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An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

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ARTICLES

NATIONAL POLICY FOR ACADEMIC MOBILITY IN RUSSIA AND THE BRICS COUNTRIES: 20 YEARS OF THE BOLOGNA PROCESS IMPLEMENTATION

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DOI: 10.21684/2412-2343-2017-5-1-5-26

The article analyses the Russian Federal Education Programmes from the aspect of their impact on student and academic staff mobility. The subject of the analysis is the programmes adopted for the period 2000 to 2020 and their implementation reports. A cluster of academic mobility forms compiled by the authors is based on two groups: academic staff and students. The forms of academic staff mobility have been identified as: (1) a migration flow: outward and incoming; and (2) purpose: teaching and research. The forms of student mobility have been identified as: (1) migration flow: outward and incoming; and (2) purpose: credit mobility and degree mobility. The cluster is based on the National Reports on the Implementation of the Bologna Process by different countries from 2012 to 2015 and the Russian Federal Education Programmes. The analysis finds that academic mobility in Russia has been an indicator of the development of education programmes for almost 20 years. During this period, the government's approach to academic mobility has undergone a change from a simple reference as an expected result to the establishing of quantitative indicators. The four quantitative indicators of academic mobility have been in place since 2000. As a result of the analysis, the authors conclude that among the forms of student mobility the most developed is the incoming degree mobility of international students. The student outward credit mobility is the least developed of the four indicators. In the current situation, it is necessary to reform and liberalise the recognition of study abroad periods for Russian students. Without

reform, it will be difficult to achieve the target set by the government to have 6 percent of students studying abroad for at least one semester by 2020. The data for 2016 show that only a few higher education institutions have approached the target. The authors also identify problems relating to academic staff mobility.

Keywords: academic mobility; credit and degree mobility; internationalisation of education; outward and incoming mobility; Russian Federal Education Programmes.

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The formation of the academic mobility system began in Russia from the date of the signing of the Lisbon Recognition Convention in 1999 and the Bologna Declaration in 2003. Russia took responsibility for establishing academic mobility mechanisms and joined the European academic mobility scheme.

Russian national educational policy is reflected in the Federal Education Programmes (FEPs). For the period 2000–2020 five FEPs were adopted, one each in 2000, 2006, 2011, 2013 and 2016. Academic mobility is the target of the FEPs 2000–2020. Quantitative and qualitative indicators of academic mobility have improved under the FEPs. The main trend in the programme indicators of mobility is expanding the forms and actors of academic mobility. In Russia, state policy and regulation have a great influence on educational institutions, which have low initiative and autonomy. This feature is reflected in academic mobility as well. Until 2005, there

were no quantitative indicators of academic mobility, and until 2011 there were no indicators of outward mobility in FEPs and the national education policy. Academic mobility has been absent in the indicators of the effectiveness of universities. As a result, Russian universities cannot show a great record of developing academic mobility, as it was not stimulated by the state. Obviously then, it is necessary to apply organisational, methodological and managerial measures to develop the practice of academic mobility in Russia.

In this article, we develop a cluster of academic mobility forms based on world practice, analyse the indicators of academic mobility established by Russian policy documents and identify their implementation in Russia and their compliance with international requirements.

To form a cluster of academic mobility forms, we used the National Reports regarding the Bologna Process implementation in 2012–2015 in 44 countries.[1] The content of academic mobility in international treaties and conventions was analysed. Scientific views on academic mobility of Russian and foreign authors were also examined. To analyse the Russian practice of academic mobility, FEPs 2000–2020, as well as reports on their implementation, including electronic public reports on academic mobility, were examined.

These sources and documents were investigated using the following methods: (*a*) theoretical analysis and analysis of best practices, which resulted in the identification of existing forms of academic mobility in the world; (*b*) modelling, which resulted in the formation of a cluster of academic mobility forms; and (*c*) a historical and legal method, that is, analysis of changes in legislation, in the dynamics, the results of which have traced the trends and changes in the indicators of the forms of academic mobility. In addition, statistical data from the websites of Russian governmental authorities were used.

1. International Discussion on the Forms of Academic Mobility

Recommendation No. R (95) 8 of the Committee of Ministers to Member States on academic mobility gives a definition of academic mobility.

> The term "academic mobility" implies a period of study, teaching and/or research in a country other than a student's or academic staff member's country of residence (henceforth referred to as the "home country"). This period is of limited duration, and it is envisaged that the student or staff member return to his or her home country upon completion of the designated

[1] National Reports regarding the Bologna Process implementation in 2012–2015 (Feb. 28, 2018), available at http://www.ehea.info/article-details.aspx?ArticleId=86.

> period. The term "academic mobility" is not intended to cover migration from one country to another.[2]

The points of view of researchers on the notion of academic mobility diverge on at least three questions:

- Does academic mobility relate to only studying abroad, or can it be implemented in the home country as well?
- Does academic mobility relate to part-time education at another institution, or does it also include full training at another institution?
- Does academic mobility relate to physical movement across a border, or can it be done through online learning?

Under these conditions, where it is not clear how to determine the features of academic mobility, it seems difficult to define the term. It is necessary to develop a sound research position on the above issues. We consider that it is necessary to build on official international documents in the sphere of the Bologna Process and mobility, while taking into account the opinion of researchers, both Russian and foreign.

1.1. Discussion about Mobility: Study Abroad and/or Within One's Home Country?

Some scholars consider that student mobility implies a period of study abroad, since academic mobility is an essential characteristic of the Bologna Process and involves obtaining a cross-border education, in contrast to the so-called geographical (or internal) mobility, which means the possibility for the student to continue studying at a university located in another region of his or her home country.[3] However, there is another viewpoint suggesting that

> academic mobility is a transfer of students... to another educational institution located both in Russia and abroad.[4]

According to the National Reports regarding the Bologna Process implementation in 2012–2015,[5] we can conclude that the purpose of the Bologna Process is international mobility.

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[2] Recommendation No. R (95) 8 of the Committee of Ministers to Member States on Academic Mobility, adopted by the Committee of Ministers on 2 March 1995 at the 531st meeting of the Ministers' Deputies (Feb. 28, 2018), available at http://www.coe.int/t/dg4/highereducation/resources/mobility.pdf.

[3] *Козырин А.Н.* Финансирование академической мобильности в зарубежных странах // Реформы и право. 2011. № 1. С. 46–52 [Alexander N. Kozyrin, *Financing of Academic Mobility in Foreign Countries*, 1 Reforms and Law 46 (2011)].

[4] *Варламова А.В.* Академическая мобильность обучающихся российских вузов (на примере ФГБОУ ВПО «РГУТИС») // Вестник ассоциации вузов туризма и сервиса. 2014. № 1. С. 76 [Anna V. Varlamova, *Academic Mobility of Russian HE Students*, 1 Bulletin of the Association of Tourism and Service Universities 74, 76 (2014)].

[5] National Reports 2012–2015, *supra* note 1.

However, this does not mean that internal mobility is completely excluded from the concept of mobility.

Nina Maadad and Malcolm Tight say that mobility programmes allow a transfer of students or teachers to another institution within or outside their home country for study or teaching for a limited period of time.[6] The electronic dictionary "Definitions" states that,

> Academic mobility refers to students and teachers in higher education moving to another institution inside or outside their own country to study or teach for a limited time.[7]

On the basis of the foregoing, we believe that the concept of mobility implies a period of study at another educational institution, whose location may be in one's home country or abroad.

1.2. Discussion on the Period of Mobility

Some Russian scholars consider that only part-time study abroad should be attributed to academic mobility. Full-time study abroad should be attributed not to mobility but to educational migration. This approach is reflected in the glossary of terms of the Bologna Process prepared by the TEMPUS (Trans-European mobility scheme for university studies) National Office in the Russian Federation:

> Student mobility implies a possibility of partial training in European universities of partners with subsequent recognition of both the time of study in a foreign institution of higher education and the credit units received there.[8]

Another point of view is that mobility relates not only to part of the period of training, but also to the whole period of training.[9] According to the National Reports regarding the Bologna Process implementation in 2012–2015, student mobility includes credit mobility and degree mobility.[10]

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[6] Nina Maadad & Malcolm Tight, *Academic Mobility* in *Academic Mobility (International Perspectives on Higher Education Research, Volume 11)* iii (N. Maadad & M. Tight (eds.), Bingley: Emerald, 2014).

[7] Academic mobility (n.d.), Definitions.net (Feb. 28, 2018), available at https://www.definitions.net/definition/academic mobility.

[8] TEMPUS National Office in the Russian Federation (Feb. 28, 2018), available at http://www.tempus-russia.ru.

[9] *Токмовцева М.В.* Правовые проблемы академической мобильности высших учебных заведений // Культура: управление, экономика, право. 2014. № 2. С. 17–21 [Margarita V. Tokmovtseva, *Legal Problems of Academic Mobility of Higher Educational Institutions*, 2 Culture: Management, Economics, Law 17 (2014)].

[10] National Reports 2012–2015, *supra* note 1.

1.3. Discussion on the Forms of Mobility

Some Russian scholars specify a particular feature of academic mobility – its reality, the actual movement across a border. For example, according to Aleksander Kozyrin,

> Academic mobility is always physical mobility.[11]

Others believe that a form of virtual mobility is also possible. For example, Viktor Galichin asserts that

> in accordance with new approaches, mobility is provided as a key component of the processes of joint learning, creativity, labor and social life and is carried out both in physical and virtual forms.[12]

According to the National Reports regarding the Bologna Process implementation in 2012–2015, countries presented information on the proposed Massive Open Online Courses (MOOCs) (para. 7.10, Part "Internationalization and Mobility"). Based on that information, we believe that internet education is recognised as a form of mobility. However, in the professional community there is a discussion whether virtual mobility is an addition to physical mobility or an alternative to it. Sylvia G.M. van de Bunt-Kokhuis says that real mobility can be either replaced by or supplemented with virtual mobility.[13] Jose Silvio tells us the following:

> The development of the traditionally called "information and communication technologies" and large telematic networks like the Internet, created new possibilities and new phenomena. It is now possible to move from one place to another in a new space called *virtual space* or *cyberspace*, without moving geographically, and to do things of many kinds, anytime, anywhere: the human dream of defeating space and time is now almost possible, thanks to a new type of mobility called *virtual mobility* enabled by computer-mediated communication.[14]

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[11] Kozyrin 2011.

[12] *Галичин В.А.* Современные тенденции в развитии академической мобильности: опыт Европы // Гуманитарные науки. 2013. № 2(10). С. 112–117 [Viktor A. Galichin, *Modern Trends in the Development of Academic Mobility: The European Experience*, 2(10) Humanitarian Sciences 112 (2013)].

[13] Sylvia G.M. van de Bunt-Kokhuis, *Academic Pilgrims: Determinants of International Faculty Mobility* (Tilburg: Tilburg University Press, 1996).

[14] Jose Silvio, *Global Learning and Virtual Mobility* in *Global Peace Through the Global University System* (T. Varis et al. (eds.), Hämeenlinna: University of Tampere, 2003) (Feb. 28, 2018), also available at http://www.friends-partners.org/utsumi/Global_University/Global%20University%20System/UNESCO_Chair_Book/Manuscripts/Part_IV_Global_Collaboration/Silvio,%20Jose/Silvio_web/SilvioD9.htm.

Ilse Op de Beeck and Wim Van Petegem add their voices:

> Since the second half of the 1990s the notion of virtual mobility has gained currency in the context of the internationalisation of higher education institutions.[15]

We believe that the definition of mobility cannot consist only in physical mobility, since researchers agree that there is also virtual mobility.

Thus, we are convinced that the idea of academic mobility should not be narrowed down on any of the following grounds: a period of mobility, forms of mobility, a direction of migration. We suggest a definition of academic mobility based on a wider approach.

The variety of academic mobility forms leads us to the conclusion that academic mobility is any studying, teaching or research period spent at a different institution whether that institution is abroad or in one's home country.

With the foregoing analysis as background, we propose a cluster of academic mobility forms. Our proposition rests on international documents, national regulations of Russia, as well as on Russian and foreign research. The cluster of academic mobility forms is based on two subject groups: academic staff and students. The forms of academic staff and student mobility are identified as follows: (1) migration direction – outward and incoming; and (2) purpose (determined as) – staff, teaching and research, and students, credit mobility and degree mobility. The forms of academic mobility are identified as follows: real (presupposes physical moving) and virtual (presupposes studying at a foreign institution or research collaboration via electronic form). The channels of academic mobility are identified as follows: (*a*) support programmes mobility (international, national, university), (*b*) mobility under the curriculum of an educational programme and (*c*) free mobility.

It should be noted that there are mobility forms which are monitored in the framework of the Bologna Process. These forms include: (1) staff incoming and outward mobility (purpose is not specified); and (2) student incoming and outward credit and degree mobility. These forms of mobility were used as a basis of cluster analysis of the Federal Education Programmes. Our conclusion is that these forms are enshrined in the Russian education programmes. So, what are the forms of academic mobility supported by the Federal Education Programmes?

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[15] Ilse Op de Beeck & Wim Van Petegem, *Virtual Mobility: An Alternative or Complement to Physical Mobility?* (Media and Learning Unit KU Leuven, Belgium 2012) (Mar. 2, 2018), available at http://i2agora.odl.uni-miskolc.hu/i2agora_home/data/P3_D6_ERACON_Virtual%20mobility_paper.pdf.

2. Mobility Indicators in Russian Federal Education Programmes (FEPs)

2.1. Russian Federal Education Programme (2000–2005)

The FEP 2000–2005 established targets for student degree mobility, both incoming and outward.[16] This programme did not include targets for student credit mobility and academic staff mobility. Mobility indicators in the FEP 2000–2005 are presented in Table 1.

Table 1: Mobility Indicators in the Russian Federal Education Programme for 2000–2005

Subject	Direction	Purpose	Existence in Programme
Student	Incoming	Credit	–
		Degree	+
	Outward	Credit	–
		Degree	+
Academic staff	Incoming	Teaching and research	–
	Outward	Teaching and research	–

To improve results on student degree mobility the following activities were planned: (1) ensuring the development of mechanisms and forms of recruitment and training of international students in the educational institutions of Russia, with the aim of increasing student incoming degree mobility; and (2) developing and implementing the order, forms and mechanisms of state support for gaining education by citizens who have shown outstanding abilities, including sending these citizens to study abroad, with the overall aim of raising student outward degree mobility, even though the efforts were directed to supporting talented youth and not all youth.

We would like to emphasise that the increase in mobility was stated as a goal, but the quantitative indicators were lacking. This indicates that the programme planning method in Russia in 2000 was at an early stage of formation. The major channels of mobility were planned to be national and bilateral programmes. Mobility was not available for everyone. The programme does not mention student credit mobility and academic staff mobility.

[16] Федеральный закон от 10 апреля 2000 г. № 51-ФЗ "Об утверждении Федеральной программы развития образования," Собрание законодательства РФ, 2000, № 16, ст. 1639 [Federal law No. 51-FZ of 10 April 2000. On Approval of the Federal Development Program of Education, Legislation Bulletin of the Russian Federation, 2000, No. 16, Art. 1639].

We can find the performance of these indicators in the report of the Russian Federal Education Agency approved by the Ministry of Education and Science of the Russian Federation on 1 March 2005.[17]

The percentage of international students (including from the CIS) in the total number of students in public universities amounted to 1.5% in 2000, 2.1% in 2001, 1.5% in 2002, 1.5% in 2003, 1.8% in 2004 and 1.9% in 2005. Thus, the share of international students in Russia increased by 0.4% over the period 2000–2005.

The number of Russian students studying abroad is not included in the report, although the programme stated the goal of supporting citizens who have shown outstanding abilities, including by sending them to study aboard. However, the report does present the number of national and international academic competitions which were attended by Russian students. There were 24 competitions in 2000, 25 in 2001, 24 in 2002, 25 in 2003, 24 in 2004 and 30 in 2005.

Thus, the FEP 2000–2005 started the development of student mobility, but this was only the beginning.

2.2. Russian Federal Education Programme (2006–2010)

The FEP 2006–2010 established targets for all of the main types of student and academic staff mobility.[18] There were quantitative indicators that should be achieved, especially for student incoming degree mobility. The mobility indicators in the FEP 2006–2010 are presented in Table 2.

Table 2: Mobility Indicators in the Russian Federal Education Programme for 2006–2010

Subject	Direction	Purpose	Existence in Programme
Student	Incoming	Credit	+
		Degree	↑ from 0.6% to 1.6% ↑ from 1% to 12% of them on a fee-paid basis
	Outward	Credit	+
		Degree	+

[17] Решение Рособразования от 1 марта 2005 г. № 2 "О работе Федерального агентства по образованию в 2004 году и основных задачах на 2005 год" [Decision of the Federal Agency for Education of the Russian Federation No. 2 of 1 March 2005. On the Work of the Federal Agency for Education of the Russian Federation in 2004 and the Main Tasks for 2005] (Feb. 28, 2018), available at http://www.zakonprost.ru/content/base/84623/pdf.

[18] Постановление Правительства РФ от 23 декабря 2005 г. № 803 "О Федеральной целевой программе развития образования на 2006–2010 годы," Собрание законодательства РФ, 2006, № 2, ст. 186 [Act of the Government of the Russian Federation No. 803 of 23 December 2005. On Federal Education Programme for 2006–2010, Legislation Bulletin of the Russian Federation, 2006, No. 2, Art. 186].

Academic staff	Incoming	Teaching and research	+
	Outward	Teaching and research	+

The priority of development is

> the growth of academic mobility of students, academic and administrative staff (increase in the number of issued loans and grants for financial support of academic mobility of students and teachers, increasing the number of citizens of the Russian Federation at the age of 30 participating in international exchanges); the growth of export of educational services (increased number of nationals enrolled in institutions of professional education of the Russian Federation).[19]

There are quantitative target indicators in a separate section of the programme: (1) an increase in the share of international students from 0.9% to 1.6%; and (2) an increase in the share of international students studying on a fee-paid basis from 1% to 12%. Thus, the programme priorities (goals, targets) apply to all forms of mobility, and the quantitative indicators relate only to student incoming degree mobility.

The advantages of this programme are: (1) the development of not only student degree mobility, but also student credit mobility (academic exchange) and recognition of study-abroad periods; and (2) the development of academic staff mobility. These indicators were introduced in the FEPs for the first time.

The implementation report of the FEP 2006–2010 states that

> all of the 27 indicators have been done at the end of 2010.[20]

The information on the programme presented on the website of the Federal Programmes of Russia also indicates the planned and actually achieved value of indicator 10, according to which,

> The specific weight of the number of international students studying in Russian higher education institutions on a fee-paid basis was 12%.[21]

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[19] Act of the Government of the Russian Federation No. 803, *supra* note 18.

[20] Краткий отчет о реализации Федеральной целевой программы 2006–2010 (данные 2017 г. по состоянию на 1 октября 2017 г.) [Brief Implementation Report on the Federal Education Programme for 2006–2010 (data for 1 October 2017)] (Feb. 28, 2018), available at http://fcp.economy.gov.ru/cgi-bin/cis/fcp.cgi/Fcp/ViewFinDoc?fcp=188&fin=92&year=2010.

[21] Федеральные целевые программы: Программа развития образования на 2006–2010 годы [Federal Targeted Programmes: Education Development Programme for 2006–2010] (Feb. 28, 2018), available at http://fcp.economy.gov.ru/cgi-bin/cis/fcp.cgi/Fcp/ViewFcp/View/2006/188/.

The total number of international students can also be evaluated by using unofficial sources, such as the website of UniPage, a company providing academic mobility and study abroad services. For example, in 2012 the total number of students in Russia was about 3,070,000, and 174,000 of them were international students. That is 5.65% of the total number of students.[22] Thus, the quantitative indicator, which was to increase the percentage of international students to 1.6%, was achieved, and, even more, exceeded 3.5 times over.

