

## POSSIBLE LEGAL COOPERATION FOR A BRICS PERSPECTIVE ON INTERNATIONAL AND TRANSNATIONAL ECONOMIC LAW

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*This research paper seeks to identify and analyze the regulations that rule the economic life of the BRICS countries in the fields of foreign investment's law, competition law and global administrative law, and further to identify points of convergence and divergence among them in order to indicate the possibilities of legal cooperation to facilitate economic exchanges and investments flow among them. We believe that the possible bottlenecks in trade and investment can be overcome mostly by exchange of experiences, to mitigate the lack of knowledge on national laws and regulations, and by the creation of cooperative mechanisms that facilitate the economic flow among them.*

*Keywords: foreign investment law; competition law; global administrative law; cooperation; international law.*

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### Table of Contents

#### Introduction

#### 1. Foreign Investments' Law Within and Among BRICS

#### 2. Competition Law Within and Among BRICS

#### 3. Improving BRICS Participation in Global Administrative Law

#### Closing Remarks

## Introduction

As BRICS has become a political grouping, some questions have arisen over the cultural similarities among these countries, besides their condition of the most representative developing economies. The questioning carries out a misleading assumption whereby BRICS could be a form of traditional regional integration – the reason why it would require solid cultural ties – since it was the sort of alignment known as the only alternative to multilateralization. But such assumption is also misplaced by virtue of proclaiming that the group would not last because their similarity would be “solely” their condition of the most representative developing economies, as if such common feature could be underestimated.

In fact, if we take a deeper look at developing countries’ social and economic demands, as well as at their contradictions, we ascertain that the “developing” economic condition represents a powerful political likeness: it places the country within the world. Such condition creates a circle of external relations’ possibilities and risks to a developing economy. It compels the country to vindicate higher participation into global governance, to reduce economic underdevelopment by means of aiming to attract foreign investments, to take part of technological revolutions in course; at the same vein that the country shall make its best efforts to safeguard its sovereignty and independence, to conserve its natural resources and to assure that its populations will access satisfactory portion of such resources, in a sustainable manner.

In the case of the BRICS, all of its members attribute particular relevance to the economic activities which evokes some sort of state measures – since direct exploitation until regulating and supervising, – as it is the case of energy, transportation, communication and so on. Moreover, all BRICS countries are strongly concerned about international investments flows, both as receivers and providers.

If the core of the shared aims of developing countries is economic, enhancing legal cooperation through economic laws and governance is strongly recommended as it rules the economic exchanges and investments in and between countries. In this sense, we seek to identify and analyze the regulations of the BRICS countries in these matters, and further to identify points of convergence and divergence among them in order to indicate the possibilities of legal cooperation to facilitate economic exchanges and the flow of investments. We believe that possible bottlenecks in trade and investments can be overcome by exchanging experiences to mitigate a lack of mutual knowledge and by cooperation in three segments: foreign investment’s law, competition law and global administrative law. Therefore, these are the guiding axes of this research, which will be addressed in the following sections.

### 1. Foreign Investments’ Law Within and Among BRICS

Brazilian foreign investments’ ruling has a constitutional framework. Its insertion into globalization, in 1990, has been made by reforming the Constitution, in order to

avoid discriminatory treatment upon foreign investments, by abrogating the provision that authorized special favored treatment directed to small companies owned by national capital, and hence evading national capital criteria.<sup>1</sup> The most important Brazilian law over foreign investments is the Law No. 4.131/1962, modified by the Law No. 4.390/1964, which is supplemented by a series of other instruments.<sup>2</sup>

Concerning its foreign policy, Brazil has assayed to take part in Bilateral Investments Treaties (BITs) proliferation in 1990, but changes occurred into political scene has made the country to refuse ratifying the treaties assigned, under suspicious held by Argentinian crisis.<sup>3</sup> Notwithstanding, Brazil is currently accepting to conclude Agreements on The Promotion and Reciprocal Protection of Investments. Internal legal measures are also taken, as the express possibility of public administration to take part in arbitration proceeding, which includes proceedings with a foreign investor,<sup>4</sup> as well as recently the legislation permitted the amount of a compensation due to expropriation to be defined in arbitration proceeding.<sup>5</sup>

The 1990s are also meaningfully for Russian investments' law. In 1991, Russia has approved its internal law ruling foreign investments. Some scholars consider it as the first instrument needed to be modernized. Lately, it was replaced by the modern Federal Law on Foreign Investments – Law No. 160-FZ. There is also an important legal instrument – Law No. 225-FZ – governing shared production, the use of subsoil and investments activities<sup>6</sup>. Furthermore, Russia, in the same decade, has concluded several BITs, which has been intensified under President Putin's mandate. Its foreign policy directed to investments comprises the resource to such treaties, many of them contending an arbitration clause.<sup>7</sup>

Previously to 1990, India has had a protectionist legislation over foreign investments. Foreign social participation into national companies was limited to a percentual

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<sup>1</sup> Eros Roberto Grau, *A Ordem Econômica na Constituição de 1988* 269–273 (3<sup>rd</sup> ed. 1997).

