

DIGITAL FINANCIAL ASSETS: SEGMENTS AND PROSPECTS OF LEGAL REGULATION IN THE BRICS COUNTRIES

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In the environment of the current trend towards digitalization of the world economy, the issue of the legal regulation of the institute of digital financial assets as well as the activity relating to the generation of these assets is of considerable interest. As practice shows, individual countries face the situation where these assets are already turning over, but there is still no legal regulation. This state of affairs may give rise to cases of illegal turnover of financial assets and fraud in this sphere. Presently, the geopolitical map on digitalization of the economy is fragmented. Some countries have recognized and legalized the turnover of digital financial assets, others have so far not adopted an unambiguous attitude with respect to this new institute, while a third group of countries has not even recognized their legal nature nor their very existence. This ambiguity raises many issues relating to the legitimacy of digital financial assets and the feasibility of the introduction of this new financial product. The article analyzes the state of the legal regulation of the institute of digital financial assets in the BRICS countries, considers the standpoints of legislators and scientists on the legal nature of these financial assets.

Keywords: digital financial assets; cryptocurrency; token; mining; smart contract; blockchain.

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Introduction

Recent global changes in the field of financial technologies and operations have raised a number of important issues for the legislator in Russia and abroad, including not only the need to determine the legal status of digital financial assets and the limits of their legal regulation, but also the possibility of their creation and use. Development of the digital economy at the state level is associated with the resolution of a number of fundamental issues in legal science in order to form a new regulatory legal environment.

Settlement of these issues will affect many spheres of legal regulation in modern society and the state, so it is important to choose the right vector of development, for which purpose it seems necessary to analyze foreign experience.

Earlier studies by individual authors addressed some of the aspects related to digital financial assets. Thus, the time of the emergence of cryptocurrency and the terms to be used were established. The past ten years have seen the creation of a new class of digital instruments that are not issued by a sovereign institution or commercial bank, are not denominated in a sovereign unit and do not have physical counterparts. Since these instruments may be used as a currency, they are variously labeled “electronic cash,” “digital currency,” “virtual currency” or “cryptocurrency.” Additionally, the conclusion was reached that it is necessary to determine the essence and nature of cryptocurrencies as well as their legal status and functions, alongside cash and e-money.¹ The term “cryptocurrency” originally was used by the Bitcoin system introduced in 2009. Cryptocurrency is a type of digital currency whose operations are based on the methods of cryptography. The word “crypto” comes from Greek, meaning “hidden” or “private.” Cryptocurrency, then, means money that is made hidden and private – and therefore secure – by means of encryption, or coding. The experience of the BRICS and European Union countries in their regulation was

¹ Irina Cvetkova, *Cryptocurrencies Legal Regulation*, 5(2) BRICS Law Journal 128, 152 (2018).

also briefly analyzed by various authors.² Others focused solely on the analysis of the situation in the Russian Federation.³

At the same time, the considered field of public relations is itself subject to rapid changes, which makes it possible to identify new sides in solving problems related to the legal regulation of digital financial assets, and without depreciating the merits of the performed research, it should be noted that they leave a significant area for discussion and define the need for additional legal analysis. In this case, it seems most promising to focus on an in-depth analysis of the state of regulation of digital financial assets in the BRICS countries, since one cannot but agree with the opinion of the President of the Russian Federation V.V. Putin, who pointed out that:

In a very short time, this interaction format has proved its relevance and efficiency. Brazil, Russia, India, China, and the Republic of South Africa more and more closely coordinate approaches to key issues on the international agenda, taking an active part in forming a multi-polar world order and developing a modern model of the global financial and trading system.⁴

It is obvious that the rate of integration in strategically important areas, including the financial and banking sectors, is high. Thus, the New Development Bank of BRICS has already been created, the process of creation of BRICS Pay, a unified payment system, is under way, the creation of a cryptocurrency of BRICS is also on the agenda today.⁵ At the same time, it should be noted that a unified approach to an understanding of digital financial assets and their regulation in the BRICS countries has not yet been developed, but each path taken by BRICS member states is interesting and unique in its own way.

1. Digital Financial Assets in Brazil

The sphere of legal regulation of financial technologies in Brazil is now emerging. Therefore, in considering digital financial assets one should refer to the bodies that are involved in the process of discussion and development of the main directions related to digital innovations and their influence on the well-established fundamentals of Brazil's monetary policy. First of all, this relates to the Central Bank of Brazil (BCB).

The Central Bank of Brazil made its first statement on this issue on 19 February 2014 when it published a Warning about the risks associated with the acquisition

² Marina Chudinovskikh & Victor Sevryugin, *Cryptocurrency Regulation in the BRICS Countries and the Eurasian Economic Union*, 6(1) BRICS Law Journal 63 (2019).

³ Anatoly A. Vlasov et al., *Legal Regulation of Cryptocurrency in the Russian Federation*, 34(14) Opcion 1200 (2018).

⁴ InfoBrics (Sep. 28, 2019), available at <http://infobrics.org/russia/>.

⁵ InfoBrics (Sep. 28, 2019), available at <http://infobrics.org/news/economy/>.

of so-called “virtual currencies” or “cryptocurrencies” and settlement of transactions therein.⁶ This document points out that virtual money should not be confused with electronic money since the former is not a part of the national payment system and has its own method of denomination not related to the government, it is not guaranteed by the government, it is not secured, but based on trust and confidence that the market will accept and settle transactions therein. Therefore, the risks associated with using virtual currencies are imposed on the users. They are informed of the possibility of a sharp change in the price of virtual currencies, including in the case where the authorities apply measures of prudential regulation, or punitive measures against the users. It is separately noted that virtual currencies can be used in illegal activities. It is obvious that in this statement, the regulator expressed its distrust of cryptocurrency and concern about its use.