2.3. Russian Federal Education Programme (2011–2015)

The FEP 2011–2015 developed all the types of academic mobility.[23] Quantitative indicators were set for student outward credit mobility and academic staff outward mobility. Mobility indicators in the FEP 2011–2015 are presented in Table 3.

Table 3: Mobility Indicators in the Russian Federal Education Programme for 2011–2015

Subject	Direction	Purpose	Existence in Programme
Student	Incoming	Credit	+
		Degree	+
	Outward	Credit	↑ mobility opportunities from 3% to 30% of students
		Degree	+
Academic staff	Incoming	Teaching and research	+
	Outward	Teaching and research	↑ collaboration opportunities from 5% to 52%

Quantitative indicators are: (1) the increase, in the share of students enrolled in programmes that provide the opportunity to study abroad, from 3% to 30% of students during 2010 to 2015 and (2) the increase, in the number of academic staff

[22] Статистика международных студентов в мире [International Students: Statistics] (Feb. 28, 2018), available at https://www.unipage.net/ru/student_statistics#Статистика_международных_студентов_в_мире.

[23] Постановление Правительства Российской Федерации от 7 февраля 2011 г. № 61 "О Федеральной целевой программе развития образования на 2011–2015 годы," Собрание законодательства РФ, 2011, № 10, ст. 1377 [Act of the Government of the Russian Federation No. 61 of 7 February 2011. On Federal Education Programme for 2011–2015, Legislation Bulletin of the Russian Federation, 2011, No. 10, Art. 1377].

who participate in research collaboration and have the opportunity to conduct research on the basis of international educational and research institutions, in the total number of academic staff, from 5% to 52% during 2010 to 2015. The innovation of the programme is its focus on Russian students and their opportunities to study abroad and on international research cooperation of academic staff. The responsibility for organising the mobility of students and staff was assigned to Russian universities. They were only required to create a framework. Universities were not even required to send any students or staff abroad for teaching and research. A national mobility scheme was not launched.

A short report on the implementation of the Federal Education Programme for 2011–2015 notes:

> By the end of 2015, out of 29 target indicators, the target values were achieved for all of them, for a number of indicators there is stable dynamics of exceeding the planned values.

According to the report, the share of students enrolled in programmes that included an opportunity of credit mobility at foreign universities in 2014 was 18.7%; the target was set at 20%, which was therefore clearly not achieved. The share of teachers who worked at universities participating in inter-university collaboration in 2014 was 42.1%; the target was set at 42%, which therefore was slightly exceeded. Data for 2015 with respect to meeting the targets in the report are not available.[24]

2.4. Russian Federal Education Programme (2013–2020)

The FEP 2013–2020 establishes targets for all the main types of student and academic staff mobility.[25] There are quantitative indicators that should be achieved, especially for student outward credit mobility. Mobility indicators in the FEP 2013–2020 years are presented in Table 4.

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[24] Краткий отчет о реализации Федеральной целевой программы 2011–2015 (данные 2017 г. по состоянию на 1 октября 2017 г.) [Brief Implementation Report on the Federal Education Programme for 2011–2015 (data for 1 Oct. 2017)] (Feb. 28, 2018), available at http://fcp.economy.gov.ru/cgi-bin/cis/fcp.cgi/Fcp/ViewFinDoc?fcp=305&fin=92&year=2015.

[25] Постановление Правительства РФ от 15 апреля 2014 г. № 295 "Об утверждении государственной программы Российской Федерации "Развитие образования" на 2013–2020 годы," Собрание законодательства РФ, 2014, № 17, ст. 2058 [Act of the Government of the Russian Federation No. 295 of 15 April 2014. On Federal Education Programme "Education Development" for 2013–2020, Legislation Bulletin of the Russian Federation, 2014, No. 17, Art. 2058].

Table 4: Mobility Indicators in the Russian Federal Education Programme for 2013–2020

Subject	Direction	Purpose	Existence in Programme
Student	Incoming	Credit	+
		Degree	+
	Outward	Credit	↑ 0.1% to 6% (except CIS and Baltic countries)
		Degree	+
Academic staff	Incoming	Teaching, research	+
	Outward	Teaching, research	+

The expected final result of the implementation of the programme and an indicator of its social and economic effectiveness is

> an increase of academic student and staff mobility, which allows to provide new levels of interaction between various educational and economic systems.

For student mobility, the set quantitative indicator is:

> [A]n increase in the share of the number of persons who have completed at least one semester of studying abroad during the academic year (except in the CIS and the Baltic countries) in the total number of students enrolled in higher education programmes from 0.1% to 6% from 2013 to 2020.

The advantage of this programme is that it assesses the development of real mobility, and not only the availability of opportunities for mobility, as in the previous programme. By 2020, the planned indicator of student outward mobility (except in the CIS and Baltic countries) should be 6%. For 2015, this indicator was set at 1.5% and for 2016 at 2%.

The Ministry of Education and Science prepared a report in 2015 on the implementation and evaluation of the effectiveness of the FEP 2013–2020 that reflects the indicators of academic mobility in a descriptive manner.

> 17 leading universities, participants of the 5-100 Project, are implementing 183 educational programmes developed in collaboration with 170 foreign

> educational institutions and awarding degrees from each of the partner institutions and 191 educational programmes, part of which is learned using the resources of others organizations. 64 educational institutions under the Ministry of Education and Science of Russia… [which] are not participating in the 5-100 Project, implement 218 joint educational programmes with international partners. 1,010 educational programmes using the resources of other organizations are implemented by 122 higher education institutions and are aimed primarily at developing internal Russian academic mobility.[26]

The report also refers to the monitoring of the effectiveness of institutions of higher education, which shows the indicators of academic mobility for each institution separately. However, it is noteworthy that in monitoring the effectiveness of institutions of higher education, this indicator is formulated differently than in the state programme, without reservation (except for CIS countries).

Thus, overall monitoring of outward academic mobility is being carried out, including for CIS countries. The question may then be asked: Have universities fulfilled the indicator of outward academic mobility for a period of not less than one semester in respect of 2% of the number of students in 2016?

Consider this indicator on the example of data presented in relation to 21 universities that are part of the 5-100 Programme. Information is presented in Table 5 below on the basis of statistical data posted on the portal "Information and analytical materials on the results of monitoring the effectiveness of educational institutions of higher education" (http://monitoring.edu.ru).

Table 5: Outward Credit Mobility of Students in the Universities Entering into the 5-100 Programme

Higher Education Institution	Outward Credit Mobility (%)
1. Immanuel Kant Baltic Federal University	0.44
2. Higher School of Economics: National Research University	1.10
3. Far Eastern Federal University (FEFU)	0.52
4. Kazan Federal University (KFU)	0.58
5. Moscow Institute of Physics and Technology (MIPT)	0.53

[26] Отчет о ходе реализации и оценке эффективности государственной программы Российской Федерации "Развитие образования" на 2013–2020 годы в 2015 году [Implementation Report on Russian Federal Programme "Education Development" for 2013–2020 in 2015] (Feb. 28, 2018), available at http://xn--80abucjiibhv9a.xn--p1ai/%D0%B4%D0%BE%D0%BA%D1%83%D0%BC%D0%B5%D0%BD%D1%82%D1%8B/8257.

6. National University of Science and Technology (MISIS)	0.67
7. National Research Nuclear University (MEPhI)	0.37
8. Lobachevsky State University of Nizhni Novgorod	0.36
9. Novosibirsk State University	0.00
10. I.M. Sechenov First Moscow State Medical University (MSMU)	0.09
11. RUDN University	1.85
12. Samara National Research University	0.00
13. Saint Petersburg Electro-technical University (LETI)	0.34
14. ITMO University	0.77
15. Peter the Great Saint-Petersburg Polytechnic University	1.51
16. Siberian Federal University	0.00
17. National Research Tomsk State University	0.32
18. National Research Tomsk Polytechnic University	1.90
19. Tyumen State University (TSU)	0.40
20. Ural Federal University (UrFU)	0.90
21. South Ural State University: National Research University	0.45

Based on the data of monitoring the effectiveness of universities in 2016,[27] it is clear that each individual institution of higher education did not achieve the target of 2% of student mobility. Just four universities had more than one percent: Higher School of Economics, RUDN University, Peter the Great Saint-Petersburg Polytechnic University and National Research Tomsk Polytechnic University. The average indicator of student mobility in all the examined higher education institutions was 0.62% of the total number of students. On average in Russia, the implementation of this indicator is much lower in higher education institutions that are not members of the 5-100 Programme. So, for example, in the Vladimir Region, 16 universities were monitored. Just one university out of 16, Vladimir State University, achieved 0.27% of students studied abroad for at least one semester. The remaining monitored institutions had a value of 0.00%. Therefore, we can state quite definitely that student outward credit mobility in Russia is very poorly developed, which leads to the impossibility

[27] Информационно-аналитические материалы по результатам проведения мониторинга эффективности деятельности образовательных организаций высшего образования в 2016 г. [Results of Monitoring the Effectiveness of HEIs [Higher Education Institutions] in 2016] (Feb. 28, 2018), available at http://indicators.miccedu.ru/monitoring/2016/index.php?m=vpo.

of fulfilling the indicators planned by the Ministry of Education and Science in the FEP 2013–2020.

The Federal Education Programme for 2016–2020 does not establish indicators of academic mobility at all.[28] This programme focuses on other goals and, in fact, acts as a part of its namesake for 2013–2020.

3. Academic Mobility in the BRICS Countries

The above review of Russian education programmes shows that beginning in 2000 and continuing to 2020 student mobility is the target indicator of the programmes. The development of student mobility is a worldwide trend. Viv Caruana believes that transnational higher education is the most visible manifestation of globalisation, trade liberalisation and commodification of higher education in a borderless market fuelled by huge increases in worldwide demand.[29] The UNESCO Institute of Statistics (UIS) conducts statistical research aimed at studying the mobility of students in the world. UIS answers questions about where students go to study, where they come from and how the demand for higher education changes, especially in the developing world. The growth of student mobility in Russia is in line with global trends, including tendencies in the BRICS countries.

Student mobility indicators in the BRICS countries for 2015 are presented in Table 6, according to UIS data.[30]

Table 6: Student Mobility in the BRICS Countries in 2015

	China	India	Russia	Brazil	South Africa
Students abroad:					
Total number of mobile students abroad	801,187	255,030	56,328	40,891	7,461
(% of total mobile students)	...	...	...	...	...
Outbound mobility ratio	1.9	0.8	0.9	0.5	0.7
Gross outbound enrolment ratio	0.8	0.2	0.7	0.3	0.1

[28] Постановление Правительства Российской Федерации от 23 мая 2015 г. № 497 "О Федеральной целевой программе развития образования на 2016–2020 годы," Собрание законодательства РФ, 2018, № 1(2), ст. 375 [Act of the Government of the Russian Federation No. 497 of 23 May 2015. On Federal Education Programme for 2016–2020, Legislation Bulletin of the Russian Federation, 2018, No. 1(2), Art. 375].

[29] Viv Caruana, *Researching the Transnational Higher Education Policy Landscape: Exploring Network Power and Dissensus in a Globalizing System*, 14(1) London Review of Education 56 (2016).

[30] Global Flow of Tertiary-Level Students, UNESCO Institute of Statistics (2015) (Feb. 28, 2018), available at http://uis.unesco.org/en/uis-student-flow.

Students hosted:					
Total number of mobile students hosted	123,127	41,993	226,431	19,855	42,594
(% of total mobile students)	...	...	...	...	...
Inbound mobility rate	0.3	0.1	3.4	0.2	4.2

China. As we can see, China is the world leader in outward mobility – no other country has such a high level of outward mobility. China is commonly perceived as a major "sending" nation of international students, but China's future development prospects distinctively attract students to choose China as their study abroad destination.[31] Recent studies show that the number of students that want to choose China for their education abroad is increasing. M.A. Jiani finds that the strong economic growth of China is a major factor that encourages international students to seek higher education opportunities in China. The interest of overseas Chinese nationals and people of Chinese descent in returning home and discovering their cultural identity may be considered a legitimate rationale for prospective students.

The Chinese government has promulgated guidelines for students and scholars studying abroad, which are

> to support students and scholars studying abroad, to encourage them to return to China after their completion of their studies and to guarantee them the freedom of coming and going.

In addition, the Chinese central government has developed many policies to attract foreign students to study in China. China's "Higher Education as a Case Study" plays a key role in the trade in higher education services. It has been a leading consumer of education abroad, becoming, in fact, the biggest such consumer in the world. In 2008, there were 2,965,840 overseas students in the whole world, of which 441,186 were from China, accounting for 14.9 percent of the total (India ranked second with more than 170,000 "outbound students," accounting for 5.7 percent of the total).[32]

The Chinese government is taking significant steps to develop incoming and outward academic mobility. China has signed protocols with more than 34 countries in mutual recognition of academic degrees and qualifications; the Chinese government has set up a series of scholarship programmes to sponsor international students, teachers and scholars to undertake study and research at Chinese higher education institutions.[33] China is a participant in many network programmes such as the University

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31 M.A. Jiani, *Why and How International Students Choose Mainland China as a Higher Education Study Abroad Destination*, 74(4) Higher Education 563 (2016).

32 The International Mobility of Students in Asia and the Pacific, UNESCO (2013) (Feb. 28, 2018), available at http://unesdoc.unesco.org/images/0022/002262/226219e.pdf.

33 *Id.*

SCO, the BRICS Network University and CAMPUS Asia – Collective Action for the Mobility Programme of University Students in Asia.

China has established a solid base for academic exchanges with the BRICS countries within the framework of special agreements, as well as in the framework of the state education policy of the Chinese government.

India. Rosa Becker and Renze Kolster have noted,

> With more than 170,300 students studying abroad, India is the world's second largest supplier of international students (after China). However, the percentage of Indians studying abroad is still small, and amounted to no more than 1% of the total Indian student population in 2008.[34]

According to data from the UNESCO Institute of Statistics, the overall trend remained the same in India in 2015. The total number of Indian mobile students abroad was 255,030 and the total number of mobile students hosted in India was 41,993. Dr Pushkar has written that given the low number of foreign students in India, while their numbers are growing worldwide, the question is whether the Indian government should become more interested in attracting international students. The question is whether the government and India's universities can take concrete measures to make India more appealing to foreign students.[35]

The 2014 QS BRICS ranking devoted a specific section to internationalisation, and on this measure India did not fare well: only one Indian institution made it into the BRICS top 100 for the proportion of international faculty, and just two institutions made it into the top 100 for the proportion of international students. In a related development, the Indian Council of Cultural Relations found that of the 3,465 scholarship slots offered to foreign students for study in India 1,361 (39%) went unused in 2013/14.[36]

One of the current policies to encourage student outward mobility is the Educational Exchange Programme. The programme, established on the basis of agreements between India and several other countries, aims to increase the focus on cooperation and sharing best practices in the field of education for mutual benefit. The programme includes scholarships that allow Indian students to study abroad in the participating countries at the postgraduate, PhD or postdoctoral levels. These scholarships are mainly funded by the participating countries.

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[34] Rosa Becker & Renze Kolster, *International Student Recruitment: Policies and Developments in Selected Countries* (The Hague: Nuffic, 2012).

[35] Pushkar, *Why India Needs to Seriously Push Its "Study in India" Initiative*, The Wire, 31 June 2016 (Feb. 28, 2018), available at https://thewire.in/55157/study-in-india-mhrd-international-students/.

[36] India is a Key Source of International Students – Can It Become a Destination?, ICEF Monitor, 18 February 2015 (Feb. 28, 2018), available at http://monitor.icef.com/2015/02/india-key-source-international-students-can-become-destination/.

The Indian government aims to attract more international students by changing the admissions process, improving the education infrastructure and increasing the emphasis on academic support.

Scholarships funded by the Indian government for foreign students include scientific fellowships (JRF) for foreign citizens, which allows international students to undertake postgraduate studies at Indian universities in the fields of the sciences, humanities and the social sciences. Scholarships are awarded to students and faculty from the developing countries of Asia, Africa and Latin America.[37]

The Indian government also provides funding for the Research Fellowships (JRFs) for Foreign Nationals, which similarly enables international students to undertake postgraduate studies/research at Indian universities in the areas of the sciences, humanities and the social sciences. Again, fellowships are awarded to students and teachers from developing countries in Asia, Africa and Latin America.[38]

Brazil. The level of incoming and outward academic mobility in Brazil is much lower than that in China and India. The total number of Brazilian mobile students abroad is 40,891 and the total number of mobile students hosted in Brazil is 19,855.

From 2002 through 2016, Brazil's federal government promoted policies that increased enrolments in higher education. The impact was substantial: from 2002 to 2012, college enrolments in Brazil doubled.[39] In 2011, the government created the programme "Science without Borders," which is aimed at promoting the consolidation, expansion and internationalisation of science and technology, innovation and competitiveness of Brazil through international exchange and mobility. This initiative was the result of the joint efforts of the Ministries of Science, Technology and Innovation and the Ministry of Education. The project provides for the use of up to 10,000 scholarships over four years to facilitate exchange so that undergraduate students and graduate students can go abroad to maintain contacts with competitive education systems in relation to technology and innovation. In addition, the programme aims to attract researchers from abroad who want to settle in Brazil or to establish partnerships with Brazilian researchers in the priority areas identified in the programme, and to create opportunities for business researchers to receive specialised training abroad.

However in December 2016, the government passed a constitutional amendment and froze social spending in Brazil for twenty years. This decision was entirely incompatible with the country's human rights obligations, according to the United Nations Special Rapporteur on extreme poverty and human rights Philip

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37 Becker & Kolster 2012.

38 *Id.*

39 José Celso Freire Jr., *Beyond Science Without Borders: Brazil Retools Its Internationalization Strategy*, World Education News & Reviews (WENR), 18 September 2017 (Mar. 2, 2018), available at https://wenr.wes.org/2017/09/beyond-science-without-borders-brazil-retools-its-internationalization-scheme.

Alston.[40] In the international education community, the official cessation of Brazil's Science Without Borders programme is one of the most important casualties of austerity measures. What may be less obvious is the impact on a broad swath of young Brazilians. These funding cuts threaten access to quality education for a substantial majority of Brazilian youth who otherwise cannot afford higher education.[41]

Political and legal changes in Brazil are putting into question the development of academic mobility.

South Africa. The student outward mobility of South Africa is quite low. The total number of mobile students abroad from South Africa is 7,461. However, South Africa is the leading host country in Africa and ranks 11th amongst host countries worldwide. South Africa is making an important contribution to the continent's human resource development and helping to retain skilled graduates in Africa.[42] The total number of mobile students hosted in South Africa is 42,594. South Africa, which has one of the most extensive tertiary education systems in the region, has fewer than 6,000 students studying abroad, representing about 0.1% of its tertiary-age population.

Student mobility is attracting increased attention in Africa, given the challenges with which the continent is confronted regarding the development of human capital and the achievement of sustainable development. Higher education is now widely recognised as an important driver of socio-economic growth and human development, for without a strong higher education system it is difficult (or maybe impossible) for any developing country, in Africa or elsewhere, to achieve sustainable development.[43]

Damtew Teferra and Jane Knight have written that in South Africa there is no policy on the internationalisation of higher education; internationalisation is a decentralised process in which every South African university pursues its own activities with a greater or lesser degree of institutional policy direction.[44] All the same, South Africa, being the most economically developed country in the region, is also the centre of attraction for students from neighbouring countries. What is more, South Africa is a participant in the BRICS Network University programme.

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[40] Brazil 20-Year Public Expenditure Cap Will Breach Human Rights, The Office of the United Nations High Commissioner for Human Rights (OHCHR) (2016) (Feb. 28, 2018), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006.

[41] Freire, *Beyond Science*, *supra* note 39.

[42] Chiao-Ling Chien & Felly Chiteng Kot, *New Patterns in Student Mobility in the Southern Africa Development Community* (Montreal: UNESCO Institute for Statistics, 2012).

