initial coin offering (ICO). In addition to purely monetary interest, the projects receive support from the community, valuable employees and publicity at the expense of the ICO.

It should be noted that successful block-projects exist at different levels of coverage of participants: world-wide, national, corporation and organisation.

Value for BRICS from the blockchain applications

BRICS, like the block, has a decentralised nature. For this reason, BRICS projects can easily use blockchain and at the same time benefit from its properties in the very near future. The projects of

the BRICS participants can receive the following benefits from the introduction of blockchain into their processes:

1) effective economic interaction, fast, open, without barriers and borders, without intermediaries
2) financial instruments and services for direct support of projects that meet the needs of organisations and are independent of external factors
3) opportunities to expand the labor market and joint activities for organisations and their employees, overcoming the borders of countries, currencies, continents
4) protection of copyright, intellectual property for citizens and organisations working outside

Economic cooperation will become faster, more transparent, more efficient and more interesting for participants due to:

1) Elimination of intermediaries and superfluous hierarchy of management and central regulation. The direct relationship between peer-to-peer (peer-to-peer) in a decentralised system has proved itself in many examples as a more progressive, economical model;
2) Overcoming barriers between countries, political, economic and financial systems through openness, an objective degree of trust, security of data storage. Blockchain can serve as a unifying factor, the credibility of which is objective and does not require additional confirmation from individuals or organisations;
3) Introducing a suitable system of values for the interests of the participants in the cooperation. Tokens produced by companies in the conduct of ICO are a special case of such value. Within the BRICS, such values can be formed within consortium between participants, individual industries to ensure transactions of value transfer between them;

4) Rapid and effective achievement of an agreement (consensus) between participants in economic interactions. This applies to voting procedures, decision-making, conclusion of contracts, consideration of disputed issues;
5) Organisation of a decentralised exchange of goods and services within the BRICS. The agreements on this exchange will be recorded in the network of blockchain in the form of smart contracts, and settlements in specialised crypto-currencies.

The following **financial instruments and services** on blockchain can be introduced in the BRICS:

- Loans in the internal crypto currency, tied to the assets of participating organisations. This will make the economic model independent of external factors (such as the dollar rate), reduce the degree of risk and speed up the development of joint ventures credited in this crypto currency;
- Investment in the crypto currency, which will grow in value in proportion to the development of organisations or entire industries. This will open up opportunities for investors and significantly expand the range of fundraising and interest of foreign investors;
- Decentralisation of the banking system for instant, transparent and secure exchange of funds between BRICS organisations;

The following blockchain solutions to **employment, expertise sharing and cooperation** can be introduced in the BRICS:

- Decentralised labor exchange in the BRICS countries can be built with a specialised crypto-currency. It will inherit all the positive properties of technology and will be governed by agreements between the participants.

The following projects in the area of **protection of copyrights, trademarks and objects of intellectual property** will be valuable for the BRICS countries:

- Decentralised register that keeps «casts» from objects of cultural, copyright and intellectual rights will help significantly simplify the procedure for registering rights and dispute settlement procedures;
- Blockchain record can serve as evidence on the basis of the fundamental properties of the block of data on the consistency and consistency of data;
- For the BRICS countries, the introduction of such a registry will help to organise a common space of law in the field of intellectual property, which is now the main asset driving high-tech industries.

The combination of projects that benefit directly from the implementation of blockages and the world experience of its implementation is a key factor in stimulating economic cooperation in the BRICS countries.

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Global fragmentation of competition law and BRICS: adaptation or transformation?

Keywords: BRICS, competition law, competition policy, national competition authority, competition enforcement cooperation

For various reasons, despite its global significance and widespread presence in the context of the globalisation of trade flows and the liberalisation of domestic and international markets, the international community has not yet managed to construct a multilateral mechanism for competition law enforcement or competition policy coordination. Unlike regional integrationist structures with a common market and supranational competition law regime, such as the European Union (EU), the BRICS countries lack a geographic connection and shared language, and their cultural, economic, political and social history reflects many more differences than common features. Despite these differences, the significance of competition policy in these large global economies has prompted a certain degree of cooperation and the sharing of experience amongst them. The most visible examples of this cooperation are the biennial

BRICS competition conferences, held in Kazan (Russia) in 2009, in Beijing (China) in 2011, in New Delhi (India) in 2013, in Durban (South Africa) in 2015, and most recently in Brasilia (Brazil) in 2017.