<sup>2</sup> Thiago Pedrosa Andrade & José Augusto, *Direito Fontoura Costa. Desenvolvimento e o Investimento Estrangeiro Direto: Crítica ao Padrão de Indenização por Danos Perpetrados Pelo Estado Conforme o Direito Brasileiro* in *Direito e Desenvolvimento: um Diálogo entre os BRICS* 406 (Mario G. Schapiro & David M. Trubek eds., 2012).

<sup>3</sup> See José Augusto Fontoura Costa, *Brasil e Arbitragem Internacional de Investimentos: Realidades e Possibilidades*, 1(3) *Revista Jurídica Luso Brasileira* 875 (2015) (15 Sep. 2021) also available at [http://www.cidp.pt/publicacoes/revistas/rjlb/2015/3/2015\\_03\\_0875\\_0911.pdf](http://www.cidp.pt/publicacoes/revistas/rjlb/2015/3/2015_03_0875_0911.pdf).

<sup>4</sup> Marco Antônio Ribeiro Tura & Emílio Mendonça Dias Silva, *Arbitragem de Investimentos Estrangeiros in Arbitragem e Administração Pública: Temas Polêmicos* 145 (Joaquim Paiva Muniz et al. eds., 2018).

<sup>5</sup> Emílio Mendonça Dias Silva, *Foreign Investments Protection and Arbitration Within BRICS in International Legal Aspects of BRICS* 289 (Paulo Borba Casella et al. eds., 2019).

<sup>6</sup> See Mark A. Stoleson, *Investment at an Impasse: Russia's Production-Sharing Agreement Law and the Continuing Barriers to Petroleum Investment in Russia*, 7(2) *Duke J. Comp. & Int'l L.* 671 (1997).

<sup>7</sup> Elliot Glusker, *Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications*, 10(3) *Pepp. Disp. Resol. L.J.* 614 (2010).

e it depended on the approval of the Reserve Bank of India. Its participation could be increased by 40% in case of technology transference. After Gulf Crisis, India has launched its New Industrial Policies and Other Reforms, aiming to attract foreign investments by altering its legislation over the issue.<sup>8</sup> Such new policy has resorted to the conclusion of a series of BIT's. Those treaties are held as the reason for great increase of foreign investments flows.<sup>9</sup>

In the history of Chinese relation with foreign investments, the reforms made in 1970 is the reference to its market openness. In 1968, the Law on Foreign-Owned Enterprises came into force. It was regulated by the Catalogue for the Industrial Guidance of Foreign Investments, establishing areas in which foreign participation are encouraged, permitted, restricted and forbidden, depending on the degree of national interest and sensibility. However, considering that there were constant measures to defraud such system,<sup>10</sup> China has approved its recent Foreign Investments Law, which came into force in January 2020.

China has a well-established foreign investments' policy founded on BITs conclusions. Interestingly, the country has been concluding BITs with "south-to-south" feature, which is not so aggressive to local potentiality because the ruling relation is governed by local legislation and the treaty is only applied in case of local admission upon the investments, despite its economic power. Besides that, China is the only BRICS country that ratified Washington Convention on the Settlement of Investments Disputes, 1968 – ICSID Convention. BITs promoted by the country generally contain arbitral clauses to ICSID to solve investments controversies.<sup>11</sup>

Investments law in South Africa has been born after *apartheid* regime. The first addressing has been extremely related to foreign policy and the conclusion of BITs since UK was endeavoring to protected British national's properties. Many BITs have been ratified with European countries. However, their provisions were too severe to local interests and collided to South African Constitution. After being charged in lots of arbitration proceedings, South Africa has terminated its first generation of BIT's, comprising the treaties among European countries. In addition, the country has decided to govern investments relations through national legislation, in a way that it has enacted its *Protection Investments Act*, in 2015.<sup>12</sup> This *Act* contains provisions

<sup>8</sup> See Tracy S. Work, *India Satisfies its Jones for Arbitration: New Arbitration Law in India*, 10(1) Transnat'l Law. 217 (1997).

<sup>9</sup> See Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) Vikalpa 275 (2016).

<sup>10</sup> Meichen Liu, *The New Chinese Foreign Investment Law and its Implication on Foreign Investor*, 38(2) Nw. J. Int'l L. & Bus. 288 (2018).

<sup>11</sup> Catherine Elkmann & Oliver C. Ruppel, *Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties*, 13(4) Rich. J. Global L. & Bus. 593 (2015).

<sup>12</sup> Dreyer Swart, *Legal Protection of Foreign Investment in South Africa*, Master Thesis, University of Pretoria (2016), at 15–43.

protecting foreign investments but conciliating to public interest. In the other hand, it furnishes detailed descriptions of the ambit of application, to avoid that the protection can be extended with no control.