[43] *Accelerating Catch-Up: Tertiary Education for Growth in Sub-Saharan Africa* (Washington: The World Bank, 2009).

[44] *Higher Education in Africa: The International Dimension* (D. Teferra & J. Knight (eds.), Accra: African Books Collective, 2008).

Conclusion

The review presented on Russian Federal Education Programmes shows that, beginning in 2000 and continuing to 2020, student mobility is the target indicator of the programmes. On the basis of the revealed indicators, we can trace the following trends in the development of academic mobility in Russia: (*a*) the increase in a number of forms of academic mobility, supported by the Federal Education Programmes; (*b*) the prevalence of indicators of the development of all the forms of student mobility in comparison with academic staff mobility; (*c*) the availability of indicators for the development of academic staff mobility is an achievement in the development of academic mobility; (*d*) the relative randomness of quantitative indicators of the development of academic mobility. None of the indicators were repeated in five national education programmes, although, in our opinion, each of the indicators would not be an asset and could be included in subsequent programmes with an increase in the quantitative value; and (*e*) it is obvious that the Ministry of Education and Science cannot cover the whole variety of relations in higher education in the field of targeted programmes and that it has to establish separate indicators. Consequently, the universities should take an active role in this issue and develop their own programmes, including in terms of academic mobility.

Legal and political analyses in other BRICS countries has showed that national governments encourage student mobility. These states have adopted programmes aimed at developing student mobility. The BRICS countries are the leaders in student mobility either on the global level (China and India) or in their regions. In the BRICS countries, the government is a key player in the formation of education policies including mobility, for the policy of universities depends on public policy. Taking into account the importance of mobility for the evolution of education and human capital, the BRICS countries actively include the development of mobility in the national education programmes. Being the economic leaders of their regions, the BRICS countries are leaders in terms of the level of education, and as a result, also the level of mobility. The process of academic mobility is a worldwide process in which almost all states are included, and on this basis we believe that it is necessary to develop academic exchanges between the BRICS countries, such as network universities, recognition of degrees and periods of education, and scientific collaboration.

Modern tendencies of the internationalisation of education lead us to the conclusion that academic mobility will continue to grow.

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SAFETY ASSESSMENT AND LIABILITY REGULATIONS IN THE CONTEXT OF GENETICALLY MODIFIED FOOD IN THE BRICS COUNTRIES

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International trade of food products is expected to increase rapidly with the widespread introduction of genetically modified (GM) food. There will be greater participation of developing countries based on investment as well as research and development. Investment in research and development and commercial production of GM crops is high in Asia, particularly in India and China, but also in Latin American countries, such as Brazil, and on the African continent, especially in South Africa. Despite the merits, the introduction of GM foods in the world market has continued to raise public concerns touching upon health, legal, social, ethical and environmental issues. Especially, the issue of contamination is considered a significant threat at many stages of development of GM food. Transboundary aspects and certain aspects of the components of the food safety system such as safety assessment, liability and redress are still not completely addressed. The present study is the systematic review of the extent of the development of legislation and institutional mechanisms in relation to safety assessment and liability mechanisms for regulating the emerging GM foods in the developing countries of BRICS. Additionally, the comparison of the components of national food safety systems of Brazil, Russia, India, China and South Africa reveals differences in policy and regulation in relation to GM food.

Keywords: food policy; regulation; genetically modified food; developing countries; BRICS; food safety assessment; liability; transboundary; comparative analysis.

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Introduction

The significant role of GM technology in agriculture and export performance is quite impressive in developing countries which surpassed the developed world in 2011.[1] Among the developing countries, the commercial production of GM crops is high in Asia, particularly in India and China, but also in some Latin American countries, such as Brazil, as well as in a few African countries, especially South Africa. As of 2015, the total population of BRICS (Brazil, Russia, India, China and South Africa) was over 3.6 billion people (considered to be half of the world population).[2] Brazil is the second largest producer of GM next to the United States.

The public concerns about genetically modified (GM) food and crops are not new. In fact, the potential health concerns of GM foods were advanced as early as 1994, simultaneously with the inception of GM food.[3] To some extent, these concerns

[1] James Clive, *20th Anniversary (1996 to 2015) of the Global Commercialization of Biotech Crops and Biotech Crop Highlights in 2015*, ISAAA Brief No. 51, ISAAA: Ithaca, NY (2015). In 2015, 54% or 97.1 million hectares of land were cultivated with GM crops by 18 million small and resource-poor farmers from 20 developing countries.

[2] Population Ranking Table, Population Ranking from the World Bank (Feb. 20, 2018), available at http://data.worldbank.org/data-catalog/Population-ranking-table; The World Factbook, Central Intelligence Agency, United States of America (Feb. 20, 2018), available at https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html.

[3] Irvin E. Liener, *Implications of Anti-Nutritional Components in Soybean Foods*, 34(1) Critical Reviews in Food Science and Nutrition 31 (1994).

became a reality in 1999, when GM foods were commercialised.[4] Also, reports have claimed that in experiments rats fed with GM foods have developed cancerous cell growth in the intestinal tract.[5] In addition to this, scientists have reportedly identified possible allergens which might cause adverse health effects after the introduction of GM food into the food supply chain.[6] The health apprehensions in respect of GM food were aggravated with the news of the first human death caused by ingestion of GM food, which was reported at a Madrid hospital in Spain in 2015. Medical examiners and forensic experts in that case identified the cause of death as the consumption of tomatoes containing fish-related genes and antibiotic resistant genes which had prevented the development of white blood corpuscles (WBC).

There are also instances showing that safety concerns over GM food were realised for potential impact and risk(s) in several other countries. For example, a study conducted by the Department of Food Science and Technology, University of Nebraska, identified that the gene developed from Brazil nuts when introduced to GM soybean causes allergies in human beings.[7] Also, there are instances showing that there is a high chance of contamination of conventional food with GM food in the process of trade. The GM contamination register, a documentation service maintained by Greenpeace and Gene Watch UK, has found contamination in three internationally cultivated GM food and feed crops – oilseed rape, soya and maize – since 1997.[8] Therefore, the contamination becomes a significant threat at all stages, from GM food production to consumption.

The components of national food safety systems such as safety assessment, labelling procedures, monitoring and surveillance, information sharing, liability and redress, and the requisite institutional mechanisms to carry out the relevant stages of GM food import and domestic production has been identified through the thorough analysis of various international instruments and domestic legislation. Out of these, the author of this article found that safety assessment and the liability and redress mechanism are of utmost importance in relation to the domestic introduction and import of GM food and derivatives which should be given prime importance. Therefore, the present study was undertaken to examine the extent of development of safety regulations and the liability framework for GM food and derivatives from an international perspective with a specific focus on BRICS countries.

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1. Commercial Status of GM Food in BRICS Countries

The research and development of GMOs in Brazil commenced in the 1990s, when farmers began to cultivate GM soybeans imported from Argentina. The first GM product was commercialised in 1995. Since then, the adoption and cultivation of GMOs in Brazil has increased to an average of 78% of total coverage of cotton, corn and soybean in 2015. So far, the CTNBio (Comissão Técnica Nacional de Biossegurança/ National Technical Committee on Biosafety) has approved 50 types of GMOs of which the majority (35 of them) are plants, including cotton, soybean and corn. Brazil is a major exporter of agricultural commodities and food products (worth US$4.8 billion) to the United States and imports agricultural products, commodities for example such as wheat, and other products (worth US$1.7 billion). Moreover, Brazil is the major exporter of GM cotton, corn and soybeans.[9] China and the European Union are the major importers of GM cotton and soybean.

In the case of China, GM technology has been used in the area of pharmaceuticals, agriculture and the food processing industry. It is the first developing country to grant commercial approval for viral-resistant tobacco plants, in 1988. In the period between 1991 and 2002, the Chinese Ministry of Agriculture granted six licenses for the commercial production of GM food crops including two varieties of cotton, and two varieties of tomato, sweet pepper and petunias. The cultivation of GM crops has been successful, with 3.9 million hectares involved. In 2014, China was ranked sixth among the 28 countries cultivating GM crops. According to a National Scientific Research Plan 2008, research and development through GM technologies were designated by the Chinese government as one of the 16 major areas targeted for major breakthroughs by 2020. China is a major importer of cotton, papaya, soybean and corn from the United States; and the annual import of soybean was approximately 70 million tonnes in 2014. Moreover, the country also imports millions of tonnes of soybean oil as a feed for farmed pigs and use as vegetable oil.[10]

Consumer concerns in relation to GM have recently been increasing, which led the country to reject shipments of GM corn from the United States. China returned 8,870,000 tonnes of US corn shipments tainted with a GM strain which was not approved because of its unapproved MIR 162, a strain of insect-resistance GM corn. The country intends to commence GM research and development rather than concentrate on imports. It thus has started to master the technology and develop its own industry. In the case of South Africa, research and development of GM has been successful in the last three decades. It is considered to be the only country on the African continent to embrace GM technologies, in order to deal with famine and

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[9] Clive, *20th Anniversary (1996 to 2015)*, *supra* note 1.

[10] Top China Imports from the World (Feb. 20, 2018), available at http://www.worldsrichestcountries.com/top_china_imports.html.

drought. South Africa acknowledges the utilisation of such technologies to increase crop production and to reduce the import of grains from other nations.[11]

Along with various other agricultural technologies, the South African government showed its positive intention in adopting GM technology. It is the ninth largest producer of first-generation GM crops. The first field trial approval of GM crops occurred in 1989, followed by the commercial approval of insect-resistance GM cotton and maize in 1997. Since then, there has been an increase in the cultivation and commercialisation of GM. For instance, the cultivation of GM maize amounted to 72% in 2011–2012.[12] Currently, commercialised GM food crops include maize, cotton and soybean. Canola oil is the only product which has been imported into the continent in the form of a GM derivative.

In 2014, three new types of GM, including two varieties of GM corn, were allowed for general release into the environment. In the same year, 25 field trial approvals were allowed for experimental purposes. Four hundred two permits were issued for import and export of GM crops that included 244 for exports, 120 for imports, 25 for trials, 3 for contained use, 6 for commodity clearance and 3 for general release.[13] Six commodity clearances for import were allowed after conducting appropriate safety assessment tests intended for food and feed use. This includes five GM varieties, namely corn, soybean, cotton, rice and rapeseed. Furthermore, the commercialisation of insect- and drought-resistant GM corn was expected for release in 2017.

In February 2016, Russia denied the import of soybean and corn from the United States because most of the crops developed there are found to be genetically modified.[14] Among the BRICS countries, in addition to South Africa, Brazil, China and India are promoting indigenous biotechnology industries and adopting greater use of biotechnology approaches in public and private research institutes. Russia took the political stand that it neither will import nor domestically produce GM foods or derivatives in any form. China and India are the most advanced leading crop producers in Asia. They represent 45% and 49%, respectively, of the total area of 76.4 million hectares of GM crops planted in the last 15 years of commercialisation. Among African countries, South Africa is the largest producer of GM crops and the commercialised varieties are Bt maize, Bt soybean and Bt cotton. India and China

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[11] The Food Security Forecast estimated that 2.9 million people needed immediate food aid before March of 2016 in the region of Malawi.

[12] Genetically Modified Organism Presentation, Department of Trade and Industry, 13 September 2013 (Feb. 20, 2018), available at https://www.thedti.gov.za/parliament/2013/GMOS.pdf.

[13] South Africa-Republic of Agricultural Biotechnology Annual, Global Agricultural Information Network Report, USDA Foreign Agricultural Service, 8 December 2013 (Feb. 20, 2018), available at http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Pretoria_South%20Africa%20-%20Republic%20of_8-12-2013.pdf.

[14] William Engdahl, *Russia Bans US GMO Imports*, Global Research, 29 February 2016 (Feb. 20, 2018), available at https://www.globalresearch.ca/russia-bans-us-gmo-imports/5510933.

contributed to improving agricultural productivity and enhancing food production with the advent of GM crops.[15] While non-food crops have been adopted in a number of Asian countries, there is a varied and limited introduction of GM-based food crops. Investment in public-sector research and development for GM foods is high in developing countries such as Brazil, China, India and South Africa.[16] Among the BRICS countries, China was the first to commence activities related to research and development of GM food crops, in 1988, followed by South Africa and Brazil in 1997 and 1998, respectively.[17]

Papaya is the only GM food crop approved for commercialisation in China. As a result, safety certificates for GM plants such as cotton, rice, maize, tomatoes, sweet pepper, papaya, poplar seeds and petunias have been issued for production. The Chinese Ministry of Agriculture has approved GM tomatoes (1997), cotton (1997), petunias (1999), sweet pepper and chili pepper (1999), papaya (2006), rice (2009) and corn (2009).[18] Only soybean, corn, rapeseed, cotton and sugar beets have been allowed to be used as raw material for domestic processing. In contrast to China, India has not approved any GM food so far. However, limited field trial approvals have been allowed for GM rice, mustard, cotton, chickpea and brinjal by GEAC, the apex body for granting regulating approvals for GM food crops of India in 2014.[19] So far, 60 applications have been permitted approvals for field trials to various public, private sector and multi-national corporations in India. For five GM food crops, i.e. brinjal, maize, rice, chickpea and cotton, field trial approvals were given by the government of Maharashtra in January 2015. The report of the sub-committee of GEAC[20] recommends the commercialisation of GM mustard (Dhara Mustard Hybrid (DMH)-11) for domestic cultivation.

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15 Muthukrishnakumar Kandasamy & Padmavati Manchikanti, *Transgenic Crop Research and Regulation in India: Whether Legislation Rightly Drives the Motion?*, 20(4) Journal of Commercial Biotechnology 17 (2014); *see also*, Peter Newell, *Lost in Translation? Domesticating Global Policy on Genetically Modified Organisms: Comparing India and China*, 22(1) Global Society 115 (2008).

16 Tao Tan et al., *The Impact of GMO Safety Regulations on Chinese Soybean Exports*, 3(3) Journal of Basic and Applied Scientific Research 164 (2013).

17 Jikun Huang et al., *Agricultural Biotechnology Development, Policy and Impact in China*, 37(27) Economic and Political Weekly 2756 (2002).

18 Canfa Wang & Wenxuan Yu, *Agro-GMO Biosafety Legislation in China: Current Situation, Challenges, and Solutions*, 13(4) Vermont Journal of Environmental Law 865 (2011–2012).

19 Xiao Zhi Lim, *Indian Biotech Regulator Approves Field Trials for 15 GM Crops*, *Draws Harsh Criticism*, Genetic Literacy Project, 23 July 2014 (Feb. 20, 2018), available at https://geneticliteracyproject.org/2014/07/23/indian-biotech-regulator-approves-field-trials-for-15-gm-crops-draws-harsh-criticism/.

20 126th meeting of the Genetic Engineering Appraisal Committee (GEAC) convened on 4 January 2016 constituted a sub-committee comprised of health expert Dr. B. Sesikeran, MD in Pathology, Former Director, National Institute of Nutrition (NIN) and Indian Council of Medical Research (ICMR) and the current Chairman of the Review Committee on Genetic Manipulation (RCGM).

In the foregoing analysis it is observed that South Africa was the earliest to introduce both GM food and derivatives. The other countries, except India, introduced GM food either through domestic cultivation or import. In this context, the development of legislation as well as regulation of the activities of GM food from the sphere of manufacturing to human consumption is essential.

2. Governmental Policies Towards GM Food: Promotion of Restriction

Understanding policy perspectives provides a view into the favourable or restrictive approaches, measures, socio-economic factors, reforms, standards and initiatives of governments. There are potential policy reactions across different nations about GM food. In China, the policy is specially focussed on the promotion of self-development rather than import. In this regard, the Ministry of Agriculture strengthened research into agricultural GMOs with the focus on safety assessment, regulation and management of agricultural GMOs.[21] In early 2015, the Central Committee of the Communist Party of China and State Council made 32 concrete suggestions on how to foster the development of modern agriculture and rural community and to increase farmers' income. Emphasis was placed on the significance of food security and the importance of agriculture for socio-economic development while ensuring food safety and quality of agricultural products.

In Brazil, GM technology has been prioritised to promote sustainable development. The President of CTNBio believes that the adoption of GM technology in agriculture is necessary to overcome issues of tropical and humid climate that promote susceptibility to pests.[22] The Science and Technology Programme aims principally at the development of technologies applied to health, agriculture and the environment, and the development of genetically modified organisms has been one of the focus areas.[23] The primary objective of the Biosafety Policy of Brazil is to ensure an appropriate level of protection to human, animal and plant health and to the environment, and the safe utilisation of GM technology. The policy established the framework to extract the maximum benefit from GM technologies and to promote the industries involved in activities of GMOs. It further believes that there is an urgency in bringing biosafety measures not only to regulate GMOs, but also to

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21 Proposal in Response to 12th Five-Year Plan for Development of Agricultural Science and Technology, 30 December 2011 (Feb. 20, 2018), available at http://www.moa.gov.cn/zwllm/zcfg/nybgz/201112/t20111231_2449779.htm.

22 Joana Ferreira, *GMOs, A Global Debate: Brazil, Second Largest GMO Producer in World*, EPOCH Times, 8 July 2013 (Feb. 20, 2018), available at http://www.theepochtimes.com/n3/162906-gmos-a-global-debate-brazil-second-largest-gmo-producer-in-world/.

23 Leda Mendonça-Hagler et al., *Trends in Biotechnology and Biosafety in Brazil*, 7 Environmental Biosafety Research 115 (2008).

GMOs intended for food, feed or processing, irrespective of whether they are locally produced or imported from abroad.

In the case of South Africa, the policy has been to ensure safe utilisation of GM technology for strengthening the country's economy as well as to enhance the livelihood of its citizens, keeping in view the protection of human health and the environment. GM regulations have been developed with zero risk to 1% risk based on the prevailing crop and climatic conditions. Recently, permits for the import of GM maize to avert a food crisis and severe drought have been considered. In fact, 90% of maize cultivation in the country has already been produced through GM technologies. But in the case of India, the government banned the commercial cultivation of GM food crops and allowed only the GM crop Bt cotton, not intended for human consumption, since 2002. In 2009, the Genetic Engineering Appraisal Committee (GEAC) of India granted approval for field trial experiments on the commercial cultivation of Bt brinjal.[24]

Due to widespread public uproar and opposition from anti-GM activists, a moratorium was placed in 2010. While Bt brinjal is not allowed by the regulators on the basis of safety considerations, the commercial approval of home-grown GM mustard is in the pipeline. In Brazil and South Africa, GMOs were introduced when there was no policy or legislative framework in place. China concentrates more on home-grown GM food crops and its domestic production, while India is in the process of making decisions on both home-grown GM food crops and to some extent the import of GM derivatives.[25] The analysis of the food safety components and the regulatory mechanism for the domestic production or import of GM food and derivatives is an important consideration in relation to the countries. In order to identify the components of the national food safety system and its regulatory measures, the thorough analysis of international trade regulations is essential as GM food and derivatives becomes a good in the international trade arena due to the process of globalisation.

3. International Trade Regulations on GM Food and Derivatives

International trade of agricultural products is based on the commodity system.[26] Food as a commodity of international trade is a growing market. The global trade in food products will continue to expand rapidly with the introduction of

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[24] Lim, *Indian Biotech*, *supra* note 19.

[25] Vandana Shiva, *GMO-Mustard Bio-Safety Assessment: A Scientific Fraud on the Nation*, 13 May 2017 (Feb. 20, 2018), available at http://vandanashiva.com/?p=491.

[26] Directorate-General for Agriculture, The European Commission, Economic Impacts of Genetically Modified Crops on the Agri-Food Sector, Working Document (Feb. 20, 2018), available at https://ec.europa.eu/agriculture/publi/gmo/full_en.pdf.