The emergence of the BRICS countries as pivotal actors in the sphere of competition law has been seen as a challenge to the uncontested US hegemony in this field.[1] Competition law practitioners have focused their attention on the national competition regimes of BRICS jurisdictions,[2] and academics have engaged in the comparative analysis of enforcement practices in the BRICS countries.[3] At the same time, little attention has been accorded to their potential contribution of the BRICS to resolving the current impasse in the development of an international competition law framework and their potential role as trendsetters for competition policy development in developing countries and for new competition law regimes in general.[4]

The failure of WTO dialogue on competition policy and current efforts by the World Bank and OECD to breach the gap between competition policy and development[5] indicate that international dialogue on the relationship between competition law and policy, economic development, industrial policy, and the eradication of poverty and unemployment is likely to continue until developing

[1] See Imelda Maher, 'Competition Law Fragmentation in a Globalizing World' (2015) 40(2) *Law & Social Inquiry* 553–571.

[2] See e.g. Adrian Emch, Jose Regazzini and Vassily Rudomino (eds.), *Competition Law in the BRICS Countries* (Alphen aan den Rijn: Kluwer Law International, 2012).

[3] See e.g. Frederic Jenny and Yannis Katsoulacos (eds.), *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer, 2016).

[4] See e.g. Ioannis Lianos, 'Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy', CLES Research Paper Series 5/2016, August 2016; available at www.ucl.ac.uk/cles/research-paper-series.

[5] See e.g. World Bank/OECD initiative Promoting Effective Competition Policies for Shared Prosperity and Inclusive Growth; available at www.worldbank.org/en/events/2015/06/23/promoting-effective-competition-policies-for-shared-prosperity-and-inclusive-growth#1 or World Bank/ICN Competition Policy Advocacy Awards; available at www.wbginvestmentclimate.org/publications/the-competition-policy-advocacy-awards.cfm.

countries are properly 'convinced' of the need and form of a competition regime that would suit their developmental needs. When they began cooperating in this field, the BRICS countries acknowledged their acceptance of the multiple goals that can be pursued in competition law and policy. The national competition legislation of the BRICS countries attributes a variety of public policy objectives to competition enforcement: the social function of property (Brazil), the position of historically disadvantaged people (South Africa), freedom of economic activity (Russia), and the development of a socialist market economy (China).[1] As a result, the BRICS platform could potentially become an alternative venue for international dialogue on the goals and objectives of competition law and policy; it would likely be more receptive and accommodating to the needs of developing countries in their attempt to develop a national competition law regime that would be suitable for the developmental and other public policy objectives they might want to pursue. This platform could also facilitate discussion on the relationship between competition policy and the Sustainable Development Goals as formulated by the United Nations.[2]

Even from a merely comparative perspective, the BRICS countries offer a wide variety of substantive, procedural, and institutional frameworks for national competition law regimes, which could be studied and learned from. For instance, China has developed a three-headed institutional framework for the enforcement of its Anti-Monopoly Law.[3] This unique institutional framework provides for a certain 'checks and balances' mechanism within the

[1] See Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review* (Alphen aan den Rijn: Kluwer Law International, 2015), p.15.

[2] See Sustainable Development Knowledge Platform, https://sustainabledevelopment.un.org/.

[3] See Qian Hao, 'The Multiple Hands: Institutional Dynamics of China's Competition Regime', in Emch and Stallibrass (eds.), *China's Anti-Monopoly Law: The First Five Years*, pp.15–34; Angela Huyue Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (2011) 56(3) *Antitrust Bulletin* 631–663.

competition enforcement mechanism, because all three enforcement authorities work towards the improvement of investigatory and decision-making practices. South Africa, where the competition law regime is almost two decades old, has developed a strong competition culture, and the work of competition authorities has received enormous popular support because the fight against economic exploitation by companies is seen as an extension of the fight against poverty and inequality.[1] Russia has accumulated substantial experience in regional cooperation and the coordination of competition laws and policies – first within the framework of the Commonwealth of Independent States on the basis of the 2000 Agreement on implementation of the coordinated anti-monopoly policy and currently within the Eurasian Economic Union.

The BRICS countries' experience in developing their national competition regimes and placing competition law and policy on the agenda of intra-BRICS cooperation could provide the background for an alternative international platform for dialogue and cooperation in competition matters. The viability of such a platform will depend to a large degree on the ability of the BRICS countries to develop and promote a common vision or approach to competition law and policy, which would allow the accommodation of various public policy goals pursued by the emerging economies. The success of the intra-BRICS coordination of competition enforcement and their ability to balance national economic interests with considerations of international cooperation, comity and the general rejection of anti-competitive business practices will be essential for the credibility of the BRICS countries as global leaders in the competition law and policy dialogue.