The market value for cryptocurrency was almost non-existent in Brazil during 2014. However, in 2017 it was estimated at US\$2.5 billion. The number of Bitcoin traders in Brazil was twice as high as the number of investors registered on the Sao Paulo Stock Exchange (Brasil Bolsa Balcao). As of December 2017, there were 619,000 registered users on the Exchange. The three largest Bitcoin-exchanges of the country, which account for 95% of all cryptocurrency transactions in Brazil, had 1.4 million registered customers. In addition, there were Bitcoin traders who use foreign exchanges or trade offline. In particular, the number of Brazilian crypto-exchange Mercado Bitcoin clients during 2017 increased by 275% and reached 750,000. The daily number of new users increased from 500 to 5,000. The largest Brazilian investment company, XP Investimentos, plans to enter the cryptocurrency market and launch a brokerage Bitcoin-exchange. XP Investimentos, which manages more than US\$35 billion for about 500,000 customers, has already registered the company XDEX Intermediacao LTDA with confirmed capital of US\$7.3 million. Despite the optimism of investors, Brazil’s government institutions are wary of cryptocurrencies. Brazilian legislation in the field of regulation on the use of virtual currencies has been steadily tightening controls since 2015.⁷

Despite the ambiguous and even rather negative attitude towards cryptocurrency, it was still decided to pay special attention to the very technology of the blockchain underlying it. Thus, on 31 August 2017, the Central Bank of Brazil published a Technical Study on the technology of distributed databases, the blockchain.⁸ This study examines the concept of blockchain technology, highlights the advantages

⁶ Comunicado nº 25.306, de 19 de fevereiro de 2014 [Press Release No. 25.306 of 19 February 2014] (Sep. 28, 2019), available at <https://www3.bcb.gov.br/normativo/detalharNormativo.do?method=detalharNormativo&N=114009277>.

⁷ Chudinovskikh & Sevryugin 2019, at 67.

⁸ Central Bank of Brazil, Distributed Ledger Technical Research in Central Bank of Brazil: Position Report, 31 August 2017 (Sep. 28, 2019), available at https://www.bcb.gov.br/htms/public/microcredito/distributed_ledger_technical_research_in_central_bank_of_brazil.pdf.

and disadvantages of its application, analyzes the experience of other countries, and also describes the experiments that were conducted by the authors of this report in relation to the technology in question. The study concludes that if its disadvantages are overcome, this technology could be useful for application across the state.

On 16 November 2017, the Central Bank of Brazil again issued a Warning on the risks associated with the holding of and negotiating in virtual currencies.⁹ In this document, it was emphasized that no government body has issued virtual currencies or guaranteed them, and their value results exclusively from public confidence in the issuer of the cryptocurrency, which means that the users are at risk, especially since the entities offering their services for settlement of transactions in cryptocurrency are not licensed and are not controlled by the BCB. The Central Bank specified that virtual currencies are not legal tender and cannot be equated to electronic money. The document warns of liability in case of use of virtual currency for illegal purposes. It also notes that despite the keen interest in cryptocurrencies in the world, the BCB does not see the need to regulate them as long as there is no danger to the national financial system, although it will monitor the situation and warn about the risks associated with their use.

Interestingly, on 19 September 2018, the Securities Commission (CVM) released a Circular containing explanations on the issue of indirect investment in cryptoassets by investment funds.¹⁰ According to this document, the CVM allowed these funds to make such investments with reference to overseas investments, for example, through the acquisition of quotas for funds and derivatives including assets traded in third-country jurisdictions, provided they are admitted and regulated in these markets. Thus, it is indicated that it is important to fulfill tax obligations and prevent risks associated both with settlement of the transactions and with engagement in fraudulent and other illegal schemes as well as compliance with the requirements set forth in this document.

Brazil's tax authorities also did not want to appear aloof when deciding the fate of cryptoassets in the country so, for example, from 31 October to 19 November 2018 the Federal Revenue Office of the Ministry of Finance of Brazil (Receita Federal do Brazil (RFB)) held public hearings on the provision of information regarding transactions in cryptoassets.¹¹ First and foremost, this was necessary for the purposes of tax administration and combating money laundering. A draft instruction was prepared. This instruction regulates the provision of information on transactions in

⁹ Central Bank of Brazil, Communiqué 31,379 of 16 November 2017 (Sep. 28, 2019), available at <https://www.bcb.gov.br/ingles/norms/Virtual-currencies-Communique-31379-English.pdf>.

¹⁰ Ofício-Circular CVM/SIN 11/18, 19 de setembro de 2018 [Circular Letter CVM/SIN 11/18, 19 September 2018] (Sep. 28, 2019), available at <http://www.cvm.gov.br/legislacao/oficios-circulares/sin/oc-sin-1118.html>.

¹¹ Consulta Pública RFB nº 06/2018, 30 de outubro de 2018 [RFB Public Consultation No. 06/2018, 30 October 2018] (Sep. 28, 2019), available at <http://receita.economia.gov.br/sobre/consultas-publicas-e-editoriais/consulta-publica/arquivos-e-imagens/consulta-publica-rfb-no-06-2018.pdf>.

cryptoassets, and it reflects such aspects as: which authority shall be provided with information; in what form and within what time limits; what parameters should be reflected; and liability in case of violation of the provisions of the draft instruction. However, at the present time the actual results of the hearings are still unclear.

Therefore, today in Brazil, not only has a ban not been imposed on transactions in cryptocurrencies, despite warnings from the Central Bank of Brazil about the risks associated with their use, but investment funds are even allowed to make indirect investments in them. And although cryptocurrency exchanges operate in the country, and there is no ban on transactions in cryptocurrencies either, at the same time, there is no legal regulation of this sphere of public relations, there is no consensus regarding cryptocurrency on the part of the authorized bodies and a wait-and-see attitude aimed at studying the experience of other countries and world trends is observed. Given the above, it seems that 2019 may be decisive for Brazil in deciding whether to ban or to implement cryptocurrency in the legal field.