GM food in the commercial food chain and greater participation of most of the developing countries.[27] Despite the concerns, the level of acceptance of GM food and derivatives is growing higher since its inception in 1996.[28] The international regulations which apply to conventional foods will be generally suitable for GM foods also. International conventions, multilateral agreements and policy decisions implemented by international organisations and international standards-setting bodies have been analysed in respect of international trade in GM foods. The Sanitary and Phytosanitary (SPS) agreement negotiated under the World Trade Organisation (WTO), and the Cartagena Protocol on Biosafety are the two major international instruments that govern the transboundary trade in agricultural and food products containing genetically modified organisms. The analysis of safety regulations and the liability framework will be done based on the consideration of those international instruments.

3.1. Safety Regulations

This section examines the international liability framework whose general structure provides an appropriate starting point for safety assessment and the development of methods to ensure the safety of products. The section is an attempt to review the extent of the development of the international regulatory framework on safety assessment which governs the domestic regulation and the transboundary trade of GM food and derivatives.

3.1.1. WTO Agreement

International trade received a major boost with the initiation of the WTO.[29] The primary objective of establishing the WTO was to regulate international trade and to effectively utilise the world's resources without any trade restrictions.[30] The WTO provides a legal foundation and institutional mechanism for dealing with the multilateral trading environment. It ensures precise measures through its agreements for assisting the manufacturers of goods and services, exporters and importers to conduct business for free and fair trade. It strongly believes that the lowering of trade barriers will always assist in encouraging international trade and commerce.

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[27] Food and Agriculture Organization of the United Nations, The State of Agricultural Commodity Markets: Trade and Food Security: Achieving a Better Balance Between National Priorities and the Collective Good (2015–2016) (Feb. 20, 2018), available at http://www.fao.org/3/a-i5090e.pdf.

[28] Ed Wallis, *Fish Genes Into Tomatoes: How The World Regulates Genetically Modified Foods*, 80 North Dakota Law Review 421 (2004).

[29] Marcos A. Orellana, *Evolving WTO Law Concerning Health, Safety and Environmental Measures*, 1(1) Trade, Law and Development 103 (2009); Gregory Messenger, *The Development of World Trade Organisation Law: Examining Change in International Law* (Oxford: Oxford University Press, 2016).

[30] Objective of the World Trade Organisation (WTO). The WTO is an inter-governmental organisation created to regulate international trade; it was established in 1995.

First of all, in the context of safety regulation, the SPS Measure laid down by the countries through Art. 5.1 of the SPS Agreement shall be justified with sufficient scientific risk assessment techniques for preventing unsafe food entering into its markets.[31] In practice, the principles laid down in this Principal Document, i.e. the Principles for the Risk Analysis of Foods Derived from Modern Biotechnology, CAC/GL 44-2003, adopted in 2003 and amended in 2008 and 2011, are to be followed along with the Codex Working Principles while conducting the risk analysis, i.e. the Working Principles for Risk Analysis for Food Safety for Application by Governments, CAC/GI 62-2007. The main scope of these Working Principles is to provide adequate guidance to the national governments in matters of three components of risk analysis, such as risk assessment, risk management and risk communication. The scientific data for the safety assessment of foods shall be derived from the development of the product, existing scientific literature, available technical information, and from independent scientists, regulatory authorities and other international bodies. In the *EC-Biotech* case,[32] the panel referred to the Codex Guidelines for determining the safety assessment of GM foods and derivatives. Legal recognition to the Codex guidelines has been given through the case.

The members of the WTO shall base their food safety measures according to Codex Standards through the application of the SPS Agreement. The standards established by the Codex Alimentarius Commission have evolved as an international guideline for the safety assessment of GM foods by principle of risk analysis. The guidelines are formulated through case-by-case analysis that applies to the conventional counterpart. The reason for the comparison of the conventional counterpart is because of its history of safe consumption. Hence, it is used as a baseline for the safety assessment of GM food and derivatives. The principle of substantial equivalence has evolved among the international community for facilitating the comparison between GM food and its conventional counterpart. Substantial equivalence is the starting step in the process of safety assessment. Through the substantial equivalence principle, the differences in composition, agronomical and morphological characters have been identified to assess any endangering activities to human health.

If any member country deviates from this standard, it should be on the strength of relevant scientific evidence and through adequate risk-assessment techniques.[33] The higher grade of protection shall be set by international standards, recommendations

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[31] *See* Preamble of the SPS Agreement, which states that, "Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade."

[32] European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS 291/R, WT/DS 292/R and WT/DS 293/R, 2006.

[33] Articles 2, 3 and 5 of the SPS Agreement.

and guidelines. However, the Principal Document does not take into account the relevant environmental, ethical, moral and socioeconomic aspects of research, development, production and marketing of foods. It is evident that the Codex presently harmonises the regulatory issues of risk analysis surrounding GM foods. Although, the principles and guidelines of the Codex[34] are legally non-binding in nature, through the mechanism of the WTO's SPS Agreement, every member of the WTO is obliged to comply with the recommendations.

There is an ongoing debate internationally on the capacity to predict and avoid the adverse effects on human health for the necessary introduction of GM food and derivatives. While the WTO limits freedom for every individual nation in imposing trade restrictions, the Cartagena Protocol on Biosafety is the only international agreement that focuses on national objectives rather than concentrating on trade restrictions. It stresses the importance of protecting biodiversity, the environment and human health.

3.1.2. Cartagena Protocol on Biosafety

The need and modalities for setting out a protocol to cover the transboundary trade aspects of GM foods, especially, with the specific purpose of protection of human health and the environment, arose as per Art. 19.3 of the Convention on Biological Diversity (CBD).[35] During the Second Conference of the Parties (COP-2) to the CBD in 1995, a Biosafety Working Group (BSWG) was established to implement the provisions of Art. 19.3.[36] The Working Group came up with the idea of a Biosafety Protocol, after several rounds of negotiations between 1996 and 2000. The Cartagena Protocol on Biosafety (Biosafety Protocol) entered into force in 2003. Currently, there are about 170 member countries that are parties to the Biosafety Protocol.

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[34] For maintaining uniformity in the safety assessment of GM foods in the context of international trade, United Nations (UN) agencies such as the World Health Organisation (WHO) and the Food and Agricultural Organisation (FAO) together established and administered the international standard-setting body, i.e. Codex Alimentarius Commission (CAC) in 1963. CAC is an inter-governmental standard-setting organisation of the FAO and WHO which promotes international guidelines for the safety assessment of foods including foods derived from genetically modified organisms and genetically engineered plants. It consists of three committees: Codex Committee on General Principles (CCGP), Codex Committee on Food Labelling (CCFL) and Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology (Task Force). Of these, CCGP is entitled to develop a set of standards concerning safety regulation, and CCFL develops guidelines to deal with the labelling aspects of GM food and derivatives.

[35] The Convention on Biological Diversity (CBD) was negotiated and signed in 1992 at the United Nations Conference on Environment and Development (the Rio "Earth Summit") and came into enforcement in 1993. As of now, 196 countries are parties to the Convention. Article 19.3 states: "Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity."

[36] Second Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity held in Jakarta, Indonesia on 6 to 17 November 1995.

The Biosafety Protocol is an international environmental agreement that established the global framework for the regulation of LMOs,[37] including GM food. It laid an important obligation on its member countries concerning the transboundary movement of GM food and derivatives. The primary objective of the Biosafety Protocol was *to ensure an adequate level of protection for the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may possess adverse effects on the conservation and sustainable use of biological diversity with a particular focus on the transboundary movements*. It is the only international instrument that specifically addresses the negative aspects of GM food and derivatives in regard to human health and the environment.[38] Also, it creates an obligation on the member states to develop regulations to address safety concerns relating to the trade of GM foods. The inclusion of the precautionary principle is hailed as one of the principal achievements of the Biosafety Protocol. It mandates that countries observe a cautious approach and restrict imports of GM food in the case of scientific uncertainty.

The important feature of the Biosafety Protocol is the incorporation of the Advance Informed Agreement (AIA). The purpose of this procedure is to provide an opportunity for the importing countries to address the safety concerns over GM in the context of international trade. Article 7.2 of the Biosafety Protocol also prescribes that the AIA procedure applies to the first intentional transboundary movement of LMOs for the deliberate release into the environment. While the transboundary movement of LMOs intended for direct use as food, feed or processing is not subject to this particular procedure, this will be governed by Art. 11 of the Biosafety Protocol.

During the pre-shipment period, the party of the export/exporter who intends to export their GM products has to obtain written consent from the party of the import/importer.[39] Based on Art. 10 of the Biosafety Protocol, the decision on notification shall be made within 15 days from the date of receipt of the notice and it shall be communicated to the party of export relating to approval or rejection of import. In general, the party intending to export must notify the same to the Biosafety Clearing House regarding the use of GM food and derivatives relating to the domestic use or placing on market shelves.

The parties shall also make reference to applicable national legislation, regulations and guidelines to the Biosafety Clearing House. Thus, it is provided that the parties to the Protocol will have the freedom to decide on the domestic regulatory framework

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[37] The terms Living Modified Organism (LMO) and Genetically Modified Organism (GMO) are interchangeably used in the various international references.

[38] Article 15 and Annexure III of the Biosafety Protocol.

[39] Principle 15 of the Rio Declaration states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary approach is reflected in various provisions of the Biosafety Protocol: Preamble, Arts. 1, 10.6, 11.8 and Annexure III.

applicable to the import of living modified organisms intended for direct use as food or feed, or for processing, subject only to the objectives of the Protocol. It is observed that the scope of Biosafety Protocol is not well defined with regard to GM foods.[40] Generally, GM foods are included in the broad scope of the Biosafety Protocol only when LMOs are capable of or replicate genetic material.

3.2. Liability Framework

This section examines the international liability framework whose general structure provides an appropriate starting point for liability and redress in dealing with damages arising out of the introduction and import of GM food and derivatives.

3.2.1. Basel Convention and Basel Liability Protocol

The most comprehensive environmental agreement that deals with hazardous substances is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention).[41] Article 12 of the Basel Convention enumerates the cooperation from member countries to develop rules and procedures in the field of liability and compensation for environmental damage arising out of the transboundary movement of hazardous waste and its disposal. Accordingly, Art. 12 of the Basel Convention acts as an enabling clause to develop the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Liability Protocol). The Basel Liability Protocol was negotiated and adopted in 1999.[42]

The important objective of the Basel Liability Protocol was to establish a comprehensive liability regime inclusive of the rules and procedures for providing third-party liability, environmental liability and compensation for damage arising out of the transboundary movement of hazardous waste. Most of the considerations being given to the third-party liability and environmental liability, which are closely associated with the damages, occur during the transboundary movement of GM food and derivatives. As contemplated in Art. 4 of the Basel Liability Protocol, the

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[40] Debra M. Strauss, *Genetically Modified Organisms in Food: A Model of Labeling and Monitoring with Positive Implications for International Trade*, 40 International Lawyer 95 (2006).

[41] The Basel Convention was negotiated and adopted in 1989 and came into force in 1992. The significant objective of the Basel Convention was to place a restriction to deal with the transboundary movement of hazardous waste and its proper disposal without causing any threat to human health and the environment; *see also*, Guido Fernando Silva Soares & Everton Vieira Vargas, *The Basel Liability Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*, 12(1) Yearbook of International Environmental Law 69 (2002).

[42] Peter Lawrence, *Negotiation of a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*, 7(3) Review of European Community and International Environmental 249 (2002); *see also*, Jerrold A. Long, *Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal*, 11 Colorado Journal of International Environmental Law and Policy 253 (1999).

legal framework developed in other multilateral agreements that deal with strict liability are considered.

Article 4 of the Basel Liability Protocol provides a basis for the *strict liability* doctrine and also the channelling of liability to a certain extent. According to the strict liability doctrine mentioned in the Basel Liability Protocol, the claimant is entitled to file a case for damage suffered during the process of transboundary trade with full compensation. In general, the notifier will be held liable and in some cases the exporter is liable.[43] If the importing state and the exporting state are contracting parties, then the "notifier" is held liable. But, the exporter is liable for any case where notification did not enter into the picture.[44] After determining the parties to the claim, then comes the definition of damage, because it was the basis for the subject matter of the claim. The definition of "damage" is enumerated in Art. 2(c) of the Basel Liability Protocol:

> any loss of life or personal injury; loss or damage to property other than property held by the person liable.

In addition to strict liability, the Basel Liability Protocol also elaborates the fault-based liability system. As envisaged in Art. 5 of the Basel Liability Protocol, whosoever is involved in the causation of damage is said to be liable. Though the Basel Liability Protocol sets out a procedure of strict liability and fault-based liability for hazardous substances, it does not directly deal with GM food and derivatives.

3.2.2. Cartagena Protocol on Biosafety and Its Supplementary Protocol

The Cartagena Protocol on Biosafety was the first international environmental agreement modelled after the Basel Convention[45] to ensure the safe handling, package and distribution of LMOs with the primary focus on the transboundary trade of LMOs including GMOs and GM food and derivatives. Though the agreement has been successful in certain regulatory innovations in the case of GM food and derivatives, the language of the agreement is silent on the matter of substantial provisions of standards of liability and redress mechanisms to deal with damages arising out of import or export of GM foods and derivatives. But the legal obligation to develop the rules on liability and redress concerning GM food is found in Art. 27 of the Cartagena Protocol on Biosafety, which reads as follows:[46]

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[43] Article 14, Insurance and other financial guarantees, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 27 May 2014.

[44] There is no precise definition of "notifier" in the Basel Liability Protocol. The definition shall be deduced from the Basel Convention and Art. 4 of the Basel Liability Protocol.

[45] Robert Paarlberg, *A Dubious Success: The NGO Campaign against GMOs*, 5(3) GM Crops & Food 223 (2014); *see also*, Paul E. Hagen & John B. Weiner, *The Cartagena Protocol on Biosafety: New Rules for International Trade in Living Modified Organisms*, 12 Georgetown International Environmental Law Review 697 (2000).

[46] Emphasis added.

> The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years.

The just-quoted clause of the Biosafety Protocol enables the parties to formulate procedures relating to liability and redress so as to deal with damage arising out of the import and export of GM food and derivatives. This particular clause necessitates the importance of the development of the liability provisions under a single legislation to deal with the damage arising in the transboundary trade of GM food and derivatives. After discussion under the purview of Cartagena Protocol on Biosafety, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress (N-KL Protocol) was negotiated for dealing with the issues of liability concerning LMOs, including GMOs and GM foods.[47] The principal objective of the N-KL Protocol is to set internationally agreed rules and procedures to prevent and remedy damage to the biodiversity for the injury caused by the transboundary movement of LMOs. The salient feature of the N-KL Supplementary Protocol includes response measures, administrative approaches, civil liability and state responsibility.

According to Art. 5 of the N-KL Protocol, member countries are authorised to formulate response measures for operators so as to keep the designated competent authority informed about incidents of damage caused by the transboundary movement of GM foods. It is the responsibility of the competent authority to consider appropriate measures to evaluate the cost of damage. Though it may be regarded as a fundamental phenomenon under the aegis of the N-KL Protocol to protect biodiversity, it offers a different fashion in dealing with damage such as personal injury or property damage. Therefore, the Food Business Operator (FBO) as well as the competent authority holds an additional responsibility to consider the procedures for dealing with the damage. In this connection, the response measures offered under the particular clause will be a full choice of action for the countries to develop a defensive or restorative mechanism in their domestic legislation. When there is a sufficient likelihood of damage or at the occurrence of harm, the member countries shall fix the procedures for the operator to take significant action to deal

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[47] Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, United Nations Environment Program, Secretariat of the Convention on Biological Diversity, Montreal, Canada (2011). As of November 2016, 36 member countries have deposited the instrument for acceptance, accession and ratification, which requires four more countries in order to enter into force. Parties to the Cartagena Protocol and its Supplementary Protocol on Liability and Redress (Feb. 20, 2018), available at https://bch.cbd.int/protocol/parties/#tab=1.

with the loss.[48] In this way, the operator has to undertake three-pronged action, such as reporting the incident to the competent authority, evaluating the damage and considering appropriate measures mentioned in Art. 5.1. In the case of failure to discharge its duties, the competent authority must enter into operation and formulate a suitable procedure to deal with the damage and to offer a remedy for the victims. In such actions, the competent authority is entitled to recover the expenses it incurs.

It is a well-established principle that every country will safeguard its boundaries from harm caused by neighbouring countries.[49] Therefore, the state is accountable for every kind of damage caused during the transportation of GM food across its territories. An attempt has been made at the international level to introduce a uniform liability regime in the form of civil liability to deal with the damage arising out of the transboundary trade in GM food and derivatives. Nevertheless, member countries must formulate the standards of liability in their domestic laws on the basis of the economic, social and other political perspectives of the country. In this connection, Art. 12 of the N-KL Protocol enumerates the principle of civil liability through the judicial system of a country which considers the attachment of responsibility for any damage through the civil remedies. The civil remedies may be obtained by the victims by way of written petition to the designated administrative authorities. It is a kind of private litigation, where the injured party files a suit against the offenders, claiming damages without including the "State" as a party. The relief sought by the claimant must be in one of two forms: either it can be monetary compensation or an injunction to restrain the activities of the defendant. This reflects the principle that the injured person has the right of recourse in their national legal system against the person accountable for the damage.

According to the civil liability doctrine, every member country shall formulate rules and procedures of liability to deal with injury arising out of the transboundary trade of GM food and derivatives. The incorporation of standards of liability may be by way of amendment to existing legislation or through the introduction of specific laws to deal with the damage. In certain circumstances, the combination of both in general and specific laws will serve the purpose.[50] Though the N-KL Protocol deals with the loss concerning the transboundary trade of GM food and derivatives, the standards of liability for damage occurring at the domestic production location needs to be developed. Moreover, the attempt by the N-KL Protocol failed in its uniform liability regime because the standards of liability are bound to differ. Even though

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48 Article 5.3 of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress.

49 Aaron Schwabach, *Transboundary Environmental Harm and State Responsibility: Customary International Law*, Encyclopedia of Life Support Systems (Feb. 20, 2018), available at https://www.eolss.net/Sample-Chapters/C14/E1-36-02-02.pdf.

50 Article 12(2) of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress.

the N-KL Protocol was unable to create rules, the obligation for transboundary trade remains an issue in the international arena. Moreover, there is a lacuna in the N-KL Protocol in the determination of liability of the parties to the suit.

Many international agreements contain provisions calling for the development of liability regimes, but so far few systems have been developed. Most international agreements in the area of transboundary environmental damage utilise a civil liability regime where private parties predominantly control the activities at issue. The definition of GMOs included in the Cartagena Protocol on Biosafety includes the activity concerning LMOs intended for the direct use of food, feed or processing.[51] The damages caused by processed GM products are also relevant in the definitional clause, which is excluded from the scope of damage. The adoption of individual liability regimes in every GM importing country will be the necessary complement to the international law system. This is because the international agreements provide freedom for the countries to develop their standards in dealing with damages arising out of the introduction or import of GM food and derivatives. In addition to the development of international law on liability, there is a possibility for the development of principles of liability in the legislation of developed as well as developing countries. In this aspect, the domestic legislation of certain developing countries needs to be analysed to bring out the extent of development of liability mechanisms in dealing with damages concerning GM food and derivatives.

4. Leading Judicial Pronouncements on the Adaptability of Precautionary Approach in Domestic Legislation

The precautionary principle has become the fundamental component of international environmental policy.[52] It was proclaimed at the United Nations Conference on Environment and Development, popularly known as the Rio Declaration in 1992. More particularly, Principle 15 of the Rio Declaration reads as follows:[53]

> In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

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51 *See*, *Procedure for Living Modified Organisms intended for Direct Use as Food or Feed, or for Processing*, Art. 11 of the Cartagena Protocol on Biosafety.

52 David Freestone & Ellen Hey, *Origins and Development of the Precautionary Principle* in *The Precautionary Principle and International Law: The Challenge of Implementation* (D. Freestone & E. Hey (eds.), Cambridge: Kluwer Law International, 1996).