[1] See Dennis Davis and Lara Granville, 'South Africa: The Competition Law System and the Country's Norms', in Fox and Trebilcock (eds.), *The Design of Competition Law Institutions: Global Norms, Local Choices*, pp.266–328.

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BRICS and developing countries

Legal Experts Forum, 8-9 June 2017
Ekaterinburg, Russia

The Second Coordination Committee Meeting of the BRICS Law Institute and the BRICS and Developing Countries Legal Experts Forum were held on 2 – 10 June 2017 in Ekaterinburg, Russia. In the framework of the forum the experts elaborated and signed a declaration (summary of the discussion) in order to analyse the role of the BRICS and developing countries in international economic relations and to outline possible directions for taking concrete measures in areas of joint interest in relation to tax matters, including the settlement of cross-border tax disputes, and information exchange, education, cooperation and research on legal issues connected with capacity building in such areas. Besides, group of experts drafted an aspirational model draft conventions, which suggest innovative and ambitious approaches in terms of tax regimes and cross-border tax dispute resolutions.

Legal expert discussion took into account the analysis of the WTO statistics data on trade between the BRICS countries and the rest of the world which indicates that:

– the share of the BRICS countries in the world exports ranged from 17% to 19% of the world indicators for the period of 2012 to 2016. (*Attachment – Figure 1*);

– the share of the BRICS countries in the world imports of goods ranged from 16% to 15% over the same period (*Attachment – Figure 2*).

Separately, the BRICS countries showed different indicators:

– the largest imports of agricultural goods were in China, the least imports – in South Africa;
– the highest export of agricultural products – in Brazil and China, the smallest – in South Africa (*Attachment – Figure 3*);
– the highest export of fuel and mining products was in Russia, the highest import was in China (*Attachment – Figure 4*);
– the highest imports and exports of manufacture products were in China, the least exports and imports – in South Africa (*Attachment – Figure 5*).

Based on recent studies conducted by the participants of the Coordinating Committee Meeting of the BRICS Law Institute and Forum, the experts came to the need to identify the following steps in the relevant areas that could provide some contribution to the achievement of the identified directions noted above in this document:

a) Development of an effective system for settlement of cross-border tax disputes, including mediation/ arbitration with representatives of the legal experts nominated by the BRICS, which suggests innovative approaches that are in harmony with the constitutional and legal frameworks of BRICS countries and can furnish a basis of change and innovation to evolve such frameworks;
b) Simplification of the mechanisms for eliminating of international double taxation and tax administration in the BRICS with respect to certain types of income on a multilateral basis;
c) Possible future development of common cross-border tax rules concerning further types of business profits;

d) Coordination of joint actions and efforts of the BRICS states in the field of technical capacity building and education in relation to the matters falling within the scope of this declaration.

I. The role of BRICS and developing countries in international trade and investment

1.1. It is envisaged that the BRICS countries develop an appropriate common standard for settling trade and investment disputes, which must be consistent with the corresponding tax dispute resolutions mechanisms and may apply in their bilateral relations with the due amendments.

1.2. This standard can also apply to relations of BRICS members with third countries.

II. Development of an effective system for settlement of cross-border tax disputes

2.1. The suggested draft of the Multilateral Model Convention modifies and supplements bilateral treaties on avoidance of double taxation between the BRICS countries. The Draft Model Convention envisages a right to taxpayers – residents of the Contracting States to refer the cross-border tax dispute that has not been expeditiously resolved or settled to a common cross-border tax dispute settlement mechanism, the decision of which will be final and binding on the competent authorities. Panels for the settlement of cross-border tax disputes are formed by competent authorities (each appoints one member) and one additional member (chosen by agreement) from among recognized experts in international tax law in the BRICS countries.

2.2. However, it is noted that the existing constitutional and legal framework may require some amendments or modifications.