2. Digital Financial Assets in Russia

The first significant legislative attempts in the Russian Federation aimed at the legal regulation of the digital economy appeared just recently, about two years ago. They began in 2017, when the Government of the Russian Federation adopted the Digital Economy Program (Decree No. 1632-p), according to which the Government intended to render significant organizational support for the digitalization of Russia.¹² Subsequently, the Program Passport¹³ was approved, and it is intended to continue until the end of 2024 (while it should be noted that Decree No. 1632-p has already ceased to be in force). The functions of implementation of this Program are imposed on the Ministry of Digital Development, Telecommunications and Mass Media.¹⁴

¹² Распоряжение Правительства РФ от 28 июля 2017 г. № 1632-п «Об утверждении программы «Цифровая экономика Российской Федерации»» // Собрание законодательства РФ. 2017. № 32. Ст. 5138 [Decree of the Government of the Russian Federation No. 1632-p of 28 July 2017. On Approval of the Digital Economy of the Russian Federation Program, Legislation Bulletin of the Russian Federation, 2017, No. 32, Art. 5138] (ceased to be in force on 12 February 2019) (Sep. 28, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_221756/.

¹³ Паспорт национальной программы «Цифровая экономика Российской Федерации» (утв. президиумом Совета при Президенте РФ по стратегическому развитию и национальным проектам 24 декабря 2018 г.) [Digital Economy of the Russian Federation Program Passport (approved on 24 December 2018, by the Presidium of the Council of the President of the Russian Federation for Strategic Development and National Projects)] (Sep. 28, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_319432/.

¹⁴ Постановление Правительства РФ от 2 марта 2019 г. № 234 «О системе управления реализацией национальной программы «Цифровая экономика Российской Федерации»» [Resolution of the Government of the Russian Federation No. 234 of 2 March 2019. On the System for Control of Implementation the Digital Economy of the Russian Federation National Program] (Sep. 28, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_319701/92d969e26a4326c5d02fa79b8f9cf4994ee5633b/.

A major step in the regulation of relations arising in the digital environment is the adoption in March 2019 of Federal Law No. 34-FZ “On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation”¹⁵ (hereinafter Law No. 34-FZ), the provisions of which will come into force on 1 October 2019. The importance of this law lies in the fact that for the first time in the legislation of the Russian Federation the framework provisions on digital rights and smart contracts are formalized, and also the background civil norms for regulation of circulation of digital rights, settlement and execution of transactions in the so-called digital environment as well as the use of significant arrays of impersonal information are defined. The main definition proposed in Articles 128 and 141.1 of the Civil Code of the Russian Federation is the concept of “digital rights,” which means

the obligations and other rights, the content and conditions for the implementation of which are determined in accordance with the rules of the information system that meets the statutory criteria.

This concept is considered a legal analogue of the term “token” commonly used in the world. At the same time, a person who, in accordance with the rules of the information system, has the opportunity to dispose of this right shall be deemed the holder of the digital right. Implementation, disposal, including transfer, pledge and encumbrance of this digital right by other means, or restriction of disposal of the right, is possible only in the information system without recourse to a third party.

Law No. 34-FZ also secured the so-called smart contracts, which are not a special type of contract, but only a type of terms and conditions concerning automatic performance of any civil law contract.

It should be noted that Law No. 34-FZ does not provide for the definition of the legal regime of cryptocurrency, and the activity for generation of these assets in the territory of the Russian Federation is not defined. We believe that this is primarily due to the fact that Draft Federal Law No. 419059-7 “On Digital Financial Assets” is under review by the State Duma of the Federal Assembly of the Russian Federation. The purpose of this draft is to determine the legal field around the relations arising upon generation (release), storage and turnover of digital financial assets, including cryptocurrency, as well as creation of the legal conditions for attracting investments by Russian legal entities and individual entrepreneurs through the issuance of tokens.

The Bank of Russia draws the attention of nationals and all players in the financial market to the increased risks associated with the use of and investment in cryptocurrencies. Furthermore, it points out that the majority of transactions in

¹⁵ Федеральный закон от 18 марта 2019 г. № 34-ФЗ «О внесении изменений в части первую, вторую и статью 1124 части третьей Гражданского кодекса Российской Федерации» // Собрание законодательства РФ. 2019. № 12. Ст. 1224 [Federal Law No. 34-FZ of 18 March 2019. On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2019, No. 12, Art. 1224].

cryptocurrencies are settled outside legal regulation both in the Russian Federation and in most other states.¹⁶

Another upcoming regulatory act in the field of digitalization of the economy is worthy of mention, namely the Draft Federal Law No. 419090-7 "On Alternative Ways of Attraction of Investments (Crowdfunding)." The purpose of this draft law is to regulate relations for attracting investments by business entities or individual entrepreneurs using information technologies. The draft law also defines the legal basis for the activity of investment platform operators relating to arrangements for retail financing, i.e. crowdfunding. The activity relating to arrangements for crowdfunding is to provide services for granting access to the information resources of the investment platform to its participants. These services consist in combining the demand for investment of the participants in the investment platform attracting investment and the investment proposals of the participants in the investment platform acting as the investors. The specified services are rendered using the investment platform, which is an information system on the Internet. The result of the provision of services for arrangements for crowdfunding is the transfer of funds from the investor to the person attracting investments, which is mediated by conclusion of the contract using the investment platform and the imposition of relevant obligations to the investors on the person attracting investments. Along with the conventional forms of legal relations between the investors and the persons attracting investments (provision of a loan, purchase of securities, acquisition of a member's share in the authorized capital of a limited liability company or a member's share in the share capital of a business partnership), the draft law proposes to use such a new form typical of the modern stage of development of crowdfunding relations as the acquisition of investment project tokens standing for certain property rights, which are recorded in the investor's name in a distributed database. For conclusion and performance of contracts between the investors and the persons attracting investments, the draft law allows the use of smart contracts. The document also provides for contractual regulation of relations concerning arrangements for crowdfunding, offering two options for contractual structures: on the provision of investment attraction services and on the provision of investment assistance services.