53 Rio Declaration on Environment and Development, United Nations Environment Programme, Rio de Janeiro, 3–14 June 1992.

This principle has been widely accepted in order to protect the environment and to prevent damage concerning GMOs where there is the existence of scientific uncertainty. Though the precautionary principle is hailed as one of the essential components of the Rio Declaration and the Cartagena Protocol on Biosafety, the adoption and justification is still unsettled in the international parlance.[54] On the other hand, the precautionary approach is considered to be a significant feature of the Biosafety Protocol in dealing with GM foods. Furthermore, in view of the absence of conclusive evidence relating to the long-term effects of GM foods on human health, it is most appropriate for the a developing country to adopt a precautionary approach.

The application of the precautionary principle was challenged in the case of *Association Greenpeace France and Others v Ministère de l'Agriculture et de la Pêche and Others*,[55] before the European Court of Justice in 2000. In this case, the petitioner argued that the decision had to be taken by the European Commission only on the basis of the evaluation of the application in the context of safety assessment studies. Therefore, complete freedom was given to the national authorities to decide the application on the basis of the precautionary rule. But the European Commission employed its powers to annul the authorisation, whereas the national authorities are the ones who are competent to issue such orders. This approach seems to be in conflict with the precautionary principle because this policy provides every Member State an opportunity to raise objections concerning any adverse effect on human health or the environment. To add to the context, the interpretation of Art. 13(4) of the Council Directive 90/220 states that the national authority had to be given adequate opportunity to raise an objection concerning a decision of the Commission.

There are other instances to show that the precautionary approach is not widely accepted due to the defence available against the concept in different international instruments. For instance, the *EC Biotech* case[56] is pertinent for understanding the implications of the international trade of GM products and the adoption of the precautionary approach in domestic legislation. The United States alleged that the de facto moratorium imposed by the European Union for 27 GM products from 1999 to 2003 was found to be a trade-restrictive measure, which is contrary to the provisions formulated under the SPS Agreement. The United States generally does not support the precautionary principle as a rationale for food safety regulation, particularly within the international context.[57] Furthermore, in this case, the complainants contended that the precautionary approach should be available only for a temporary period as per Art. 5.7 of the SPS Agreement. However, the respondent, i.e. the EU, defended

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54 Orellana 2009.

55 Case C-6/99(2000).

56 European Communities – Measures, *supra* note 32.

57 Spencer Henson & Julie Caswell, *Food Safety Regulation: An Overview of Contemporary Issues*, 24(6) Food Policy 589 (1999).

itself by raising the argument that the precautionary principle was considered to be a general principle of international law.

Under the circumstances, the EU argued that the precautionary principle has been incorporated in various international agreements such as the Cartagena Protocol on Biosafety besides the domestic legislation of many countries.[58] But the Panel did not accept these arguments; rather, it delivered the opinion stating that the precautionary principle must not act as a defence for implementing trade-distortive measures concerning GM legislation.[59] In citing references from *Hormone Treated Beef*,[60] the Panel found that the relevance of the precautionary principle is still unsettled in international law. If the precautionary approach was not given adequate recognition across international jurisprudence, it is hard to develop the liability norms to deal with damage concerning the development of GM food and derivatives.

The components of the national food safety systems such as safety assessment, labelling procedures, monitoring and surveillance, information-sharing, liability and redress and the requisite of the institutional mechanism to carry out the relevant stages of GM food import and domestic production have been identified through the thorough analysis of various international instruments and domestic legislation. Out of these, safety assessment and the liability and redress mechanisms are of utmost importance for the domestic introduction and import of GM food and derivatives. Therefore, the present analysis has been carried out to review the existing regulatory measures and institutional set-up in relation to safety assessment and liability mechanisms in relation to the domestic introduction and import of GM food and derivatives in BRICS countries.

5. Critical Analysis

5.1. Safety Regulation in BRICS Countries

Safety has to be ensured not only from the point of manufacturing to market, but also from market to consumers, which includes many procedures to be followed to avoid risks to human health and the environment. It involves procedures to be adopted by the food manufacturers/exporters to comply with pre-market safety approvals and post-market monitoring mechanisms. In this relation, the present study has been attempted in order to compare and contrast the development of

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[58] Barbara Eggers & Ruth Mackenzie, *The Cartagena Protocol on Biosafety*, 3(3) Journal of International Environmental Law 525 (2000). The precautionary principle has its earlier reference from Preamble, followed in Arts. 1, 10.6, 11.8 and Annexure III of the Biosafety Protocol.

[59] Para. 7.89, Page 340 of Panel's Report in European Communities – Measures Affecting the Approval and Marketing of Biotech Products WT/DS291/R, WT/DS292/R and WT/DS293/R adopted on 21 November 2006.

[60] European Communities – Measures Concerning Meat and Meat Products (Hormones), US – WT/DS26/19 (18 May 1999) and Canada – WT/DS48/17 (20 May 1999).

policies, laws, regulations, guidelines and standards of food legislation and the development of institutional mechanisms in the said countries to deal with the food safety concerns related to GM food and derivatives. Furthermore, the procedures and guidelines for approval and the components of national food safety systems of BRICS such as safety regulations and liability have been analysed.

The safety assessment is an important criterion for identifying and evaluating the adverse effects of GM food and derivatives and their impact on human health. CTNBio of Brazil, National Agricultural GMO Biosafety Committee (BC) of China, Genetically Modified Food Safety Assessment Unit (GMFSAU) of India and Ministry of Agriculture are the appropriate authorities to conduct the safety assessment of the applications related to the introduction or import of GM foods and derivatives. In Brazil, the observance of the precautionary principle, the adoption of the scientific method and transparency of procedures are the guidelines for conducting methods of safety assessment. In China, the safety assessment has to be carried out at each and every stage of development. The procedures for safety assessment are of two kinds, viz. classification-based and evaluation-based. The classification shall be of GMOs in general, GM crops, GM foods in particular, whereas the evaluation shall be based on research, experiments, production, processing, business operations, import and export.

The principles of safety assessment are derived from the Codex guidelines for evaluating safety in both India and South Africa. The initial procedures for carrying out safety assessments of GM food and derivatives are to assess whether GM food is substantially equivalent to the conventional counterpart. The GM product shall be analysed for unexpected changes in a limited group of components such as toxins, nutrients or allergens that are present in the conventional food by the manufacturer. The safety and nutritional assessment are particularly important for developing nations like BICS because the consumption of such foods will cause significant changes in the dietary intake patterns and the food chain.

In addition to this, South Africa and India follow the procedures established in Annexure III of the Cartagena Protocol on Biosafety. The science-based safety assessment is acknowledged in Sec. 5(c)(i) of the GMO (Amendment) Act 2006. In India, subsec. 2 of Sec. 92 of FSSA 2006 provides the regulations concerning safety assessment under the purview of the Department of Biotechnology (DBT), the Ministry of Environment and Forest (MoEF) and the Indian Council of Medical Research (ICMR). Given the permissibility of the field trials and the increased international trade of GM foods approved for various countries, in 2008 the ICMR formulated guidelines for the safety assessment of GM foods, "Guidelines for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants." In Brazil, the safety assessment is carried out as prescribed by Normative Resolution No. 5 of 2008. It defines safety assessment as a combination of procedures or methods to evaluate the potential effects of the planned release of GMOs and derivatives on human health.

The methods of safety assessment in South Africa, China, Brazil and India are more or less similar with certain differences in their approaches. Science-based assessment and case-by-case analysis to identify the source of genes, recipient organisms, and operation of GM have been considered. In addition to this, toxicological tests, allergenicity and nutritional analysis have been performed. Other than Brazil, all three countries follow the principle of substantial equivalence to bring out the difference between the GM products and conventional counterparts. In addition to the existing guidelines specified through the regulations, the authority of Brazil such as the CTNBio, the Ministry of South Africa and the FSSA of India shall make additional standards for the purpose of conducting a safety assessment (Sec. 13 of the Law No. 11,105 of 2005 of Brazil and Sec. 92(2) of the Food Safety and Standards Act 2006 of India).

If the derivative of GM food is already approved, it need not be subjected to safety assessment again in Brazil. So far, the Ministry of Agriculture in China has issued a Safety Certificate for five GM food crops: soybean, corn, tomatoes, rapeseed and cotton, in 2010. Furthermore, it approved 49 laboratories for carrying out safety assessment. The legislature of Brazil highlights the importance of transparency in approval procedures, whereas transparency in the approval process is more or less followed in South Africa and India. As per Sec. 18(2) of the GMO (Amendment) Act 2006, the report of science-based risk assessment shall not be kept confidential, and it shall be disclosed to the general public for the purpose of receiving their comments.

In addition to the safety assessment, safety management is an important aspect for considering an application for an activity concerning GM food and derivatives. The only country that put into effect the measures relating to safety management is South Africa. The Executive Council of South Africa proposed safety management measures along with the application. Regulation 7 is the appropriate standard to prescribe the procedures for safety assessment, but it did not prescribe any standards for safety management; rather, it includes measures on containment and confinement of GMOs, including GM food and derivatives, and rules covering activity such as storage, disposal, cleaning of equipment, monitoring for compliance, restriction of unlawful access, management and maintenance of records, etc. Along with the requisites mentioned in Regulation 7, the applicant has to follow Art. 16 of the Cartagena Protocol on Biosafety in prescribing safety management measures. States need to ensure appropriate measures to prevent unintentional transboundary movement and unauthorised environmental release without conducting a safety assessment to ensure safety and security to human health.

BRICS countries face challenges in developing safety measures because of the complexity in the international scenario. Safety assessment methods, development of guidelines, notification of necessary data for safety assessment and the extent of institutional mechanisms to perform the activities of risk analysis are a few of the challenges. In Brazil, the CNBS is authorised only to review the administrative appeal that is of national interest; in 2008, socioeconomic considerations were taken into account. But the CNBS powers are limited, as it cannot evaluate technical decisions

on GM traits and events approved by the CTNBio. Table 1 below represents the comparison of safety assessment and liability & redress components of National Food Safety Regulations of the BRICS countries.

Table 1: Comparison of Components of Safety Assessment and Liability & Redress of BRICS Countries

	Safety Assessment			Liability & Redress		
	Guiding Principles	**Law**	**Enforcement Agency**	**Guiding Principles**	**Law**	**Enforcement Agency**
Brazil	Precautionary, Science-Based Safety Assessment Techniques and Transparency	Normative Resolution No. 5 of 2008	SA Units under CTNBio[e]	No such issues on GM contamination. Liability principles are fault-based	Arts. 20 & 21 of Law No. 11,105 of 2005	CIBio
Russia	NIL	NIL	NIL	NIL	NIL	NIL
India	Substantial Equivalence, Science-Based Safety Assessment Techniques	Sec. 92(2) of FSSA[a], 2006 & ICMR[b] Guidelines, 2008 (Updated 2012)	GMFSAU[f]	GM contamination is high. Principle of Liability towards GM food is not well established	Secs. 28 and 34 of FSSA, 2006	Food Business Operator
China	Generally Regarded As Safe, Science-Based Safety Assessment Techniques	Administrative Measures for Safety Evaluations of Agricultural GMOs	National Agricultural GMO Biosafety Committee	GM contamination is high. Liability fixed for applicant and Not Regulators	Food Safety Law 2009	Ministry of Agriculture
South Africa	Substantial Equivalence, Science-Based Safety Assessment Techniques	Codex Guidelines, Annexure III of CPB[c], Regulation 4(5) & Sec. 5(c)(i) and Sec. 20(1) of GMO(A) Act[d] 2006+ Ministers shall make Regulations	Authorities established through the Act	GM contamination is high. Liability fixed for Regulators and Users. Liability imposed through consumer legislation	Secs. 5, 7 & 19 of GMO(A) Act 2006 and CPA 2008	User, Registrar, Executive Council

a. Food Safety and Standards Authority of India

b. Indian Council of Medical Research

c. Cartagena Protocol on Biosafety

d. Genetically Modified Organisms (Amendment) Act 2006 of South Africa

e. Safety Assessment Units of National Technical Commission on Biosafety of Brazil

f. Genetically Modified Food Safety Assessment Unit of India

g. General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China

h. Food Safety and Standards Act 2006 of India

5.2. Liability Mechanisms in BRICS Countries

The GM Contamination Register provides instances of conventional crops being contaminated with GM food crops. For example, in 2013, 396 incidents of contamination by GM food crops across 63 countries were reported. Among these, the conventional variety of rice faced the highest amount of contamination, though there was no commercial cultivation of GM rice anywhere in the world market.[61] Bt-63 rice from China and LLRICE (Liberty Link Rice) from the United States showed high contamination with 35%, while maize showed 25% contamination, and soybean and rapeseed both about 10%.[62]

Several countries in Africa, and especially South Africa, have imposed a moratorium and enacted regulations to limit the use of grain derived from GMOs donated at the time of famine as food aid. Even though the population is facing difficulties with the scarcity of food, the regulators refused to import GM crops, considering the safety surrounding the foods.[63] The case of contamination is not only restricted to organic farmers and to the farm fields, it also extends to health effects on consumers. In *Gallagher v. Chipotle Mexican Grill Inc.* (2015), for instance a class action lawsuit was filed by a Californian woman before the United States District Court of Northern California claiming that the food served at a restaurant contained an ingredient of GM, whereas the advertisement was GM free.

In India, traces of cotton seed oil developed from Bt cotton seeds (first introduced in 2002), which were not approved for food use, nevertheless were discovered in human foods.[64] Furthermore, in most parts of India, canola oil imported from Canada is sold in supermarkets without any sensible labelling strategies. There might be the

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61 Genetically Modified (GM) Rice, International Rice Research Institute (IRRI) (Feb. 20, 2018), available at http://irri.org/news/hot-topics/genetically-modified-gm-rice.

62 Price & Cotter 2014.

63 José Falck Zepeda, *Coexistence, Genetically Modified Biotechnologies and Biosafety: Implications for Developing Countries*, 88(5) American Journal of Agricultural Economics 1200 (2006).

64 Committee on Agriculture, Cultivation of Genetically Modified Food Crops-Prospects and Effects, Ministry of Agriculture, India, 37th Report (2011–2012).

chance of contamination, because 74% of the canola cultivation in Canada is through genetically modified techniques. Therefore, contamination causes a significant threat at the time of import as well as at the time of domestic introduction. Moreover, in India, the country is interested in importing GM in the form of additives in the near future. In the process of the transboundary trade of GM foods, many parties could be involved as operators, which necessitates the importance of determination of liability.

Therefore, the question of legal liability for injury arising out of the import and the introduction of GM food emerges as a crucial issue confronting the promotion of GM food and derivatives.[65] In South Africa, liability has been dealt with in two aspects. The ultimate responsibility rested upon the consumer for any accidents involving GMOs before the establishment of the Genetically Modified Organisms Act 1997. Furthermore, the Genetically Modified Organisms (Amendment) Act 2006 plays a significant role in designing liability from the level of regulators to consumers. Liability has been fixed for each and every institution viz. the Executive Council, the registrar and the users concerned. In addition to the liability specified in the GMO Act, liability may arise in other consumer legislation, i.e. the Consumer Protection Act 2008. The producer, importer, distributor or a retailer whoever that may be is liable for any harm that is caused while supplying any unsafe goods, a product failure, defect or hazard in any goods, inadequate and false descriptions on labels, resulting in a loss to the consumer, including death and illness, loss in respect of personal damage or damage to property and economic loss, all of which shall be compensated as per the Consumer Protection Act, 2008.

Article 27 of the Cartagena Protocol on Biosafety was implemented in Arts. 20 and 21 of Law No. 11,105 of 2005 of Brazil with certain exceptions to it. The strict liability doctrine was opposed by the regulators of Brazil, and thus it was agreed to adopt a narrow definition of damage and a narrow definition of the operator. Article 20 of the Law contemplates that those who cause any damage to a third party or the environment while performing the activities concerning GM food and derivatives shall be liable for complete indemnification and reparation. In furtherance, Art. 21 contemplates that any actions or omissions that violate or negate the standards established by the Law shall be considered as administrative violations. In certain instances, CIBio is required to share information with the workers and other communities relating to accidents arising out of the introduction or import of GM food and derivatives.

In India, the current FSSA 2006 does not have any provisions to deal with response measures; rather, it provides food recall procedures in Sec. 28 of the Act. Through this provision, the food business operator is entitled to initiate procedures for withdrawal of marketing food if he believes that the food he has processed, manufactured

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[65] Shanmugam Kabaleeswaran Balashanmugam et al., *South Asian Perspective on Institutional Mechanism for Introduction and Import of GM Crops*, 35(2) Biotechnology Law Report 73 (2016).

or distributed is not in compliance with this Act. The operators shall exercise this provision only after informing consumers of the reasons for withdrawal. In addition to this provision, Sec. 34 of FSSA 2006 empowers designated officers to issue an emergency prohibition notice for imposing a prohibition against the health risk in respect of any food business. Therefore, the current FSSA 2006 does not have any appropriate procedure to deal with the damage caused by the transboundary trade of GM foods or remains silent on incorporating the procedures relating to emergency response measures.[66]

In China, in the case of any accidents during production or processing, the particular organisation involved in the activities concerning GM food shall be liable to take immediate actions. Furthermore, the information relating to the accident has to be communicated to the Administrative Department at the county level. In the case of illegal import, the food business operators shall be punished with a fine. Liability and redress mechanisms have been worked out to a limited extent in South Africa and to some extent in Brazil. But they are not well addressed in India and China. China, India and South Africa experienced the problem of contamination of GM food with the conventional counterpart. Currently, South Africa is interested in relaxing its stringent legislation on GMO and to start importing varieties of corn from the United States and Mexico. Previously, the storage or containment of GM food was not permitted at the ports of South Africa, whereas the Department of Agriculture has decided to allow storage at the ports during the transboundary movement in near future.

The main intention of temporal storage at ports is to encourage and enlarge the volume of GM imports from other nations.[67] While this is the actual situation, there might be a number of threats in relation to human health, animal health and the environment. The commercial cultivation of Bt brinjal has not been approved so far, but there are instances to show that there are transboundary concerns. For instance, there are reports alleging that the border districts of West Bengal (India) have been infiltrated with Bt brinjal seeds from Bangladesh. This brings to light the predicament of these countries on many counts. One aspect is that agricultural production needs to be increased with the support of GM technology. Another aspect is to ensure there are no risks posed in relation to people and the environment.

In the case of South Africa, the provisions relating to liability have been made available to both regulators as well as the applicants. But in the country, as in China, liability provisions have been fixed for the applicants and not the regulators.

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[66] Shanmugam Kabaleeswaran Balashanmugam et al., *Liability Aspects Related to Genetically Modified Food under the Food Safety Legislation in India*, 9(12) International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering 4060 (2015).

[67] Lorraine Chow, *Epic Drought and Food Crisis Prompts South Africa to Ease Restrictions on GMOs*, Eco Watch, 26 February 2016 (Feb. 20, 2018), available at https://www.care2.com/causes/epic-drought-and-food-crisis-prompts-south-africa-to-ease-restrictions-on-gmos.html.

While in India, the liability provisions are available to the regulators for dealing with conventional foods but not for GM foods. Furthermore, the 37th Report of the Committee of Agriculture also highlighted the importance of the liability clause in the form of claim, compensation for any adverse effects on the health of consumers, which needs to be established to address the emergence of GM food and derivatives in India. Contamination concerns in respect of GM foods is not only an issue for the countries engaged in GM cultivation or consumption; it is also an issue in other countries.[68]

In **Russia**, the question of legal liability for injury caused by GM food, right from the manufacturing phase to human consumption, emerges as a crucial issue confronting the promotion of GM food.[69]

In **South Africa**, liability has been dealt with in specific legislation. The ultimate responsibility to prove causation was on the consumer before the introduction of the Genetically Modified Organisms Act 1997. Currently, liability is determined for both regulators and consumers in the Genetically Modified Organisms (Amendment) Act 2006.