III. Simplification of the mechanisms for eliminating of international double taxation and tax administration

3.1. The suggested draft of multilateral convention proposes to modify existing bilateral treaties between the BRICS countries on avoidance of double taxation. The Convention covers taxes on income and compulsory insurance contributions on income from activities such as employment, artists and athletes, teachers and researchers, and entrepreneurial activities. The main feature of the articles is the exclusive single taxation of these incomes in the source state, if the income does not exceed 100,000 US dollars for the tax period. The Convention establishes a «national regime» for the taxation of such incomes from the very first day of the activity (for example, the application of the tax rate applicable to residents). Also, the Convention eliminates double taxation of the permanent establishments of enterprises of the Contracting States within the above thresholds, vesting the exclusive right to tax the profits of the permanent establishment to the state in which it is located. The Draft significantly expands the guarantees of non-discrimination of covered persons, specifying that the national regime of taxation is applicable to the permanent base of individuals, extends to workers, artists, athletes, scientists and researchers in terms of tax rates, deductions and other tax benefits and preferences.

3.2. It is also hereby envisaged that there will be a possible future development of common cross-border tax rules concerning further types of business profits.

IV. Coordination of joint actions and efforts of the BRICS states in the field of technical capacity building and education in relation to the matters falling within the scope of this declaration.