The provisions of both of the aforementioned draft laws, if adopted, as well as Law No. 34-FZ are expected to come into force on 1 October 2019.

Despite the active work on the settlement of relations in the field of the digital economy, unfortunately, judicial practice, which so far has only begun to be formed, has not yet developed a unified position when considering cases in this sphere.¹⁷

¹⁶ Информация Банка России от 4 сентября 2017 г. «Об использовании частных «виртуальных валют» (криптовалют)» // Вестник Банка России. 2017. № 80 [Information from the Bank of Russia of 4 September 2017 "On Use of Private "Virtual Currencies (Cryptocurrencies)," Bulletin of the Bank of Russia, 2017, No. 80].

¹⁷ See, e.g., Апелляционное определение Московского городского суда от 28 ноября 2018 г. по делу № 33-51690/2018 [Appellate Ruling of the Moscow City Court of 28 November 2018 in case

The issue of qualification of cryptocurrency most commonly arises when the courts consider cases on bankruptcy of individuals, in the course of which disputes arise over the possibility of requesting information about the availability of the debtor's cryptocurrency and its inclusion in the bankruptcy assets. Similar disputes may arise in the determination of the composition of the estate or division of the property of spouses. The positions of the courts on whether it is possible to recognize cryptocurrency as property currently differ. Case No. A40-124668/17 considered by the Moscow City Commercial Court appears to be interesting in this regard. The ruling of the court of first instance of 5 March 2018 rejected the financial manager's request to include cryptocurrency in the bankruptcy assets and to force the debtor to provide the password to access the e-wallet. At the same time, the court specified that cryptocurrency does not pertain to objects of civil rights and is outside the legal environment. The Ninth Arbitration Court of Appeal did not agree with such conclusions, overturned the ruling of the court of first instance and obliged the debtor to transfer the access to the e-wallet to the financial manager to include the digital assets in the bankruptcy assets.¹⁸ According to the Court of Appeal, in the context of Article 128 of the Civil Code of the Russian Federation, cryptocurrency can be qualified as other property.¹⁹

Therefore, it can be noted that Russia is actively developing along the path of gradual legalization of the institute of digital financial assets. However, as judicial practice shows, many more changes need to be introduced in certain regulatory legal acts to eliminate ambiguous and incorrect interpretations of the legal provisions governing this area of economic activity, as well as to create the conditions for the most comfortable development of entities performing this type of activity.

3. Digital Financial Assets in India

It should be noted that in recent years, the Government of India has implemented many initiatives related to digitalization of the economy and helped to finance

No. 33-51690/2018]; Апелляционное определение Санкт-Петербургского городского суда от 4 июня 2018 г. № 33а-12820/2018 по делу № 2-10119/2016 [Appellate Ruling of the Saint Petersburg City Court of 4 June 2018 No. 33а-12820/2018 in case No. 2-10119/2016]; Постановление Девятнадцатого арбитражного апелляционного суда от 25 февраля 2019 г. № 19АП-6454/2018 по делу № А14-18307/2017 [Resolution of the Nineteenth Arbitration Court of Appeal of 25 February 2019 No. 19АП-6454/2018 in case No. А14-18307/2017]; Апелляционное определение Свердловского областного суда от 8 ноября 2018 г. по делу № 33а-19381/2018 [Appellate Ruling of the Sverdlovsk Region Court of 8 November 2018 in case No. 33а-19381/2018] (Sep. 28, 2019), available at ConsultantPlus Legal Reference System.

¹⁸ See Постановление Девятого арбитражного апелляционного суда от 15 мая 2018 г. № 09АП-16416/2018 по делу № А40-124668/2017 [Resolution of the Ninth Arbitration Court of Appeal of 15 May 2018 No. 09АП-16416/2018 in case No. А40-124668/2017] (Sep. 28, 2019), available at ConsultantPlus Legal Reference System.

¹⁹ Филиппов А.Е. Отдельные правовые аспекты регулирования оборота цифровых активов в России и за рубежом // Арбитражные споры. 2018. № 4. С. 85 [Andrey E. Filippov, *Some Legal Aspects of Regulation of Circulation of Digital Assets in Russia and Abroad*, 4 Arbitration Disputes 85 (2018)].

financial technologies. Moreover, in 2014 the Pradhan Mantri Jan Dhan Yojana program was launched, thanks to which the procedures for using fintech (financial technology) are systematized and simplified. In India, the Bharat Bill payment system was also developed for making cashless payments.

However, the issue of the legal regulation of digital financial assets remains open. It is important to note that this is a very expected event, the occurrence of which has already been postponed several times. The need to regulate cryptocurrencies and the activities of cryptocurrency exchanges is also strongly demanded by India's Supreme Court.²⁰ At the moment, the Indian authorities state that the draft law intended to settle the cryptocurrency sector, and developed by a committee consisting of representatives of several ministries, will be presented to the public in the very near future.²¹

Although the content of the draft law is still secret, given that India is also a member of the Financial Action Task Force on Money Laundering (FATF), it can be safely assumed that the draft law will take into account the provisions specified in Draft Interpretive Note to FATF Recommendation 15.²² Of course, this refers to those provisions that will be adopted in the final version. First of all, this concerns the risks associated with money laundering and the financing of terrorism that may arise upon performance of activities related to virtual assets, as well as the need for registration or licensing of the activities of the providers of services of virtual assets and control over them by the authorized bodies. Thus, a constructive exchange of experience and information in this sphere between the FATF members should be ensured.