In the case of **Brazil**, the provisions in relation to civil liability and administrative liability concerning GM food and derivatives are incorporated in Arts. 20 and 21 of Law No. 11,105 of 2005 with certain exceptions (mentioned earlier). Article 20 of the Law contemplates that the offenders were ultimately liable in the form of indemnification and reparation for any damage caused to a third party or the environment. Furthermore, any actions or omissions that contravene the standards set down in the Law are administration violations and shall be punished by observing precautionary measures to seize the products, suspend the sale of the products and cancellation of the registration, license or authorisation.

In **China**, as mentioned earlier, the organisation involved in the production or processing of GM food shall be liable for any accidents (and responsible to take quick remedial action in accordance with Art. 5 N-KL Protocol on Liability and Redress).

In the case of **India**, the Indian Food Safety and Standards Act 2006 does not have any provisions to deal with response measures, but it does provide food recall procedures under Sec. 28 of the Act[70] as well as empowering designated officers to make public notice of emergency prohibitions, banning high-risk activities of any food business.

The varying standards and approaches towards dealing with damage is a major bottleneck in the development and realisation of an international civil liability system for GM foods. Moreover, the BRICS countries do not have a comprehensive liability

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68 In the perspective of developing countries, China, India and South Africa are the top countries to adopt and commercialise GM crops. China and South Africa already are in the process of commercialising GM food crops, whereas India is willing to introduce GM food crops for commercialisation soon.

69 Balashanmugam et al. 2015.

70 *Nestle India Limited v. The Food Safety and Standards Authority of India and Ors.*, MANU/MH/1937/2015.

policy that applies to liability and damages arising out of the domestic introduction and import of GM food and derivatives.

After the thorough analysis on the development of the liability framework in the BRICS countries, the result is that the provisions available in the existing laws are not sufficient to deal with the damage, such as the long-term effects concerning the manufacturing to consumption of GM food and derivatives. The domestic legislation or the machinery in these countries does not address many crucial issues: the definition of damage, parties to the suit, determination of liability, proof of damage, exemption of liability and expiration of liability concerning suit for damages. Therefore, the situation requires either an amendment to the existing legislation or the incorporation of a specific liability law as in the case of the European Union to deal with the damage in relation to production and consumption of GM food and derivatives.

Conclusion

The promotion of GM food crops in a large number of developing countries is a motivation to understand comparative aspects of adopted regulatory frameworks. Comparing and contrasting the legislation and regulations in the case of the BRICS countries reveals differences in their extent of development. Most BRICS countries lack appropriate procedures for safety assessment, and the institutional mechanism is not sufficient to perform the functions of safety evaluation and safety management. Some countries follow the safety methods recognised by the Codex Alimentarius Commission, whereas others the procedures given in Annexure III of the Cartagena Protocol on Biosafety.

The need to implement international agreements and to adhere to national policy considerations is not reconcilable. Further, transboundary considerations on GM crops necessitate that states choose among options: for example, whether to set down legal regulations to deal with transboundary trade in GM and, another, which path to take where existing legislation can be interpreted.

The development of an institutional mechanism for GM foods, compared to that of conventional foods, is still in the development stage in the BRICS countries. While more than two decades have passed since the introduction of GM food crops in some of the BRICS countries, transborder aspects such as the functions of the customs authorities have still not been addressed. This assumes importance in light of the reports of the rise in GM contamination. The differences in standards and approaches in dealing with damages are a concern in the international civil liability system.

As noted above, the merits, or otherwise, of such measures had political overtones in the past, but recent developments demonstrate that states have a broader scope to decide where to strike a balance between international commitments *vis-à-vis* national interest/public policy. This assumes importance due to the concept of

mutual recognition. It is imperative for states to begin to consider mutual recognition, considering the transboundary nature of GM crop products. At the same time, it is important that national regulators act in a socially responsible manner. Such determination is by regulations authorised by the domestic laws.

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ANTI-CORRUPTION IN THE BRICS COUNTRIES

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Corruption is a global challenge which may impact negatively on economic growth and sustainable development of the BRICS countries (Brazil, Russia, India, China and South Africa). All of these five countries have been held back by corruption, in varying ways, but their rising importance to the global economic system ensures the spotlight now shines brighter than ever on them. Yet some of the BRICS countries have handled the issue better than others. According to Transparency International's Corruption Perception Index (2017), in the BRICS bloc of major emerging economies, South Africa is ranked the best (71st), followed by China (77th) and India (81st), with Brazil is 96th and Russia 135th out of 180 countries. These five nations support the strengthening of international cooperation against corruption, including through the BRICS Anti-Corruption Working Group, as well as on matters related to asset recovery and persons sought for corruption. This article provides a detailed analysis of anti-corruption legislation of four of the BRICS countries (Brazil, South Africa, China and India), as well as a brief overview of the efforts of these countries in the fight against corruption.

Keywords: anti-corruption; bribery; crime; law; liability; transparency.

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Introduction

The story of the BRICS countries (Brazil, Russia, India, China and South Africa) begins with Goldman Sachs chief economist Jim O'Neill, who wrote a paper in 2001 arguing that these countries (originally the BRIC countries, for South Africa did not become a member of the bloc until 2010) were the emerging superstars most likely to dominate the 21st century globalized economy. The high economic growth of the BRICS economies and their demographic dividends indicate a structural edge possessed by the BRICS economies relative to the rest of the world. In 2015, with 53.4 percent of the world's population, the BRICS countries accounted for a total nominal GDP of US$16.92 trillion – equivalent to 23.1 percent of global GDP. In the same year, BRICS accounted for 19.1 percent of world exports and, between 2006 and 2015, intra-BRICS trade increased 163 percent, from US$93 billion to US$244 billion.[1] BRICS can be broken into two groups, those that took advantage of globalization's march to integrate themselves into global supply chains (primarily China and India) and those that took advantage of globalization to sell their abundant natural resources (primarily Brazil, Russia and South Africa).

All of these five countries have been held back by corruption, in varying ways, but their rising importance to the global economic system ensures the spotlight now shines brighter than ever on them. Yet some of the BRICS countries have handled this issue better than others.

In Transparency International's (TI) Corruption Perceptions Index 2016 South Africa fared the best among the BRICS countries at 64th place, but its score of 45 is still below the midpoint. Nevertheless, South Africa has improved its score steadily from 42 in 2012. Brazil, China and India are tied at 79th place with a score of 40; Brazil and China have had their scores fluctuate up and down since 2012. But India has

[1] Geethanjali Nataraj, *India Takes the Lead in BRICS*, East Asia Forum, 8 October 2016 (Mar. 4, 2018), available at http://www.eastasiaforum.org/2016/10/08/indias-takes-the-lead-of-brics/.

made consistent gains over its score of 36 in 2012. Russia came in at 131st place with a score of 29, well below the global average of 43.[2]

According to Transparency International's Corruption Perception Index (CPI) for 2017, among the BRICS bloc of major emerging economies, South Africa is ranked the best (71st out of 180 countries), followed by China (77th) and India (81st), while Brazil is ranked 96th and Russia 135th.[3] The Transparency International's CPI ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).

Significant success in the fight against corruption was achieved by China. At the 19th National Congress of the Chinese Communist Party, held between 18 and 24 October 2017, the Central Commission for Discipline Inspection (CCDI), China's top anti-graft watchdog, reported its work over the past five years. Since President Xi Jinping came to power in 2012, the CCDI has undertaken a massive campaign against corruption and extravagance within the Communist Party, reportedly jailing or otherwise punishing nearly 1.4 million party members. From December 2012 to October 2017, 18 sitting Central Committee members of the Chinese Communist Party – almost 9 percent of the total – were detained for alleged corruption. To date, 6 have been formally tried, convicted and sentenced to jail terms ranging from 12 years to life. They are among the highest profile victims of Xi Jinping's historic anti-corruption campaign, which has ended the careers of more than 150 government ministers, army generals and state-owned enterprise executives (*see* Fig. 1).[4]

China has stepped up efforts in international cooperation to hunt down corrupt officials. Up to the present time, China has signed extradition treaties with 48 countries including France, Spain and Italy, and engaged in 15 multilateral anti-graft mechanisms with organizations including the UN, the Asia-Pacific Economic Cooperation (APEC), the Group of Twenty (G20) and the BRICS grouping. China chaired the Anti-Corruption Working Group of the G20 in 2016, and a series of significant achievements have been accomplished under China's leadership.[5]

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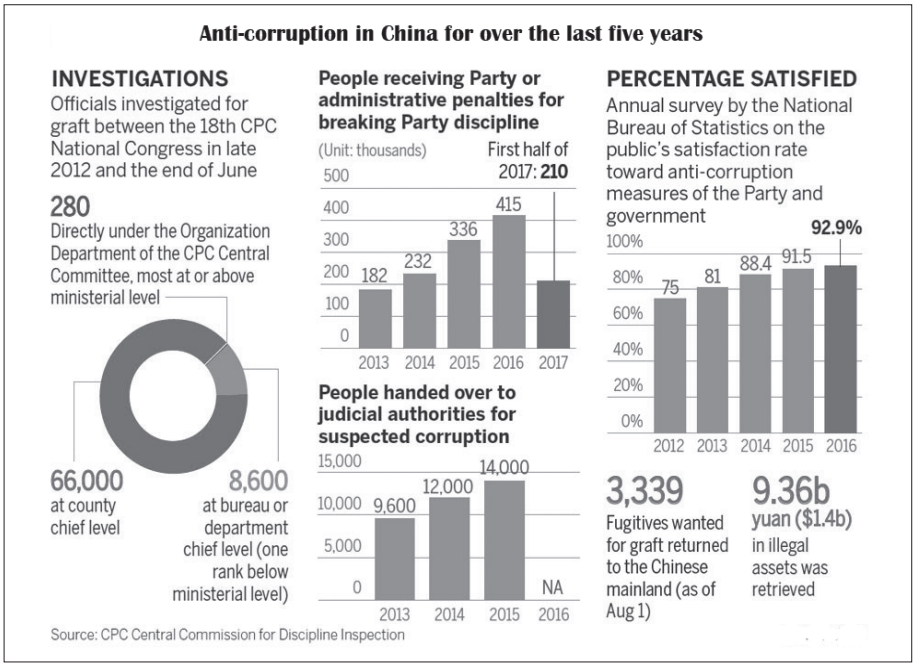
2 Corruption Perceptions Index 2016, Transparency International (Mar. 4, 2018), available at https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

3 Corruption Perceptions Index 2017, Transparency International (Mar. 4, 2018), available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

4 Tom Mitchell, *China Anti-Corruption Purge Hits Central Committee Members*, Financial Times, 18 October 2017 (Mar. 4, 2018), available at https://www.ft.com/content/51ea866e-b314-11e7-a398-73d59db9e399.

5 Lin Xuedan, *China Ramps Up Overseas Hunt of Fugitive Officials*, Kabar, 6 March 2017 (Mar. 4, 2018), available at http://kabar.kg/eng/news/peoples-daily-china-ramps-up-overseas-hunt-of-fugitive-officials/.

Fig. 1: Anti-Corruption in China for the Last 5 Years



A total of 2,566 fugitives, including 410 former officials and 39 on the 100 most-wanted list, have been extradited or repatriated to China from 72 countries since 2014. Most of the fugitives had fled to developed countries, including Canada, the United States and Australia, but a few also took refuge in Africa. Also, 8.6 billion yuan (US$1.2 billion) in illegal assets have been seized. The anti-graft campaign has effectively stopped corrupt officials from fleeing overseas. The number of those who fled abroad dropped significantly over the period 2014 –2016, from 101 to 19.[6]

In addition, a new anti-corruption agency, the National Supervision Commission, will be set up under a new law and will share responsibility and personnel with the CCDI in 2018. The new agency is aimed at broadening the anti-corruption campaign to all public servants exercising public power, beyond the CCDI's jurisdiction over only Party members.

For the past three years, Brazil has been gripped by a scandal which started with the state-owned oil company Petrobas and grew to entangle people at the very top of business – and even presidents. In January 2018, an appeals court panel upheld a corruption conviction against former Brazilian president Luiz Inácio Lula da Silva,

[6] Xinhua, *China Captures 2,566 Fugitives Abroad in Anti-Graft Campaign*, China Daily, 25 March 2017 (Mar. 4, 2018), available at http://www.chinadaily.com.cn/china/2017-03/25/content_28678703.htm.

who had been sentenced by a lower court, and increased the penalty from nine and a half years to twelve years and one month. The year before, Silva was found guilty of receiving a seaside duplex apartment worth approximately US$755,000 from a construction company called OAS. Prosecutors said the gift was part of a multi-billion dollar bribe scheme controlled by the ex-president at Petrobras.[7]

In India, the BJP-led National Democratic Alliance came to power in the 2014 Lok Sabha elections on the main platform plank of fighting against corruption. Criticizing the previous Congress-led United Progressive Alliance government over a string of corruption cases such as 2G spectrum, coal allocation and CWG scams in the run-up to the elections, Prime Minister Narendra Modi's refrain had been to check corruption if his government came to power. Judging by a survey report from Transparency International, it is clear that Prime Minister Modi's efforts have started to bear fruit. The report "People and Corruption: Asia Pacific – Global Corruption Barometer" concluded that India was the most corrupt country in Asia; it also concluded that the people were optimistic about the efforts being made by the government to root out corruption. Nearly seven in ten people who had accessed public services had to pay a bribe (69 percent) in India.[8]

According to the EY Europe, Middle East, India and Africa (EMEIA) Fraud Survey 2017, India ranks ninth among 41 countries in bribery and corrupt practices in businesses. Nearly 78 percent of respondents said that bribery and corrupt practices happen widely in business. The ranking has improved marginally from the survey findings in 2015 when India was in sixth position, owing to better regulatory scrutiny and emphasis on transparency and governance.[9]

Former South African president Jacob Zuma, 75, will face charges of fraud, racketeering, corruption and money laundering, according to the National Prosecuting Authority. The charges relate to a US$2.5 billion arms deal in the 1990s, when Zuma was deputy president. In a separate case, South African authorities are seeking to arrest members of the Gupta business family, which allegedly used its connections to Zuma to influence government cabinet appointments and win state contracts. Additionally, a judicial panel is preparing to view allegations of corruption at high levels of the South African government during Zuma's years in office.[10]

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[7] Dom Phillips, *Brazilian Court Upholds Corruption Conviction for Ex-President Lula*, The Guardian, 24 January 2018 (Mar. 4, 2018), available at https://www.theguardian.com/world/2018/jan/24/brazilian-court-upholds-corruption-conviction-for-ex-president-lula.

[8] Kumar Shakti Shekhar, *India Most Corrupt Nation in Asia, Most Indians Believe PM Modi is Checking It*, India Today, 6 June 2017 (Mar. 4, 2018), available at https://www.indiatoday.in/india/story/india-most-corrupt-nation-in-asia-pm-narendra-modi-bjp-981310-2017-06-06.

[9] EMEIA Fraud Survey 2017, at 4, 6 (Mar. 4, 2018), available at http://www.ey.com/Publication/vwLUAssets/EY_-_EMEIA_Fraud_Survey_2017/$FILE/ey-emeia-fraud-survey-2017.pdf.

[10] Samuel Rubenfeld, *Corruption Currents: South Africa Charges Former President Zuma*, The Wall Street Journal, 16 March 2018 (Mar. 4, 2018), available at https://blogs.wsj.com/riskandcompliance/2018/03/16/corruption-currents-south-africa-charges-former-president-zuma/.

Despite the regular improvement in anti-corruption legislation in Russia,[11] law enforcement practice in this area is changing only slowly. The share of corruption crimes in the total volume of registered crimes does not exceed 1.5 percent, which amounts to around 20 crimes per 100,000 people. Among the categories of corruption crimes, bribery and fraud prevail. In 2016, 32,900 corruption crimes were registered (+1.4% by 2015), and the amount of material damage they caused exceeded 78 billion rubles. However, in 2017 the number of corruption crimes decreased by 10 percent (to 29,600), and the amount of damage by 49.5 percent (to 39.6 billion rubles).[12] The observed tendency to reduce the number of recorded corruption crimes[13] did not reflect the real scale of this phenomenon, given its high latency. This conclusion correlates with the assessment of Transparency International and sociological surveys.

In order to get the full picture of the existing anti-corruption policy of the BRICS countries, let us turn to an analysis of their legislation.

1. Anti-Corruption in Brazil

Brazil has signed the following international conventions in the area of anti-corruption: the United Nations Convention against Corruption was ratified on 18 May 2005 and promulgated through Presidential Decree No. 5,687 of 31 January 2006 (UN Convention). The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was ratified on 15 June 2000 and promulgated by Presidential Decree No. 3,678 of 30 November 2000 (OECD Convention).

The main laws relating to anti-bribery and anti-corruption in Brazil are: Decree-Law No. 2848 of 7 December 1940 (Criminal Code), Law No. 8,429 of 2 June 1992 (Administrative Improbity Law) and Law No. 12,846 of 1 August 2013 (Anti-Corruption Law). Such laws cover not only anti-bribery and anti-corruption, but also a number of related crimes and violations, such as bid rigging and fraud in government contracts. Note that Brazilian law does not adopt corporate criminal liability for corruption-related offences. The liability of companies for such offences arises in the civil and administrative law spheres.

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[11] *See*, *Сухаренко А.Н.* Антикоррупционная политика России: состояние и проблемы // Юридический мир. 2013. № 5. С. 15–19 [Alexander N. Sukharenko, *Anti-Corruption Policy of Russia: State and Problems*, 5 The Legal World 15 (2013)]; *Куракин А.В., Сухаренко А.Н.* Противодействие коррупции в финансово-бюджетной сфере // Российская юстиция. 2017. № 1. С. 48–52 [Alexey V. Kurakin & Alexander N. Sukharenko, *Counteraction to Corruption in the Financial and Budgetary Sphere*, 1 Russian Justice 48 (2017)].

[12] Состояние преступности в России за 2017 г. [*The State of Crime in Russia for 2017*] (Moscow: Ministry of Internal Affairs of the Russian Federation, 2018).

[13] *Илий С.К.* Анализ основных тенденций коррупционной преступности в России // Всероссийский криминологический журнал. 2016. № 3. С. 531–543 [Sergey K. Ilii, *Analysis of the Main Trends of Corruption Crime in Russia*, 3 All-Russian Criminological Journal 531 (2016)].

There are no official guidelines regarding the interpretation and enforcement of the Criminal Code, the Administrative Improbity Law and the Anti-Corruption Law by Brazilian courts. In 2015, the Federal Public Prosecutor's Office (MPF) issued the MPF Calculation Manual on Fighting Corruption, with recommendations to federal prosecutors on how to calculate damages and fines when filing lawsuits to enforce the Administrative Improbity Law.

Concerning the Anti-Corruption Law, the Brazilian Federal Executive Branch issued Decree No. 8,420 of 18 March 2015 (Anti-Corruption Decree), regulating, among other things, the sixteen criteria to be used by Brazilian authorities to assess anti-corruption compliance programs when enforcing the Anti-Corruption Law in administrative proceedings. The Anti-Corruption Decree also contains guidance on the calculation of administrative fines by authorities, in the form of percentages that authorities can add or subtract based on certain findings. The final percentage represents a share of a company's gross revenues in the year preceding the filing of the administrative proceeding, in order to reach the amount of the fine.

The Federal General Comptroller's Office (currently known as the Ministry of Transparency, Auditing and General-Comptroller or CGU) has also published certain non-binding guidelines on matters related to the administrative enforcement of the Anti-Corruption Law and corruption prevention in the public and private sectors. In 2016, the CGU issued the "Manual on the Administrative Liability of Legal Entities" to provide details on the administrative proceedings to enforce the Anti-Corruption Law. The Manual includes an overview of the legal principles applicable to administrative proceedings, details in the procedural rules applicable to the enforcement of the Anti-Corruption Law, and the calculation of applicable penalties.[14]

Bribery is defined in Sec. 333 of the Criminal Code as, "to promise, offer or give any undue advantage to a public agent in order to make him do, omit or delay any official act." The Criminal Code does not contain a specific definition of a bribe or of an undue advantage. Due to the language adopted by the Criminal Code, Brazilians refer to this crime as "active corruption."