Figure 1

Figure 2

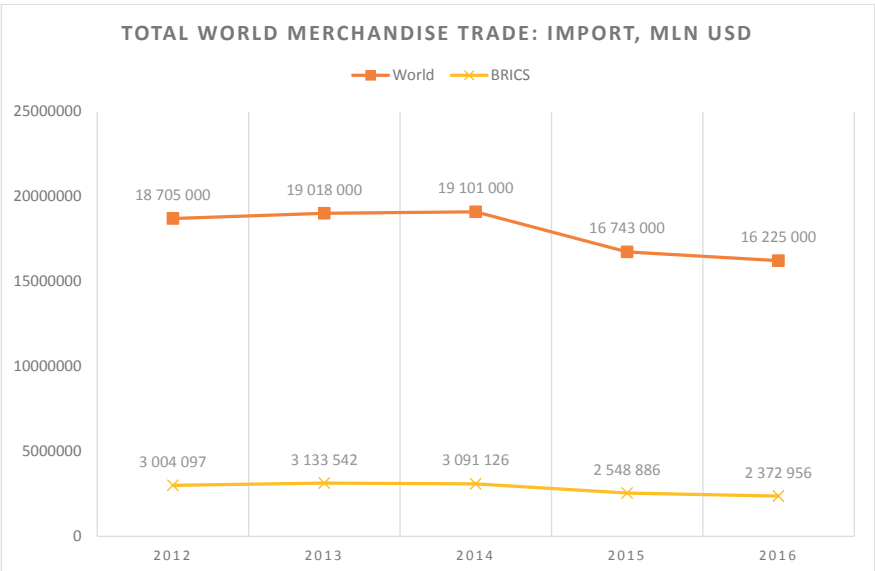


Figure 3

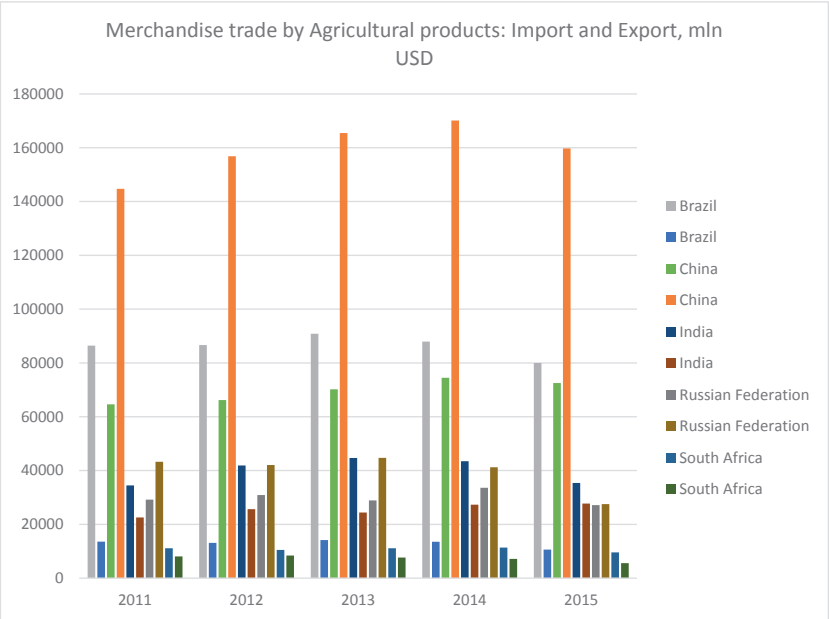


Figure 4

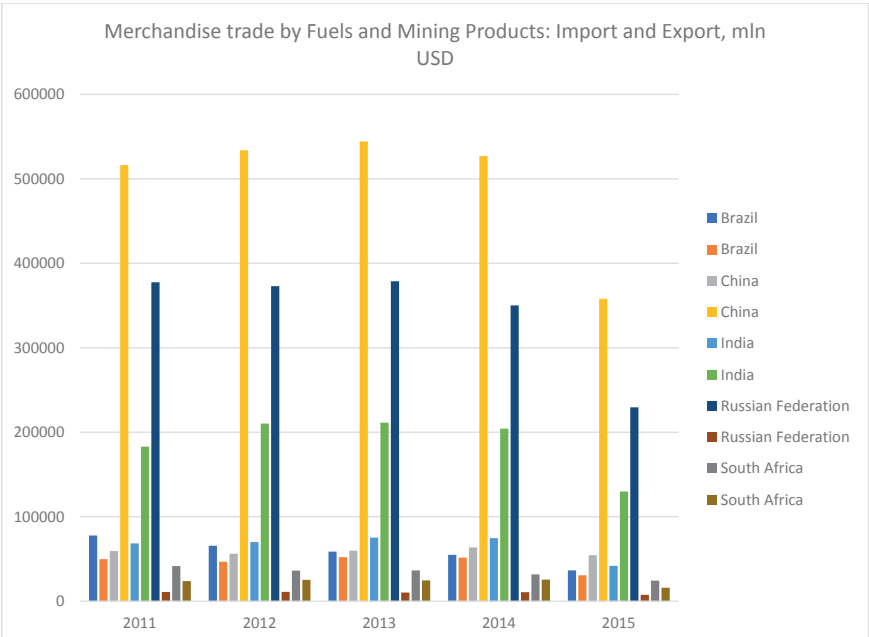


Figure 5

Figure 6

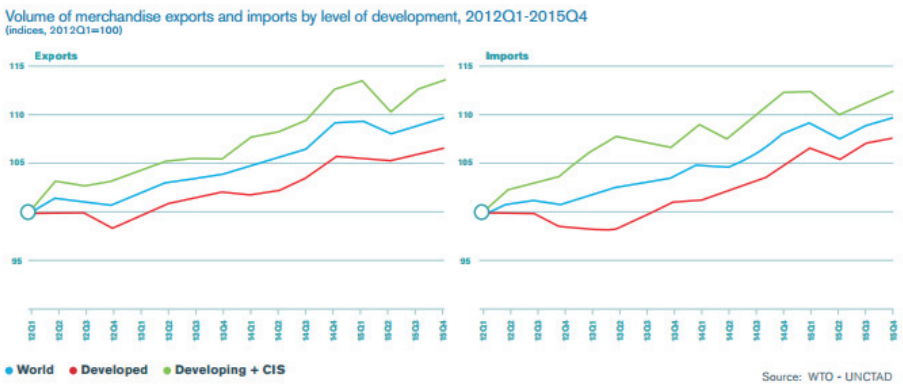


Figure 7

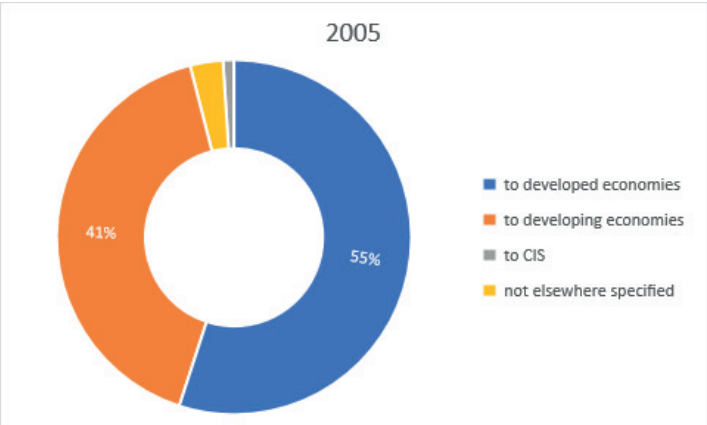
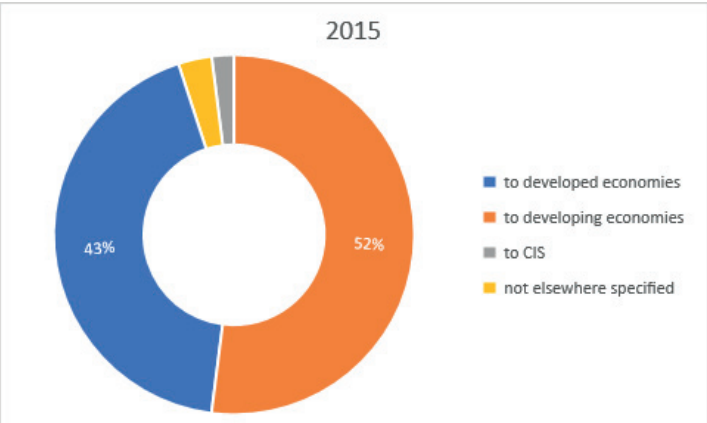