However, until the draft law is published, and while the Draft Interpretive Note of the FATF is under discussion, we should refer to the few documents that presently affect the cryptocurrency sphere in India.

Thus, on 24 December 2013 the RBI issued a Warning on the risks for the users of virtual currencies²³ which specified that they were not authorized by any central bank or monetary authority, and their issuing entities did not receive any approval, registration or permit to perform these activities, which entail a significant number

²⁰ P.H. Madore, *India's Supreme Court Sets 4-Week Deadline for Government to Regulate Cryptocurrency*, CCN, 26 February 2019 (Sep. 28, 2019), available at <https://www.ccn.com/indias-supreme-court-sets-4-week-deadline-for-government-to-regulate-cryptocurrency>.

²¹ Катрич М. Правительство Индии близко к тому, чтобы представить криптовалютное законодательство // Coinspot.io. 28 января 2019 г. [Maksim Katrich, *Government of India Is Close to Introduction of Cryptocurrency Laws*, Coinspot.io, 28 January 2019] (Sep. 28, 2019), available at <https://coinspot.io/china-and-asia/pravitelstvo-indii-blizko-k-tomu-chtoby-predstavit-kriptovalyutnoe-zakonodatelstvo/>.

²² FATF, Public Statement – Mitigating Risks from Virtual Assets, 22 February 2019 (Sep. 28, 2019), available at <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets-interpretive-note.html>.

²³ Reserve Bank of India, RBI Cautions Users of Virtual Currencies Against Risks, 24 December 2013 (Sep. 28, 2019), available at <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF>.

of risks, including, among others: susceptibility to loss and impossibility of recovery; lack of an established framework for addressing customer problems, disputes or reimbursement; susceptibility to the volatility of their value; uncertainty of the legal status of cryptocurrency exchanges; and the possibility of violation of the laws on combating money laundering and financing of terrorism. At the same time, the RBI stated that work would be organized to ensure a more thorough study of this issue.

On 1 February 2017, the RBI again warned about the risks associated with virtual currencies.²⁴ However, the statement was brief and, in terms of its content, referred to the text of the Warning of 2013 analyzed above.

On 5 December 2017, due to a significant upward shift in the valuation of many cryptocurrencies and the rapid growth of the initial offers of tokens, the RBI again expressed its concern about the existence and regulation of the cryptocurrency sector, wishing to draw public attention to this problem. It also stressed that it had not granted any licenses or permits to any entities to settle transactions in Bitcoins or any other virtual currencies.²⁵

On 29 December 2017, the Ministry of Finance of India also published an official statement,²⁶ warning people against risks upon investment in virtual “currencies,” while comparing them to Ponzi schemes (fraudulent investment scams). First of all, the Ministry pointed out that virtual currency is not legal tender, it does not have the legal status of currency and is not allowed as a medium of exchange; its price depends on speculative activity and is subject to volatility; and it is at increased risk of creating an investment bubble and being used for illegal purposes. Moreover, it emphasized that virtual currencies do not have any regulatory authorization or protection in India and, therefore, investors and other players dealing with them should shoulder all the risks and should avoid them.

It should be noted that shortly afterwards, in April 2018, the Reserve Bank of India published a Notice of Prohibition on Dealing in Virtual Currencies²⁷ in which it prohibited banks and other financial institutions under its regulation and control from settling any transactions therein. The subjects already providing these services were given three months to withdraw from the relationship.

Therefore, it can be said that today only the Reserve Bank of India has repeatedly expressed its official position with regard to virtual currencies. However, the RBI only

²⁴ Reserve Bank of India, RBI Cautions Users of Virtual Currencies, 1 February 2017 (Sep. 28, 2019), available at <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR205413F23C955D8C45C4A1F56349D1B8C457.PDF>.

²⁵ Reserve Bank of India, Reserve Bank Cautions Regarding Risk of Virtual Currencies Including Bitcoins, 5 December 2017 (Sep. 28, 2019), available at https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=42462.

²⁶ Government of India, Government Cautions People Against Risks in Investing in Virtual “Currencies”; Says VCs are like Ponzi Schemes, 29 December 2017 (Sep. 28, 2019), available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=174985>.

²⁷ Reserve Bank of India, Prohibition on Dealing in Virtual Currencies (VCs), 6 April 2018 (Sep. 28, 2019), available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11243&Mode=0>.

aims to warn users and other entities about the risks associated with cryptocurrencies, but does not clarify the direction of India's policy in this sphere and the legal and economic nature of virtual currencies, nor does it show the possible ways of settlement of disputable situations, although it implies the regulator's concern that this area of public relations is not under strict control and a desire not to allow financial institutions that it controls to be involved in cryptosecurities. It appears that the publication of the draft law on cryptocurrencies will clarify the attitude of the Government of India towards the regulation of cryptocurrencies, which will determine the further development of digital financial assets in the country and India's position on this issue within the framework of BRICS.

4. Digital Financial Assets in China

It is obvious that in the modern world financial technologies attract considerable attention from both the legislator and the potential users. China is not an exception, and in recent years a number of documents have been adopted to help arrangements for legal regulation in this sphere. Therefore, it seems that an analysis of the specified documents will make it possible to determine the position of China in this area of legal relations and to identify the prospects for its development.

At the same time, as regards digital financial assets, it should be noted that in China an ambiguous attitude has been formed towards the legal regime of certain varieties as well as the technologies underlying them. Moreover, no uniform special laws have been developed. For example, Big Data technology is included in the legal field of China and is supported by the Government for the purpose of further improvement and development, but under the laws of China it is not classified as a digital financial asset. Tokens and cryptocurrencies, on the contrary, tend to be limited by the authorities as a potentially dangerous segment since 2017. Thus, the blockchain technology underlying cryptocurrency has a high potential, which will have priority in development, despite the legal fate of cryptocurrency, although concerns about the safety of its use also still exist.