In 2002, because of Brazil's signing of the OECD Convention, the Criminal Code was amended to include the crime of active corruption of a foreign government official in connection with an international commercial transaction (Sec. 337-B). The definition of this crime mirrors the definition of active bribery described above.

The Administrative Improbity Law sets forth that an improbity violation occurs if a public agent receives, for oneself or to a third party, money, a movable or unmovable asset, or any other economic advantage, directly or indirectly, on a basis of commission, percentage, gratification or gift, from one who has a direct or indirect interest that may be attained or supported by an action or omission related to the responsibilities of the public agent (Sec. 9, item I of the Administrative Improbity Law).

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[14] *Anti-Corruption in Brazil* in *Anti-Corruption 2018* (London: Chambers, 2018).

The Anti-Corruption Law establishes that a violation against the government occurs if companies "promise, offer or give, directly or indirectly, an undue advantage to a public agent, or to a related third party" (Sec. 5, item I). Violations also include to finance, cover the costs of, sponsor or in any way subsidize, the undue advantage (item II) or to use an intermediary to conceal the real identity of the beneficiary of the conduct (item III). The Anti-Corruption Law does not define undue advantage.

Brazilian law does not contain exceptions for facilitation payments. The receipt of a bribe is also a crime in accordance with the Criminal Code: "to request or receive, for oneself or to a third party, directly or indirectly, even outside of office or before entering it, but in connection to it, an undue advantage, or accept a promise of such advantage" (Sec. 317). Due to the language adopted by the Criminal Code, Brazilians refer to this crime as "passive corruption."

The failure to prevent bribery is not an autonomous offence. However, the failure to prevent bribery may amount to a bribery offence when one has a legal obligation of care, protection or surveillance, when one has in some way undertaken the responsibility to prevent the result, or when one has created the risk of the occurrence of the crime with one's previous behavior. The failure (omission) is relevant for criminal purposes only if the agent refrains, through fault or willful misconduct, from taking action when the action is feasible for him or her.

Brazilian law does not define, criminalize or establish particular criminal or civil sanctions in respect of commercial or private bribery, although in certain specific circumstances the practice can constitute the crimes of larceny or unfair competition.

Larceny is defined in Sec. 171 of the Criminal Code as to "obtain, for oneself or for others, an unlawful advantage, to the detriment of another person, inducing or maintaining someone in error, by means of artifice, deception, or any other fraudulent means." Unfair competition is defined in Law No. 9,279 of 14 May 1999 (Industrial Property Law) as follows: "A crime of unfair competition occurs when someone: …IX – gives or promises money or other benefit to an employee of a competitor, so that the employee, disregarding his duties, provides him with an advantage" (Sec. 195, item IX). In the civil sphere, commercial or private bribery may be treated in a civil lawsuit (or employment lawsuit, as the case may be) as a wrongful act that can result in compensation of damages pursuant to Law No. 10,406 of 10 January 2002 (Civil Code).

Bribery is a crime that requires willful intent, by either act or omission of an individual (Sec. 18, § 1 of the Criminal Code). The motive behind the bribery offense does not need to be proven, except with respect to the part of the definition requiring that the bribe is promised, offered or given by the agent to induce a certain behavior in the public agent. The prosecution does not need to prove that the individual gained anything from bribing the public agent or that the public agent actually made, omitted or delayed an official act. Nonetheless, if the public agent does

perform, omit or delay any official act, disregarding a duty, the judge may aggravate the sentence by one third (Sec. 333, the sole para. of the Criminal Code).

With respect to civil infractions, the Administrative Improbity Law requires an agent, a cause and the illegal result (unlawful enrichment of public officials, harm to the principles of government or to public assets), combined with willful intent or gross negligence, as the case may be. In order to apply to a company or private individual, the Administrative Improbity Law requires that the company or individual either induces or colludes with the public agent, or obtains a benefit from the infraction (Sec. 3 of the Administrative Improbity Law).

Pursuant to the Anti-Corruption Law, an infraction occurs if the promise, offer or payment of an undue advantage is made to a public official or a related third party in the interest or to the benefit of the corporate entity, whether exclusive or not (Secs. 2 and 5 of the Anti-Corruption Law). Note that the Anti-Corruption Law became effective on 29 January 2014 (Sec. 31 of the Anti-Corruption Law) and therefore should not apply to violations that took place before that date. The definition of domestic public official is provided by the Administrative Improbity Law as "anyone who performs, even if temporarily or without pay, by election, appointment, designation, hiring or any other type of vesting or bond, a mandate, an office, an employment, or a function" in any governmental entity or government-controlled entity, by any of the federal entities or branches of Brazil, as well as public foundations or state-owned or state-controlled companies (Sec. 2 of the Administrative Improbity Law).

The statute of limitations for the crime of bribery is sixteen years (sec. 109, item II of the Criminal Code). According to the Criminal Code, the sixteen years start to count from the date of the crime, which is whenever the crime is completed in all its aspects (Sec. 111, item I).

The statute of limitations for violations of the Administrative Improbity Law is either: (i) five years counting from the end of the term of office of the implicated public official; longer, if the statute of limitations for legal disciplinary measures applicable to the public official is longer; or (ii) if the affected governmental entity renders accounts, five years counting from the final date of the rendering of accounts (Sec. 23, items I to III of the Administrative Improbity Law).

The statute of limitations for the infractions of the Anti-Corruption Law is five years. The five years start to count from the date the public authority becomes aware of the violation, or in case of a permanent or continued infraction, from the date the illegal activities have ceased (Sec. 25 of the Anti-Corruption Law). The Criminal Code applies to any crime performed on Brazilian territory (Sec. 5), and to certain crimes performed outside of Brazil, including the crime of corruption of a foreign government official in connection with an international commercial transaction. The Administrative Improbity Law applies only in Brazil and with respect to Brazilian public agents. The Anti-Corruption Law applies both to domestic public agents and to foreign public agents with an extraterritorial reach, as it applies to infractions

committed by Brazilian corporate entities against foreign governments, even when committed abroad (Sec. 28).

Only individuals can be held liable for crimes in connection with bribery and corruption in Brazil. The Brazilian Constitution provides that "no punishment shall pass over the individual that received the sentence, but the damages and the loss of assets may, in accordance to the law, be extended and enforced against successors until the limit of the transferred assets" (Sec. 5, item XLV of the Constitution of the Republic of Brazil).

The penalties on conviction for bribery, including active corruption and passive corruption, are closed imprisonment of between two and twelve years and fines (Secs. 317 and 333). The penalties on conviction for bribery in an international commercial transaction are closed imprisonment of between one and eight years and fines (Sec. 337-B). If the public agent (domestic or foreign) does perform, omit or delay any official act, disregarding a duty, the judge may aggravate the sentence of the agent and of the public agent by a third (Sec. 317, § 1; Sec. 333, sole para.; and Sec. 337-B, sole para.). If the public agent performs or does not perform or delays an official act, disregarding a duty, at the request or influence of someone else, the penalty for the public agent is semi-open imprisonment of between three months and one year, or a fine (Sec. 317, § 2).

The sanctions that are set forth in the Anti-Corruption Law are the following: administrative fines ranging from 0.1% to 20% of the entity's gross revenue in the year prior to the initiation of the administrative proceeding, which should never be less than the advantage amount obtained through the unlawful act. If it is not possible to estimate the gross revenue, such fine shall be fixed in an amount between BRL6,000 and BRL60 million.

The Anti-Corruption Law also provides an administrative reputational sanction consisting of the obligatory extraordinary publication of the condemnatory decision, at the implicated entity's own expense, in all of the following: a widely circulated newspaper within the area where the infraction was committed and where the legal entity does business, or in a national newspaper; a public notice in the entity's place of business, where it can be seen by the public, for a minimum of 30 days; and a highlighted position on the website of the entity, for 30 days.

2. Anti-Corruption in South Africa

South Africa is a signatory state to the following international conventions: the United Nations Convention against Corruption (ratified by South Africa in 2004); the Organization for Economic Cooperation and Development Convention against the Bribery of Foreign Public Officials in International Business Transactions (signed by South Africa in 2007) and the African Union Convention on Preventing and Combating Corruption (ratified by South Africa in 2005).

The main legislation relating to anti-bribery and anti-corruption in South Africa is as follows:

- the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PCCA), whose objective is to create measures and standards for the prevention of corrupt activities in the public and private sectors;
- the Prevention of Organized Crime Act 121 of 1998 (POCA), whose objective is to combat money laundering and organized crime, and to place an obligation on certain persons to report specific information relating to known or suspected criminal activities; and the Financial Intelligence Centre Act 38 of 2001 (FICA), whose objective is to establish a strong regulatory framework for the prevention and combating of money laundering and financial terrorism, i.e. the financing of terrorist and related activities.[15]

It is important to note that the PCCA is the primary piece of legislation dealing with corrupt activities and offences in South Africa.

Section 3 of the PCCA creates one general offence of corruption, and Secs. 4 to 16 create several specific offences relating to corruption and bribery, including the offence of corrupt activities relating to public officers, foreign public officers, agents, members of a legislative or prosecuting authority, judicial officers, witnesses and evidential material, contracts, procuring and withdrawal of tenders, and unauthorized gratification (i.e. advantage or benefit) by or to a party in an employment relationship. The underlying principle of all of these offences is that an offence is committed when any person, directly or indirectly, improperly offers any benefit to any other person to influence that person in the performance of his or her duties or functions, or to induce that person to do or not do anything.

The PCCA applies to the actions of corrupt public officials (public officials such as, for example, employees of a public body) as well as to corrupt activities that occur in the private sector, such as the offer or receipt of an unauthorized gratification by any person who is a party to a contractual or employment relationship, in a manner which can improperly influence the execution and procurement of contracts. As such, a person acting in this manner will be found guilty of an offence under Sec. 12 of the PCCA.

The PCCA defines a public official or officer as any person who is a member, officer, employee or servant of a public body, and includes any person in the public service or any person receiving any remuneration from public funds or, where the public body is a corporation, the person who is incorporated as such. However, the definition does not include a member of the legislative authority, a judicial officer or a member of the prosecuting authority.

The PCCA accordingly makes it an offence for public officials to accept or offer any gratification in order to act in a manner that may amount to abuse of power

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[15] *Anti-Corruption in South Africa* in *Anti-Corruption 2018*, *supra* note 14.

or unauthorized exercise of power. Section 4 of the PCCA provides that "an act" by a public official includes: voting at any meeting of a public body; performing or not adequately performing any official functions; expediting, delaying, hindering or preventing the performance of an official act; aiding, assisting or favoring any particular person in the transaction of any business with a public body; aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favor of any person in relation to the transaction of any business with a public body; showing any favor or disfavor to any person in performing a function as a public officer; diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or exerting any improper influence over the decision-making of any person performing functions in a public body.

The PCCA does not contain a specific reference to the term "bribery" but provides instead (in Sec. 3) that any person who directly or indirectly accepts, gives, agrees or offers to accept or give any "gratification," whether for the benefit of himself or herself or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner that amounts to the illegal misuse or unauthorized exercise of any power, function or duties, or that amounts to the abuse of authority, breach of trust or improper inducement to undertake to do or not to do anything, is guilty of the offence of corruption. This is the general offence of corruption created by Sec. 3 of the PCCA.

The term "gratification" is very widely defined in the PCCA, to include the following: money, whether cash or otherwise; any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage; the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage; any office, status, honor, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation; any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; any forbearance to demand any money or money's worth or valuable thing; any other service or favor or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, including the exercise or the forbearance from the exercise of any right or any official power or duty; any right or privilege; any real or pretended aid, vote, consent, influence or abstention from voting; or any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

As noted above, the term "gratification" is very widely defined under the PCCA, and extends to cover hospitality or promotional expenses, if such expenses result in a person being improperly influenced or induced to undertake to do or

not do anything. It is, however, generally accepted that reasonable hospitality or promotional expenditures may be acceptable, particularly in a corporate or business environment. In the context of hospitality and promotional expenses, it is necessary to consider the nature of the gift or hospitality offered or given, to whom it is given, and the time and circumstances under which it is being offered or given in order to determine whether or not an offence of corruption is committed within the meaning of a general offence of corruption as defined in Sec. 3 of the PCCA.

Facilitation payments are not mentioned explicitly in the PCCA but, given that the term "gratification" includes "money, whether in cash or otherwise including any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage," facilitation payments are likely to qualify as corruption where such payments are offered, given or accepted by any person in a manner that amounts to the improper influence or inducement to do or not to do anything.

The general offence of corruption created by Sec. 3 of the PCCA makes provision not only for a gratification that is offered or given to a person but also a gratification that is accepted by any person, whether for his or her benefit or for the benefit of another person. Therefore, the receipt of a bribe (or gratification) constitutes an offence of corruption.

Furthermore, under Sec. 4 of the POCA, a person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and who enters into an agreement or engages in any arrangement or transaction with anyone in connection with that property or performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect of enabling or assisting the commission of an offence either by concealing the nature of the property or by avoiding prosecution, shall be guilty of an offence.

Failing to prevent bribery is an offence, although this is achieved indirectly through the creation of a reporting duty in the PCCA. Section 34 of the PCCA imposes an obligation to report corrupt transactions by providing that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence of corruption, including the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of ZAR100,000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation. A person who fails to comply with the duty to report corrupt activities under Sec. 34 of the PCCA is guilty of an offence.

It should be noted that an additional reporting obligation is created under FICA, Sec. 29(1)(a) of which requires a person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that the business has received or is about

to receive the proceeds of unlawful activities, to report to the Financial Intelligence Centre – within the prescribed period of time after the knowledge was acquired or the suspicion arose – the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Section 10 of the PCCA makes it an offence to improperly offer or receive gratification in an employment relationship. Furthermore, Sec. 12 of the PCCA extends the scope of the Act to private contractual relationships in terms of which any person who directly or indirectly accepts, gives, agrees or offers to accept or give any gratification, in order to improperly influence in any way the promotion, execution or procurement of any contract, is guilty of the offence of corrupt activities relating to contracts.

The Guide expresses the relevant principles by stating, quite simply, that it is a crime for anyone to offer or accept money or favors to influence who gets a contract, or to dishonestly fix the price or other money relating to a contract.

Section 35 of the PCCA provides that the Act applies to any activity that occurs outside of South Africa, even if the activity in question is not an offence in the place it is committed.

The PCCA will find application where the person to be charged with an offence under the Act: is a South African citizen; is ordinarily resident in South Africa; was arrested in South Africa; is a company, incorporated or registered under any law in South Africa; or is anybody of person, corporate or unincorporated in South Africa.

The Act furthermore provides that an activity that constitutes an offence in terms of the PCCA and that was committed outside of South Africa by an individual who does not fall into the categories listed above shall nevertheless be deemed to have been committed in South Africa if the activity concerned affects or is intended to affect a public body, a business or another person in South Africa; if the person who committed the offence is found to be in South Africa; and if that person is for one or another reason not extradited by South Africa.

Finally, the Act provides that an alleged offence committed outside the Republic by a foreign official shall be deemed to have been committed in the Republic of South Africa.

The Criminal Procedure Act 51 of 1977 makes provision for the prosecution of corporations and members of associations. Section 332 of the Act provides that, for purposes of imposing criminal liability on a corporate body, any act performed with or without intent, by or on the instruction of or with permission – express or implied – given by a director or servant of that corporate body in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed by that corporate body. The effect of this is that the corporate body in question will be held liable for acts or omissions committed by its directors or servants.

Depending on the type of offence committed and the monetary value of the offence, a person convicted under the PCCA may be liable for a fine or imprisonment. Section 26 of the PCCA gives authority to the High Court, Magistrate's Courts and Regional Courts to impose a fine or imprisonment up to a period prescribed by the PCCA; the High Court has the authority to impose up to a period of life imprisonment. In addition to any fine a court may also impose, a fine equal to five times the value of the gratification involved in the offence may be imposed as well. The prohibition applies to both individuals and companies.

Where an offence under the PCCA relates to corruption pertaining to private commercial contracts or to the procuring or withdrawal of tenders, a court may order the particulars of the offender to be placed on the Register of Tender Defaulters. The Register is held within the office of the National Treasury and is a public document, whose purpose is to inform the public sector of individuals or entities that have been convicted of corrupt activities, and to prevent them from supplying goods and services to the public sector while listed on the Register.

Under the PCCA, the National Director of Public Prosecutions has the power to initiate investigations if he or she believes that a person may be in possession of information relevant to the commission or intended commission of an alleged offence, or that any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence. The aforesaid investigation may be instituted prior to any civil or criminal proceedings.

3. Anti-Corruption in China (PRC)

The PRC is a party to the United Nations Convention against Corruption. The primary anti-corruption legislation in China include the Criminal Law (as amended from time to time) and the Anti-Unfair Competition Law (AUCL). Other legislation (e.g. the Charity Law) also contain provisions relating to anti-corruption. Detailed rules on anti-corruption are set out in subsidiary regulations, judicial interpretations and prosecution guidelines.

In relation to the Criminal Law, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) have, respectively and jointly, published various guidelines and interpretations relating to criminal actions against corruption activities, including, e.g., the Interpretation of Several Issues concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery jointly published by the SPC and SPP in 2016 (2016 Interpretation), the Interpretation of Several Issues concerning the Application of Law in Handling Criminal Cases of Bribery jointly published by the SPC and SPP in 2012 (2012 Interpretation), and the Opinions on Several Issues concerning the Application of Law in Handling Criminal Cases of Commercial Bribery jointly published by the SPC and SPP in 2008 (2008 Opinions).[16]

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[16] *Anti-Corruption in China* in *Anti-Corruption 2018*, *supra* note 14; *A Guide to Anti-Corruption Legislation in Asia Pacific* 13–21 (5th ed., London: Clifford Chance, 2018).

A bribe under the Criminal Law refers to money or property in kind provided in exchange for "illegitimate benefits." It also refers to money or property in kind solicited or received by the relevant individuals or entities for the purpose of securing or providing benefits for others by taking advantage of their positions. The 2016 Interpretation further clarifies that bribes can take the forms of cash, property and other benefits such as house renovation, discharge of debts, membership services and travel.

Under the AUCL and the AIC Measures (which only addresses private-sector bribery), a bribe may take the form of money or property in kind provided to an entity or an individual under the guise of promotional expenditures, advertising fees, sponsorship, research fees, service fees, consulting fees, commissions, reimbursement of out-of-pocket expenses, or other forms such as overseas trips.

Whether hospitality and promotional expenditures are treated as bribes depends on their nature, value and purpose. For example, under the 2008 Opinions, whether a gift is treated as a bribe or a legitimate benefit depends on the following factors: the background against which the gift is provided (e.g. whether the parties are relatives or friends, and the history of their personal relationship); the value of the gift; the timing, form and context of the gift; and whether the gift provider requests the receiver to act in a certain way in his or her relevant position or whether the receiver takes advantage of his or her position in the relevant entity.

Similarly, the AIC Measures exempt advertising gifts of nominal value provided in accordance with the relevant market practice but prohibit bribes offered under the guise of promotional expenditures. In practice, excessive or lavish hospitality/promotional expenditures may probably be regarded as bribes, depending on the overall circumstances. There are no specific provisions or exemptions under the Criminal Law or the AUCL in relation to facilitation payments.

The receipt of a bribe is an offence under both the Criminal Law and the AUCL. There are no specific provisions penalizing the failure to prevent bribery under either the Criminal Law or the AUCL. Private sector bribery is prohibited under PRC law. Under Art. 163 of the Criminal Law, it is a criminal offence for any individual from a private entity (or any non-public official from a public entity) to solicit or accept money or property in kind for the purpose of securing or providing benefits for others by taking advantage of his or her position. Article 164 of the Criminal Law further provides that it is a criminal offence for any individual or entity to provide money or property in kind to any individual from a private entity (or any non-public official from a public entity) with the intention of seeking illegitimate benefits. Furthermore, the AUCL also covers private sector bribery: Art. 8 of the AUCL prohibits any individual or entity from secretly giving or accepting kickbacks off the books.