Figure 8



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Legal risks of unmanned marine vessels use

Key terms: unmanned marine vessel, outboard captain, maritime administrative law, Law of the Sea

The introduction of robotics has become more and more popular nowadays. Robotics products are introduced in the air (unmanned aerial vehicles) and on land (unmanned military land vehicles). In the 21st century the global trend of replacement of humans by robots in difficult and risky jobs is also reaching the marine industry. It should also be stated that marine robotic systems are basically innovative solutions in the modern world, but the marine robotics industry itself is in its initial state, thus there are a lot of risks, including legal ones, that may arise while these high-technology projects implementation.

Such matters as plans on unmanned marine vessels operation and some related safety issues were discussed at the International Marine Organisation's MSC (Maritime Safety Committee) session

in June, 2017. All the participants of the discussion spoke about the need to create an appropriate regulatory documentation[1].

Indeed, neither international, nor national legislation is ready for legal regulation of marine robotic vessels with fully automated remote control.

There is still much to be done for develop the engineering solutions, but today one thing can predict legal risks of such vessels use. First and foremost, these are the problems of such platforms legal status definition as vessels, their legal registration as propriety items, and also the definition of such concept as «the outboard captain» and its legal and administrative status. It is expected that some legal risks may also arise due to robotic vessels liability insurance.

The conducted legal researches have shown that the correction of both Russian and international legislation is required.

The following amendments to Article 7 of the Merchant Shipping Code of the Russian Federation of 30.04.1999 №81-FL (further – MSC RF) are suggested. The first point of the Article 7 of the MSC RF is suggested to be stated as follows:

«1. By *vessel* a self-propelled or non-self-propelled floating structure is meant. It is also meant that this floating structure is used for the purposes of commercial navigation and is commanded by the crew.

By *unmanned vessel* a self-propelled floating structure is meant. It is used for the purposes of commercial navigation and is remotely commanded by the captain not being present on board the vessel (the outboard captain).»

Regarding unmanned vessels, it is proposed to identify the outboard captain of the vessel as the person who remotely controls the robotic vessel.

It is suggested that besides the vessel commanding the following duties also should belong to captain's functions: supervising of the

[1] http://masterok.livejournal.com/3670614.html

vessel's appropriate use, safety of its navigation, and prevention of any harm.

It is necessary to specify the requirements for outboard captain's position at the country level, also to define the range and level of responsibilities, to consider the possibility of working out some specialised training programs.

Some amendments are required in a number of provisions of Chapter XV «Marine Insurance Contract» of MSC RF. The hypothetical circumstances that are essential for risk estimation also need to be worked out. For example, it can be a malfunction in smart telematic complex.

Particular attention should be given to the international maritime law.

The international maritime conventions adopted in the 60–70s no longer conform to the modern reality and are not capable of unmanned vessels operation regulating. Thus, in the Convention on the International Regulations for Preventing Collisions at Sea (COLREG-72) there is no definition of the term «robotic vessel» and as a consequence those provisions cannot be applied to such type of vessels. The COLREG-72 determines the mutual responsibility for vessels but it doesn't state the type of vessel the remotely-controlled vessel should give way to.

The following documentation should be supplemented with provisions on social relations regulation in the sphere of robotic vessels use: The International Convention for the Prevention of Pollution from Ships of 1973, updated by the related Protocol of 1978 (MARPOL 73/78); the International Convention for the Safety of Life at Sea of 1974 (SOLAS-74); the UN Convention on the Law of the Sea (UNCLOS 82).

To sum up the results of the conducted research, let us list the main legal risks of such unmanned marine vessels at the present time:

– absence of state legal regulation of the watercraft certificate of title registration;

– absence (in both Russian and international Law) of administrative and legal status of the outboard captain, his rights, duties and responsibilities;
– controversy over robotic vessels insurance matters along with high insurance risk.