So, the regulatory framework that establishes the legal regulation of financial technologies has been actively formed in China since 2015. The publication of the Guidelines on Promoting Development of Internet Finance²⁸ may be considered to be the starting point in this development. This document sets forth the basic ideas aimed at the regulation of online payments, online lending, online insurance, stock crowdfunding and online sales of financial products.

Therefore, it seems quite natural that in the 13th Five-Year Plan for Economic and Social Development of China for 2016 to 2020²⁹ special attention was paid to this area.

²⁸ Chen Jia, *China's New Guideline Targets Internet Financing*, China Daily, 20 July 2015 (Sep. 28, 2019), available at http://english.gov.cn/policies/latest_releases/2015/07/20/content_281475150612696.htm.

²⁹ The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016–2020) (Sep. 28, 2019), available at <http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf>.

Part III of this Plan (Innovation-driven Development) contains provisions indicating the need for: development of well-regulated funding through the Internet; creation of a mechanism for consolidation of statistics, risk monitoring and management; development of online finance and cross-border financing; and improvement of the system for protection of the rights and interests of the financial consumers. Part IV (The Cyber Economy) specifies the main directions of development of the digital economy in China. They are related to ensuring fundamental understanding of the trends in the development of information technologies; the need to implement the National Cyberspace Development Strategy; accelerating the development of digital technologies; and deepening the integration of information technology in economic and social development. Evidence of the development of plans for future cyber-frameworks, cyber-technology systems and cybersecurity systems as well as the importance of breakthroughs in key Big Data technologies and cloud computing, independently controlled operating systems is not less important within the framework of the topic under consideration.

The national strategy for the development of cyberspace has already been implemented in the Law on Cyber Security, which came into force on 1 June 2017.³⁰ This law regulates the activities of network resources, and defines the rights and obligations as well as the liability of the participants of Internet resources. The strategic objectives are as follows: protection of the sovereignty of security and interests of the country in cyberspace; ensuring a safe and orderly flow of information on the Internet; improvement of global network connectivity; maintaining peace, security and stability in cyberspace; strengthening the international legal order in cyberspace; promoting the global development of the digital economy; and assistance in the deepening of cultural exchange and mutual learning.

In 2017, the Notice of the Banking Regulatory Commission, the Main Department of Industry and Information Technology, the Central Internet Office of the People's Bank of China "On Prevention of Financial Risks Associated with Issue of Tokens"³¹ (hereinafter the Notice) was made public. According to the Notice, tokens are virtual currency, virtual money used upon financing the issue of the same, which are not issued by monetary authorities, do not have such monetary properties as compensation and obligation, do not have legal status equivalent to currency, and cannot and should not be used as a currency for circulation on the market. As a result, trading platforms for tokens were

³⁰ International Strategy of Cooperation on Cyberspace, China Copyright and Media, 1 March 2017 (Sep. 28, 2019), available at <https://chinacopyrightandmedia.wordpress.com/2017/03/01/international-strategy-of-cooperation-on-cyberspace/>.

³¹ 中国人民银行中央网信办工业和信息化部工商总局银监会证监会保监会关于防范代币发行融资风险的公告[Notice of the China People's Bank of China, Central Internet Office, Main Department of Industry and Information Technology, General Administration of Industry and Commerce, Banking Regulatory Commission, Securities Regulatory Commission "On Prevention of Financial Risks Associated with Issue of Tokens"] (Sep. 28, 2019), available at <http://www.pbc.gov.cn/goutong/jiaoliu/113456/113469/3374222/index.html>.

subject to closing, and financial institutions and non-bank payment institutions were forbidden to settle transactions related to financial transactions for issue of tokens and their insurance coverage.

On the one hand, due to the provisions contained in the Notice, the legal status of tokens and cryptocurrencies in China was established. Since prior to the entry into force of the Notice cryptocurrency in China was considered to be a commodity, and cryptocurrency exchanges (and other websites related to digital currency) were to be registered with the Telecommunications Bureau, taxes were assessed in accordance with the rules typical of a commodity: transactions in cryptocurrency were subject to income tax, profit tax and capital gains tax, and sales could be subject to the value added tax (VAT).³² On the other hand, since 2017 cryptocurrency and payment and exchange transactions in cryptocurrency have been banned, which could not but affect the market and the entities involved in its creation and circulation.

It seems interesting that despite the prohibition, economists note that there is a strong effect of the Chinese yuan on all the cryptocurrencies analyzed, if we consider that only for Bitcoin the Chinese yuan did not pass the significance stage of the multivariate regression. There is no doubt that three fiat currencies (Thai baht, Taiwan dollar and Chinese yuan) are strongly connected to the six major cryptocurrencies currently available to investors in the world.³³ This indicates that China should not be left out of account when deciding on the place of cryptocurrency in the world legal order.

Moreover, as of today, the prohibition on cryptocurrencies has not been canceled; the miners continue their work on the mining of digital assets. Additionally, blockchain technology has become legally regulated, in particular, the consolidation of the rule on the need to register real user names using a national identity document or telephone number as well as to check content and store user data.³⁴

In general, the law stipulates that China values justice, openness and competition in the market. Continuing its own development, China stands for cooperation and common benefits, and undertakes to promote investment, trade and the strengthening of the digital economy throughout the world. It supports fair and open international trade, resists trade barriers and trade protectionism, and ensures

³² Регулирование криптовалют: исследование опыта разных стран (декабрь 2017 г.) [Regulation of Cryptocurrencies: Study of Experience of Different Countries (December 2017)] (Sep. 28, 2019), available at <http://www.eurasiancommission.org/ru/act/dmi/workgroup/Documents/digest/Регулирование%20криптовалют%20в%20странах%20мира.pdf>.