Despite being a matter of importance for all BRICS countries, there is not a joint and uniform vision construed by the group on foreign investments. Before BRICS alignment, India and Brazil have made a joint announcement in the World Trade Organization (WTO) opposing to the idea that trade-related measures should be considered as harmful to competition.<sup>13</sup> Those measures imply requirements to the foreign investor, aiming to improve local potentiality, like the duty to use local inputs or to promote technological transference. For both countries, those measures could favor industrialization and, therefore, improve competition.

Investments have also appeared as a strategic issue for BRICS countries, in the document named "The Strategy for BRICS Economic Partnership,"<sup>14</sup> which was prepared and presented in the Ufa Summit, in 9 July, 2015.

## **2. Competition Law Within and Among BRICS**

Competition law is an important field to all BRICS countries. BRICS countries' legislation over competition are, in some cases, referred as the firsts in the world: in case of Russia competition law exists since the enactment of the "Code of Criminal Remedies," by Emperor Nicholas I, in 1845<sup>15</sup>; or India, which counts to a modern competition legislation since 1969. Most of BRICS countries counts to administrative bodies, holding preventive and repressive duties in order to avoid monopolies and cartels: in case of Brazil, the Administrative Council for Economic Defense (CADE); in Russia the activity is exercised by the Federal Antimonopoly Services (FAS); in India by the Competition Commission of India (CCI); and the Competition Commission, in South Africa. China, in this sense, has a particular difference, inasmuch as the duties to avoid economic domination are exercised in a diffuse manner, counting to diversified authorities to lead with the matter, being the most prominent the Ministry of Commerce of the People's Republic of China (MOFCOM).

Moreover, all BRICS countries has an economic framework traditionally connected to State-Owned Companies (SOE's), which made their legal flexibilizations to vindicate competition efficient laws. Meaningful, competitive cooperation among BRICS

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<sup>13</sup> World Trade Organization, Council for Trade in Goods, Committee on Trade-Related Investments Measures, Communication from Brazil and India, G/TRIMS/W/25, 9 October 2002 (15 Sep. 2021) available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=37165,80441,62798,46188,7585,107275,42800,32046,24943,47836&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=37165,80441,62798,46188,7585,107275,42800,32046,24943,47836&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

<sup>14</sup> The Strategy for BRICS Economic Partnership (15 Sep. 2021) available at <http://infobrics.org/files/pdf/43.pdf>.

<sup>15</sup> About the FAS Russia, FAS (15 Sep. 2021) available at <http://en.fas.gov.ru/about/what-we-do/>.

countries is more advanced than foreign investments. Russia has demonstrated to be greatly interested in the matter, since FAS has promoted the first BRICS conference on the matter, held on 1 September 2009, in Kazan. Since then, BRICS countries have, in each two years, new edition of the conference.

Competition is, therefore, an area that BRICS is effectively promoting cooperation. It is fruitful to keep strengthening BRICS ties relating to the matter, because avoiding the abuse of economic power is important for the democratization of international relations.

### **3. Improving BRICS Participation in Global Administrative Law**

Another important discussion for BRICS could be the advance of the postulates of a global administrative law. They derive from the transformation of domestic administrative laws by the necessary adaptation to globalization. As a general phenomenon, the provider state, which was built by the conception of welfare state, is being replaced by a manager state. Public activities take place by means of public and private partnerships and, as sensible to public policies, these activities are object of state regulation. From that, regulation and supervision of this cluster of economic activities are realized by regulatory agencies with transnational behavior, claiming more attention from international law to those matters.<sup>16</sup>

A good example of the expansion of global administrative law is the Government Procurement Agreement (GPA) in the ambit of WTO. It is aimed to submit local government procurement to its *desiderata* of non-discrimination and open market. Within BRICS, Hong Kong and Chinese Taipei are members of the agreement and, recently, Brazil and Russian Federation are in process of acceding.

Public procurement is also extreme important to infrastructure. It is also a tool for reversion of economic underdevelopment. It is a matter relevant to foreign investments and to the condition of developing economy. Therefore, it would be fruitful if BRICS had a view and a joint strategy on the matter, beginning from the establishment of group studies to understand the meanings of a possible "global administrative law."

### **Closing Remarks**

The BRICS grouping has a strong economic and financial motivation in its political coordination and cooperation. However, this convergence needs to be strengthened to be able to optimize trade and investment flows between them. For this reason, the need to intensify cooperation between them within the scope of the regulatory

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<sup>16</sup> Benedict Kingsbury et al., *A Emergência de um Direito Administrativo Global in Ensaios sobre o Direito Administrativo Global e Sua Aplicação no Brasil* 11 (Michelle Ratton Sanchez Badin (org.), 2016).

matter on economic relations has been raised. In this concern, it is possible to verify the existence of standards that can be used for better understanding, converging points that turn into cooperation mechanisms, and divergent points that can reach a consensus that benefits all the BRICS countries. Thus, this study sought to identify these points in each of them and advocate the need to increase legal cooperation and exchange of experiences, showing that there is an extraordinary potential for increasing economic relations through the regulation on investments, trade and governance that strengthen the grouping as a whole, above all in the economic and financial sphere.

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