As follows from the official information given by the Ministry of Transport of Russia[1], the first tests of Russian unmanned marine vessel are planned for 2018. It is therefore necessary to start working out a legal system ensuring the operation of such vessels. It is also necessary to start working on the improvement of the International Maritime Law.

[1] http://sudostroenie.info/novosti/17616.html

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Arbitration in BRICS countries

Since the birth of BRICS concept, economic and trade activities among the BRICS countries have steadily moved forward. Nevertheless, the BRICS countries are endowed with diversified cultural, legal and economic milieus, which will inevitably drive up the number of disputes among BRICS trading partners. As a result, dispute resolutions, e.g. litigation and arbitration, will be increasingly resorted to as we speak. Among the available ADR choices, arbitration enjoys its irreplaceable edges, like palpable jurisdiction, flexible procedures and more approachable recognition and enforcement mechanisms. Therefore, arbitration is an applaudable answer to our multilateral BRICS dispute resolution endeavours. Back in the II BRICS Legal Forum, under the guidance of China Law Society, Shanghai International Arbitration Center («SHIAC») established BRICS Dispute Resolution Center Shanghai. As a specialised working platform of SHIAC, the BRICS Dispute Resolution Center Shanghai not only has access to all the resources

of SHIAC, but enjoys the benefits of a selected Experts Committee, so as to fulfill its mission to provide efficient, convenient and economical dispute resolution services to BRICS trading partners. The creation of the BRICS Dispute Resolution Center Shanghai represents the collective wisdom of BRICS law experts. It is a realistic example for our BRICS law partners and for building a multilateral arbitration mechanism among the BRICS countries. For the time being, India has followed by having established its own BRICS dispute resolution center. In the near future, hopefully there will be more BRICS dispute resolution centers and interaction, so that a cordial and efficient network may grow and serve the BRICS prospects.

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Construction and improvement of the anti-corruption cooperation system of the national Commonwealth under the framework of BRICS – based on the legal experience of China and Russia

Keywords: BRICS, National Union, Sino Russian Cooperation Experience, Anti-Corruption Legal System, New International Law Order

(1) Speech Outline

First part: Preface

Second part: Experience and Problems of China and Russia in the Anti-Corruption Legal Regulation Cooperation

Third part: Basic Situation and Problems of BRICS National Union in the Legal Cooperation of Anti-Corruption

Fourth part: Construction and Improvement of the Legal Cooperation System of the BRICS Member States' Commonwealth

Fifth part: Epilogue

(2) Speech Summary

In the current complex international political and economic situation, as the BRICS National Association on behalf of the world's emerging economies is not affected by the inverse trend of globalisation, has been actively committed to the establishment of the WTO, according to the principle of non-discrimination and open economic cooperation in space, to create a peaceful and stable environment for the development of the BRICS member countries and neighbouring countries and regions, in the adjustment and improvement of the existing international order, made a great contribution to building a new international order.

Corruption in such an important stage of social historical development, and as an inevitable social phenomenon, has been undermining the financial stability of the world, the deterioration of the investment environment, has a negative impact on the stability of the national economy, a member of the BRICS growth of national strength is the BRICS members and other countries need to solve the problem. Under the BRICS framework, despite the increasingly serious corruption of the Member States, most of them have imposed different legal systems to punish them. A member of the national, also signed a series of unilateral and multilateral treaty agreement, in-depth cooperation in combating cross-border corruption, increase the pursuit stolen goods, strengthen the international criminal judicial cooperation and other aspects of the plan. A member of the national, also signed a series of unilateral and multilateral treaty agreement, in-depth cooperation in combating cross-border corruption, increase the pursuit stolen goods, strengthen the international criminal judicial cooperation and other aspects of the plan. But firstly, most of these documents belong to the framework, the specific implementation measures

and procedure need to be further identified in detail; secondly, as different countries have different national conditions, some of the provisions are in the file to the specific implementation, which leads to a mere formality. Thirdly, although these documents are signed between countries for certain problems, with appropriate flexibility, there is a lack of coordination between the anti-corruption activities and correspondence as there are no unified legal norms of the United Nations led guidance; fourthly, the current international situation and the needs of the new international order to be standardised, constructing and perfecting the country the joint anti-corruption cooperation system can build a new international legal order to lay the legal foundation and accumulated experience.