³³ Angelo Corelli, *Cryptocurrencies and Exchange Rates: A Relationship and Causality Analysis*, 6(4) *Risks* 111 (2018).

³⁴ Антипов Г. Китай вводит жесткие правила для блокчейн-стартапов и молчит об отмене запрета на крипто // Coinspot.io. 10 января 2019 г. [Gennady Antipov, *China Introduces Strict Rules for Blockchain Startups and Keeps Silence on Repeal of the Prohibition on Crypto*, Coinspot.io, 10 January 2019] (Sep. 28, 2019), available at <https://coinspot.io/law/asia-and-africa/kitaj-vvodit-zhyostkie-pravila-dlya-blokchejn-startapov-i-molchit-ob-otmene-zapreta-na-kripto/>.

an open and secure environment for the digital economy so that the Internet will serve the economy and innovation. China calls for fair, reasonable and universal access to the Internet, popularization of Internet technologies and diversity of Internet languages, and seeks to expand cooperation and exchange with other countries and regions in the sphere of cybersecurity and information technologies, to develop and innovate Internet technologies, and to ensure equal distribution digital dividends and sustainable cyberspace development.³⁵

And according to the National Bureau of Statistics of China, in 2018 investments in high-tech industries increased by 14.9% as compared to 2017, and investments in industrial and technological transformation increased by 12.8%.³⁶ Thus, in 2017 investments in high-tech industries reached 4,291.2 billion yuan, which is 15.9% more compared to 2016, while investments in industrial technological transformation amounted to 10,591.2 billion yuan, having increased by 16.3%.³⁷

Therefore, the objectives set forth in the strategies and developed in the laws have already started to be implemented in practice and obtain financial support, which shows the interest of China's leadership in developing the sphere of financial technologies and the safety of their use as well as ensuring interstate cooperation in the global space, including within the framework of BRICS. Thus, at least it is possible to say that the common legal framework for the digital economy and its security is being actively created. Within this framework, in the future it will be possible to create or isolate a direction related to digital financial assets, but today China is purposefully developing the technologies that underlie digital financial assets, while tokens and cryptocurrencies remain prohibited. At the same time, the logic of the legislator is clear: it is necessary to impose a ban until a safe environment is created, risks are limited and protection of the users and the investors is established. However, one should not forget that the presence of risk is not a reason for prohibiting the emergence and development of new public relations, but the need for their competent settlement. It is another question as to whether there is a need for their development.

5. Digital Financial Assets in the Republic of South Africa

Unlike China, the Republic of South Africa does not have regulations that directly prohibit cryptocurrency and transactions therein. On the contrary, this trend is flourishing in the country. It is important to note that in the Republic of South Africa

³⁵ International Strategy of Cooperation on Cyberspace, *supra* note 30.

³⁶ National Bureau of Statistics of China, Statistical Communiqué of the People's Republic of China on the 2018 National Economic and Social Development, 28 February 2019 (Sep. 28, 2019), available at http://www.stats.gov.cn/english/PressRelease/201902/t20190228_1651335.html.

³⁷ National Bureau of Statistics of China, Statistical Communiqué of the People's Republic of China on the 2017 National Economic and Social Development, 28 February 2018 (Sep. 28, 2019), available at http://www.stats.gov.cn/english/pressrelease/201802/t20180228_1585666.html.

there is the FinTech program, which is a pro-fintech innovation. Important activities in the field of distributed ledger technologies (DLT) and digital currencies are performed. Various startups have developed products secured by virtual currencies, for example the “contracts for difference” that refer to cryptocurrencies as a base product. The number of cryptocurrency exchanges has increased, while the existing ones have expanded to offer new cryptocurrencies.³⁸

Nevertheless, digital financial assets have not yet found their positive legal regulation, although in the future it is planned to take this sphere under control. It is noted that no primary or secondary legislation pertaining to virtual currencies has been promulgated in South Africa. No public consultation by which parliament and provincial legislatures consult with the people and interested or affected individuals, organizations and government entities before making a decision has taken place in respect of virtual currencies in South Africa.³⁹

It should be noted that in 2014 the first public statement on virtual currencies⁴⁰ and the position of the Reserve Bank of the Republic of South Africa (SARB) on this issue were published. They contained general information on virtual currency, provisions on distinguishing it from legal tender, and a warning on risks and liability.⁴¹

Then, in order to establish taxation on such a dynamically developing market, on 6 April 2018 the South African Tax Service (SARS) posted information on its official website, according to which the standard income tax rules shall be applied to cryptocurrencies, while SARS considers cryptocurrencies to be intangible assets, and income received or accumulated as a result of transactions in cryptocurrency may be taxed on the income account in the “gross income” section, or as capital in kind. In the future, it is also planned to revise the approach to VAT for cryptocurrencies.⁴²

The Intergovernmental FinTech Working Group (IFWG) was established for a more detailed study of this issue. Currently, the IFWG activities have begun to bring results. Thus, in early 2019 an advisory document drafted by the group and

³⁸ According to Регулирование Финтех в Южной Африке // IQ DECISION. 7 февраля 2019 г. [Fintech Regulation in South Africa, IQ DECISION, 7 February 2019] (Sep. 28, 2019), available at <https://iqdecision.com/regulirovanie-finteh-v-juzhnoj-afrike/>.

³⁹ Annamart Nieman, *A Few South African Cents' Worth on Bitcoin*, 18(5) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1978, 1988, 1989 (2015).

⁴⁰ National Treasury of South Africa, User Alert: Monitoring of Virtual Currencies, 18 September 2014 (Sep. 28, 2019), available at http://www.treasury.gov.za/comm_media/press/2014/2014091801%20-%20user%20alert%20virtual%20currencies.pdf.