As important members of the BRICS, China and Russia should play an active leading role in the struggle against corruption in the BRICS. In the history of anti-corruption, two countries have similar struggle experience. As far as China is concerned, the reform and opening up in the past forty years have brought great opportunities for China's development. China has not only developed and improved in politics, economy, culture and diplomacy, but also established a close legal network in the construction of the anti-corruption legal system, which has a considerable experience in legislation and practice. In recent years, a large number of corrupt people have been punished. Russia is also a country with a rich experience in anti-corruption legislation and practice. The formulation of the anti-corruption law of the Russian Federation marks a new stage in the development of anti-corruption activities in Russia. At the same time, China and Russia, as well as the other BRICS members, we are developing countries, with the development of the demands of the same, economic situation is similar, the process of social development is also similar, have reached a consensus on the international social order. Therefore, in the experience of international cooperation in anti-corruption, it can provide some reference for other member states.

From the current international perspective, the international community is at a node of change, and the stability of some countries and regions is only a relative phenomenon, and more and more regions are in a turbulent situation. The international political and economic order, the need for new international rules to be adjusted, a perfect international law to protect the construction of new order, the countries of the Commonwealth of anti-corruption cooperation system are therefore the era of opportunities and possibilities. It coincides with the release of a series of achievements, such as the «2017 BRICS Leaders Xiamen Declaration», and lays a foundation for further development of international anti-corruption cooperation. In order to implement the BRICS in anti-corruption cooperation law, to strengthen anti-corruption cooperation among the BRICS countries, construction of an anti-corruption cooperation unified system, to improve the existing legal provisions, to be carried out on the existing treaty agreement, to deepen the anti-corruption cooperation between countries, to expand and create a new international legal order would be beneficial try.

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Localised global enterprises and responsible business in BRICS

Keywords: Responsible Business, Localised Strategy, Chinese enterprises «going-out», foreigner investment

Current situation of China's overseas investment is momentous, for example, there are 20,000 Chinese enterprises all over 118 countries, and more than 30,000 enterprises have been set up worldwide. The Direct investment is $1.1 trillion and the total overseas assets achieved $4 trillion. China's GDP is more than $10 trillion and the import and export is over $4 trillion. Since 2015, the rank of the external investment flows from the Top3 to the Top 2 around the world. China has officially become a net capital exporter recently.

However, our enterprises have faced many difficulties when «going-out». Firstly, there are some investment barriers to protect the core technology of domestic enterprises, threats to national security, etc. Secondly, there are market access restrictions, many industry access barriers, only recognised domestic or European

technical standards and so on. Moreover, there are Performance requirements for foreign-funded enterprises, the revocation of foreign licenses for enterprises that do not meet high value-added and do not promote employment policies. Furthermore, reduce the number of foreign employees, using the Professional competency determination, language test, quota of labor nationality, personnel localisation index, etc. Finally, there are also some non-legal factors that may lead the foreigner investment project to be halted, for example, the domestic political parties' struggles, environmental assessments, administrative measures, etc.

One socio-economic theoretical hypothesis argues three factors: economic globalisation, nationalism and democracy cannot be coexistent at the same time in one country. Therefore, the law community should discuss two following questions, (1) What are high risks arising from the host country's own system – legal risks determined by legal norms; and (2) which are related to the management decision-making model of Chinese enterprises, and the problems that are particularly easy to encounter by Chinese enterprises–the scope of legal risks based on behavioral characteristics. And then we help those companies to analyse the relationship between their core business and dynamic factors of conflicts overseas.

There are some localised management strategies for Chinese overseas enterprises: Firstly, we suggest the global enterprise fully using local resources, integrating into the local community, retaining some of the Chinese characteristics when globalised, including human resources, materials and equipment supply, collaboration units, market development and social relations being localised, becoming a real local company when operating. Secondly, change of the mind: from «what can we do» to «what can we do for the local community?» From «What can we do to make a profit» to «what can we do to make a profit for both of us and the local community?» Moreover, we assume that global enterprises should be responsible

for the creation of tax revenue for the host country to help citizens to obtain benefits from social services, and for job creation and the development of appropriate human resources policies to ensure equal job opportunities, such as recruitment projects for domestic young people. And finally, they should ensure that local products and services are used in the supply chain as far as possible, giving special consideration to vulnerable groups and conflict-affected populations. We also suggest that they may build a conducive for the local community development infrastructure in the scope of enterprise operations.

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