⁴¹ South African Reserve Bank, Position Paper on Virtual Currencies, Position Paper No. 02/2014, 3 December 2014 (Sep. 28, 2019), available at [https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/Legal/Documents/Position%20Paper/Virtual%20Currencies%20Position%20Paper%20%20Final_02of2014.pdf](https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Documents/Position%20Paper/Virtual%20Currencies%20Position%20Paper%20%20Final_02of2014.pdf).

⁴² SARS's Stance on the Tax Treatment of Cryptocurrencies, SARS, 6 April 2018 (Sep. 28, 2019), available at <http://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx>.

containing proposals on cryptocurrencies⁴³ was published. It defined and classified cryptocurrencies, analyzed the risks and benefits of their use, and identified problems and approaches to the legal regulation of cryptocurrency. In particular, this document proposes to use the term “cryptoassets,” meaning digital representations or tokens that are accessed, checked, wherein transactions are settled, and that are electronically traded by a community of users. Cryptoassets are issued in an electronic form by decentralized organizations and do not have the status of legal tender, therefore, they are not considered to be electronic money either. Thus, there are no statutory compensation measures related to them. Cryptoassets can be used by the users of cryptoassets for payments (exchange of value) and for investment purposes. Cryptoassets may function as a medium of exchange, and/or unit of account, and/or store of values in the community of the users of cryptoassets.

As a result, we may conclude that the Republic of South Africa proposes digital financial assets to be designated by the term “cryptoassets” and establishes a common understanding and regulation for them, while maintaining a global approach that they cannot have the status of legal tender in the country, and their legal regime should be distinguished from that of electronic money.

The classification of approaches to the legal regulation of cryptoassets given in the IFWG document also seems interesting. According to the document, 150 countries in the world have not yet made a decision on their legal regime and hold the position of ignoring their existence, three countries have officially recognized their existence, but have not developed an approach to regulation (this group includes the Republic of South Africa), twenty-five countries have official recommendations for combating cryptoassets, five countries have guidelines for their use, three countries have developed conditions under which they can be authorized, and eleven countries have imposed a prohibition or ensured integration into the legal environment. Based on these indicators, we may say that the Republic of South Africa has adopted a progressive approach in recognizing the need to regulate this sphere of public relations and may well join the group of countries that have developed their attitude towards digital financial assets in the near future; and given that China has already developed a position, and Brazil, Russia and India will also soon come to a consensus on this issue, it will, in the near future, likely be possible to talk about the possible formulation and settlement of a number of related matters at the BRICS level.

The Republic of South Africa does not currently intend to prohibit the purchase, sale or ownership of cryptoassets or to prohibit cryptoassets for payments, but reserves the right to change its political position; that is to say, the monitoring of the situation continues. In the meantime, the objectives have been developed, such regulatory principles as the risk-based approach, technology neutral and primarily principles-

⁴³ IFWG – Crypto Assets Regulatory Working Group, Consultation Paper on Policy Proposals for Crypto Assets (Sep. 28, 2019), available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/9037/CAR%20WG%20Consultation%20paper%20on%20crypto%20assets_final.pdf.

based, and a unified regulatory approach are proposed. The IFGW also proposes to protect investors, first of all, to officially authorize the service providers with regard to cryptoassets operating in the Republic of South Africa either by registration or by licensing their activities. Thus, they will have to comply with the rules on combating money laundering, which means the need to identify their customers. It should be noted that this is consistent with the provisions set forth in the previously mentioned Draft Interpretive Note to FATF Recommendation 15.⁴⁴

Conclusion

One cannot but agree that the emergence of cryptocurrencies and their active popularization in the world, on the one hand, and the uncertainty surrounding their legal nature, on the other, may have a considerable impact on the national economy due to the need for consistent maintenance of the balance of payments. Modern international processes have such a strong influence on the modern world economy that the economic decisions of individual countries, regardless of their type, influence each other, as well as the overall global development trend.⁴⁵

The performed study on the legal regulation of digital financial assets in the BRICS countries shows that currently there are different approaches to their regulation and the regulation itself in these countries is at different stages. All of the countries agree that it is no longer possible to ignore their presence in the modern world, and thus it is necessary to clearly define the legal regime for their use. For these purposes, research and experiments are performed, possible consequences are analyzed and suggestions are made to prevent anticipated risks. The first steps are aimed at the protection of the population against fraud in this sphere. Thus, in the case of a prohibition on settlement of transactions in digital financial assets, an orientation towards identifying and punishing the guilty parties is formed. And if the transactions in digital financial assets are permitted, it has been shown that it is necessary to establish requirements and restrictions on these transactions, identify the providers of these services, determine the procedure for their registration or licensing and establish a clear difference between digital financial assets and legal tender.

All the same, while there are still a number of other issues and tasks that require understanding and legal regulation – for example, consolidation of the principles of the legal regulation of digital financial assets, creation of new mechanisms to reduce the risks associated with the ownership and circulation of digital financial assets, establishment of liability of entities involved in this kind of relationship, etc. – it can be stated that this institute is supported by the majority of the BRICS countries that

⁴⁴ FATF, Public Statement, *supra* note 22.

⁴⁵ Oleg Stepanov & Denis Pechegin, *Legal View on the Introduction of New Technologies*, 6(3) Russian Law Journal 149, 170 (2018).

do not intend to completely prohibit the purchase, sale or ownership of cryptoassets, turnover of smart contracts, etc. And it seems that over time this will make it possible to develop a common BRICS policy with respect to digital financial assets as well as to create a platform for dialogue on improvement of the regulation of this sphere of legal relations, which, undoubtedly, is already transnational in nature. Still, only time will tell how it will ultimately affect the global financial system, money turnover and judicial practice.

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