For the criminal offences of giving and accepting bribes, a key test is whether they were given or received for the purpose of securing illegitimate benefits. "Seeking illegitimate benefits" means "that a briber seeks interests in violation of laws, regulations, rules or policies, or requests the counterparty to provide help or

convenient conditions in violation of laws, regulations, rules, policies and the industry standards" or that "in bidding, government procurement or other commercial activities, a briber provides the relevant person with money or property in order to gain competitive advantage contrary to the principle of equality and fairness." That said, the specific tests for each type of corruption offence vary, and under some circumstances, a corruption offence may be established without satisfying the above test (e.g. giving or accepting kickbacks to or by government officials in commercial transactions in violation of relevant regulations may constitute bribery even without satisfying the test of "seeking illegitimate benefits").

Article 87 of the Criminal Law provides that the limitation period applicable to a particular criminal offence depends on its maximum sentence. Specifically: a five-year limitation period applies to a criminal offence with the maximum sentence of less than five years of imprisonment; a ten-year limitation period applies to a criminal offence with the maximum sentence of five to ten years of imprisonment; a fifteen-year limitation period applies to a criminal offence with the maximum sentence of ten to fifteen years of imprisonment; and a twenty-year limitation period applies to a criminal offence with the maximum sentence of life imprisonment or the death penalty unless this is extended with the SPP's specific approval.

The maximum penalty for corruption-related offences, depending on their seriousness, ranges from three years of imprisonment to the death penalty. Therefore, the corresponding statutory limitation period ranges from five years to twenty years.

The Criminal Law has extraterritorial effect. If a PRC citizen commits a crime under the Criminal Law outside the territory of the PRC, the Criminal Law is applicable to the PRC citizen. However, if the maximum sentence of such a crime under the Criminal Law is under three years of imprisonment, the prosecution may be exempted, save that such an exemption does not apply to PRC public officials or military members.

Furthermore, if (i) a foreigner commits a criminal offence under the Criminal Law outside the territory of the PRC; (ii) that offence harms the interest of the PRC or its citizens; and (iii) the minimum sentence for that offence under the Criminal Law is no less than three years, the Criminal Law is also applicable, unless the offence is not punishable under the law of the place where it is committed.

The AUCL may also have extraterritorial affect when, for example, both the commercial bribery payer and the receiver are incorporated in the PRC. However, in practice, it is still not very common for PRC enforcement agencies to investigate overseas transactions.

Under the Criminal Law: in the event that an individual commits an offence, that individual is liable for the offence; in the event that an entity commits an offence, the entity will be liable for that offence, and the directly responsible person in charge and other persons who are also directly responsible for the wrongdoing may also be held personally liable.

PRC law is not perfectly clear regarding the circumstances under which offences committed by an individual will be attributed to his or her affiliated legal entity, except for the following rules set out by the SPC: (i) if an individual establishes a company solely for the purpose of committing crimes, or the main activities of a company after its establishment are criminal activities, the relevant individual, not the company, would be liable for such crimes; and (ii) if an individual commits a crime in the name of a company without the authorization of that company and takes illegal benefits as his or her own assets, the relevant crimes should be regarded as crimes committed by that individual.

Under the AUCL and the AIC Measures, an employer is vicariously liable for commercial bribes offered or accepted by its employees for the purpose of selling or purchasing goods for the employer.

Penalties for individual perpetrators under the Criminal Law include: bribing public officials or entities could result in criminal detention, imprisonment of up to life imprisonment, confiscation of property, and/or criminal fine; bribing non-public officials could result in criminal detention, imprisonment of up to ten years, and/or criminal fine; accepting bribes by public officials could result in criminal detention, imprisonment of up to life imprisonment or the death penalty, confiscation of property, and/or criminal fine; and accepting bribes by non-public officials could result in criminal detention, imprisonment of up to fifteen years, and/or confiscation of property.

Penalties for individual perpetrators under the AUCL include an administrative fine ranging from RMB10,000 (approx. US$1,500) to RMB200,000 (approx. US$30,000) and confiscation of illegal income.

Penalties for perpetrators that are legal entities include unlimited criminal fines under the Criminal Law and/or an administrative fine ranging from RMB10,000 (approx. US$1,500) to RMB200,000 (approx. US$30,000) and confiscation of illegal income.

The People's Procuratorates and the Public Security Bureaus are primarily responsible for investigating and prosecuting corruption activities under the Criminal Law. The State Administration of Industry and Commerce (SAIC) and its local branches (collectively as AICs) are primarily responsible for enforcing the AUCL and investigating commercial bribery.

4. Anti-Corruption in India

The primary anti-corruption legislation in India include the Indian Penal Code 1860 (IPC) and the Prevention of Corruption Act 1988 (PCA). The term "bribery" has not been defined under the PCA. However, it has been defined specifically in the context of offences relating to elections under the IPC as an act of giving gratification to any person with the object of inducing him or her or any other personnel to exercise any electoral right or of rewarding any person for having exercised any such right. The PCA criminalizes the receipt or solicitation of illegal gratification by "public servants"

and the payment of such gratification by other persons as a motive for the public servant doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his or her official functions, any favor or disfavor to any person or for rendering or attempting to render any service or disservice to any person.[17]

The term "gratification" is not restricted to pecuniary gratifications or those quantifiable in money, but can include anything that would satisfy an "appetite" or "desire." The term can cover even insignificant amounts paid to influence a public servant, so long as it is beyond the legal remuneration to which the public servant is entitled. The provisions of the PCA Amendment Bill, as they currently stand, seek to further expand the scope of the offences.

The expression "public servant" has a wide import under the PCA and includes not only persons in the service or pay of the government or remunerated by the government for the performance of any public duty but also persons in the service or pay of a local authority or of a corporation established by or under central, provincial or state legislation or an authority or a body owned, controlled or aided by the government or a government company; judges, court appointed arbitrators, senior office bearers of certain registered cooperative societies that receive or have in the past received, any financial aid from any government of India or from any corporation owned, controlled or aided by the government.

"Government company" here means any company in which at least 51 percent of the paid-up share capital is held by the central government or any state government (or both), as well as the subsidiaries of such a company.

There are no Indian laws that apply to bribery of foreign public officials. While there is no specific law covering "private sector bribery," the Companies Act 2013 contemplates punishments for "fraud."

The PCA extends to Indian citizens outside India. A reading of the provisions of the PCA along with the statement of its extent makes it clear that this statute applies to situations where an Indian "public servant" accepts illegal gratification from any person whether in India or abroad. The PCA does not apply to the payment of bribes to foreign public officials.

The PCA presumes to be a bribe the act of giving or offering to give any gratification or any valuable thing by an accused as a motive or reward to a public official for doing or forbearing to do any official act without consideration or for a consideration which he or she knows to be inadequate, unless the contrary is proved. The intent with which the gratification or valuable thing was given or attempted to be given to the public official is crucial.

There is no *de minims* threshold regarding the receipt of offerings by public officials. However, conduct rules applicable to some kinds of public officials permit them to accept gifts and hospitality within certain prescribed limits and accordingly

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[17] *A Guide to Anti-Corruption Legislation in Asia Pacific*, *supra* note 16, at 93–103.

gifts and hospitality that meet such criteria are permitted. Such limits vary depending on the rules applicable to the public official in each case. For example, the All India Services (Conduct) Rules 1968 have been amended by the All India Services (Conduct) Amendment Rules 2015 (Amendment Rules 2015) to increase the threshold of the value of gifts permitted to be accepted by the member of the service. The Amendment Rules 2015 applicable to some officials provide an exception for the receipt of "casual meals" or "casual lifts" or gifts worth up to a *de minims* amount of INR5,000 rupees (approx. US$77) as against the earlier amount of INR1,000 rupees (approx. US$16).

According to the PCA, whoever accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or herself or for any other person, any gratification whatsoever as a motive or reward in order, by corrupt or illegal means, to influence a public servant or taking gratification for the exercise of personal influence with a public servant will be considered guilty of an offence. Any person guilty of specific influence peddling will be punishable irrespective of whether such person exercised the influence on the public official directly or through another person.

The payer of the illegal gratification as an "abettor" will also be punishable. The offence of abetment is an independent, distinct and substantive offence. The *mens rea* or mental state of the bribe giver is important, and it is irrelevant that the public servant had no authority to commit the particular offence or refused to accept the bribe. The mere offering of illegal gratification with the objective of offering gratification is considered sufficient to aggravate the offence, even if no money or other compensation is produced.

Indian law does not hold a company liable for the acts of its subsidiaries. In the case of a conviction of a company, all officers in charge of the company at the time when the offence was committed will be held to be officers in default and shall be liable for the acts of the company. Payments made to get even lawful things done promptly are prohibited and the PCA has been enforced with respect to facilitation payments. The Supreme Court of India has held that it has "little hesitation in taking the view that 'speed money' is the key to getting lawful things done in good time and 'operation signature' be it on a gate pass or a pro forma, can delay the movement of goods, the economics whereof induces investment in bribery," and that, if speed payments are allowed, "delay will deliberately be caused in order to invite payment of a bribe to accelerate it again" (*Som Prakash v. State of Delhi*, AIR 1974 Supreme Court 989).

Conclusion

Since its inception, BRICS has expanded its activities in two main streams of work: (i) coordination in meetings and international organizations; and (ii) the development of an agenda for multisectorial cooperation among its members. In relation to the BRICS coordination in international fora and organizations, the mechanism focuses on the economic-financial and political governance spheres. As

to the first, the BRICS agenda prioritized G-20 cooperation, including the IMF reform. In the political realm, BRICS advocate the reform of the United Nations and of its Security Council, aiming for more inclusive representation and more democratic international governance. Moreover, BRICS maintain a constant dialogue on the main issues on the international agenda.

In June 2015, at the Ufa Summit, the BRICS members reaffirmed their commitment against corruption. This commitment was based on their acknowledgement that

> corruption including illicit money and financial flows, and ill-gotten wealth stashed in foreign jurisdictions is a global challenge which may impact negatively on economic growth and sustainable development.

The BRICS member countries also cited the United Nations Convention against Corruption (UNCAC) as the basis on which to act. The UNCAC is a global, legally binding international anti-corruption convention. It is the core basis for the Anti-Corruption Plan, as it includes a detailed list of standards, rules and measures that states are offered to use in order to fight corruption and also offers a mechanism of implementation.

At the 2015 Ufa BRICS Summit, the Anti-Corruption Working Group was created to combat corruption that will

> work for the inclusion of crime prevention and criminal justice issues among the long-term priorities of the UN agenda.

During India's 2016 presidency, the BRICS Senior Members met three times to discuss anti-corruption: March 16 in Paris, June 8 in London and October 17 in Paris.[18]

> Corruption, including illicit money and financial flows, and ill-gotten wealth stashed in foreign jurisdictions, is a global challenge which may impact negatively on economic growth and sustainable development,

said the BRICS Leaders Xiamen Declaration, released after the 9th BRICS summit in the southeastern Chinese city of Xiamen (September 2017). The BRICS countries would strive to coordinate their approach in this regard and encourage a stronger global commitment to preventing and combating corruption on the basis of the United Nations Convention against Corruption (2003) and other relevant international legal instruments.[19]

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[18] 2016 BRICS Goa Summit Final Compliance Report 31 (Toronto: BRICS Research Group, 2017).

[19] BRICS Leaders Xiamen Declaration, Xiamen, China, 4 September 2017 (Mar. 4, 2018), available at http://www.dirco.gov.za/docs/2017/brics0904.htm.

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COUNTERMAJORITARIAN INSTITUTIONS IN THE RUSSIAN CONSTITUTION OF 1993 AS AN INSTRUMENT ENSURING CONSTITUTIONAL AND POLITICAL STABILITY

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The article enriches the discussion on the legal reasons and conditions fostering the viability of democratic constitutions by analyzing the rich experience of the Russian Constitution of 1993. Particular attention is paid to the concept of countermajoritarian institutions. The authors elaborate the idea that countermajoritarian institutions can play an important role in ensuring the viability (put in other terms, the proper balance between stability, adaptability, and dynamic development) of modern democratic constitutions as well as political regimes.

The article presents evidence-based data showing that the President and the Constitutional Court of the Russian Federation systematically acted as countermajoritarian institutions at the initial stage of the implementation of the "blueprint for the future" set down in the 1993 Russian Constitution. As a result of the activities of these institutions, strong legal frameworks were created that are necessary for the establishment of a new constitutional system of the Russian state and law.

Today, the Russian Constitution of 1993 is one of the longest lasting democratic constitutions in the world (the average "life expectancy" of democratic constitutions adopted over the past 250 years is about seventeen years). The study of the countermajoritarian provisions in the 1993 Russian Constitution is of both theoretical and practical importance. In particular, the results of the study can be useful in creating efficient legal instruments for the maintenance of political stability and social development management both within sovereign states and within interstate communities.

Keywords: constitutional law; constitutional court; countermajoritarian institutions; constitutional stability; president; Russian Constitution.

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Introduction

Studies on the factors and mechanisms ensuring a political system's stability in the situation of major changes, determined both internally (reforms, modernizations) and externally (global crises, revolutions), comprise one of the most topical global issues of the second half of the 20th and the early 21st century. Today's world has entered an era of instability and profound transformations whose future outcome is thus far unclear. In this context, the requirements of prognostic value and the practical usefulness of knowledge of the legal sciences, as well as the humanities, for improving the effectiveness of social development management become significantly more demanding.

This paper proceeds from ideas about the fundamental role of constitutional models and institutions in managing social transformations. Another starting point is the concept of the countermajoritarian institution. It assumes that modern social systems have special legal and political mechanisms which can "correct" the decisions of the majority adopted in a lawful, democratic procedure. These mechanisms come into action when the majority decision harms the interests of the State and society or violate citizens' rights and freedoms.

The experience of major changes in the world in recent decades provides a wealth of empirical material that enables the theoretical conceptualization of the place and role of constitutions in managing social transformations. In Russia, it has been shown that the viability of the Constitution of 1993 is the main prerequisite for the

successful implementation of the strategic "blueprint for the future" enshrined in the constitutional provisions.[1] Here, "viability" means a combination of sustainability and development. Put in other terms, a viable constitution must have special mechanisms to ensure its long-term stability and the realization of its creative potential.

According to some international authors (e.g. Adam Przeworski, Larry Diamond, Barry R. Weingast, Juan J. Linz, Alfred Stepan),[2] among the most important conditions for ensuring a constitution's stability are its special internal design and the firm conviction among different groups of the general public and politicians that conforming to constitutional principles promotes their own interests. These conclusions were made in the 1990s when the transformation processes in Eastern Europe and post-Soviet space were far from completion and the West's faith that liberal values would be automatically adopted by any society that had embarked on the path to modernization had not wavered yet. However, the democratic transition experience of Russia and other countries has demonstrated that, even in the absence of sustainable interest in the preservation of the constitution on the part of the majority of the general public and political elites, the Basic Law could remain stable and viable while the ideas, principles, and models enshrined in it could effectively change the social and political reality. This is what the institutions such as the Constitutional Court and the Head of State exist for. Among other things, these institutions can play the role of a countermajoritarian instrument.

1. Starting Point: The Concept of Countermajoritarian Institutions

One of the best known themes in the American theory of constitutional law is "countermajoritarian difficulty" (sometimes referred to as "countermajoritarian dilemma"). It was first described by Alexander M. Bickel,[3] a professor at Yale Law School, who maintained that judicial review is illegitimate because, in his opinion, it makes the will of the judges who have not been democratically elected superior to the will of the democratically elected legislative body that represents the people's majority.

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1 *See, e.g.*, Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 29(2) Journal of Law, Economics, and Organization 278 (2013); *Шахрай С.М.* О Конституции: Основной закон как инструмент правовых и социально-политических преобразований [Sergey M. Shakhray, *Towards the Constitution: The Basic Law as an Instrument for Legal and Socio-Political Change*] (Moscow: Nauka Publishing House, 2013).

2 *See* Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991); Larry Diamond, *Developing Democracy: Toward Consolidation* (Baltimore: Johns Hopkins University Press, 1999); Juan J. Linz & Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91(2) American Political Science Review 245 (1997).

3 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., New Heaven and London: Yale University Press, 1986).

Such an approach to interpreting the meaning of democratic legitimacy, however, is formal, stemming from the understanding of democracy in a narrow, procedural sense only, as the implementation of the will of the majority. In spite of its majoritarian nature, the meaning of democracy is much wider than mere mathematical calculations, since true democracy is based on a complicated set of ideas and principles the most important of which are the guarantees of citizens' rights, freedoms, and equality, including minority rights.

When a judge argues against an adopted law in order to protect citizens' rights and freedoms guaranteed by the constitution, he or she acts democratically, thus putting the democratic ideas and principles into practice.

Moreover, there are quite a few instances when democratically elected representatives pass legislation that does not actually reflect the people's will, and in such cases judicial review of the adopted legal acts is the only acceptable way to correct the "failures of democracy."

In 2008, John E. Jones III, a U.S. federal judge, declared that Art. 3 of the U.S. Constitution (which describes the U.S. court system) is, in essence, countermajoritarian, establishing the right of the judicial branch to act against the will of the majority. He wrote,

> The judicial branch protects against the tyranny of the majority. We are a bulwark against public opinion. And that was very much done [enshrined in the U.S. Constitution] with a purpose, and I think that it really has withstood the test of time. The judiciary is a check against the unconstitutional abuse and extension of power by the other branches of government.[4]

In fact, it is the countermajoritarian institutions of the State that comprise one of the pivotal mechanisms to ensure the constitution's stability and facilitate its proper implementation.

In the early 21st century, American political scientists, who have not yet given up the idea of creating a universal model of the constitution that would be able to guarantee the successful democratic transformation of authoritarian regimes, have focused on identifying conditions fostering the viability of democratic constitutions.[5] As a result, the experts arrive at the conclusion that many examples of successful

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[4] Judge John E. Jones III, *Inexorably toward Trial: Reflections on the Dover Case and the "Least Dangerous Branch,"* The Humanist, 17 December 2008 (Feb. 11, 2018), available at https://thehumanist.com/magazine/january-february-2009/features/inexorably-toward-trial-reflections-on-the-dover-case-and-the-least-dangerous-branch.

[5] *See* Zachary Elkins et al., *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009); Susan Alberts et al., *Democratization and Countermajoritarian Institutions Power and Constitutional Design in Self-Enforcing Democracy* in *Comparative Constitutional Design* (T. Ginsburg (ed.), Cambridge: Cambridge University Press, 2012).

democratization are associated with using specific countermajoritarian institutes, as well as with "appropriately designed" countermajoritarian provisions set down in the constitutions.[6] Where necessary, those countermajoritarian mechanisms impose restrictions on the will of the elected majority.

For example, according to Susan Alberts, Christopher Warshaw, and Barry R. Weingast, a bad choice of the formula to calculate pro-rata representation in the electoral legislation can be beneficial for the former authoritarian elite. This risk, however, can be offset by the presence of an upper house of the parliament that represents regions, or by other power institutions that are capable of vetoing the majority's decisions.[7] Or, as Weingast notes in a recent article, a necessary condition to support the market economy is

> a critical set of countermajoritarian provisions [that] include the rule of law, protection of property rights, and enforcement of contracts and justice more generally.[8]

2. Countermajoritarian Institutions in the Russian Constitution of 1993

The conclusions put forward by the American researchers appear quite obvious to the modern Russian school of constitutional design, which, based on the in-depth analysis of the experience of Russia's political history, has built into the Basic Law a powerful checks and balances mechanism as a guarantee of the protection of the interests of each individual citizen and of the State at large from the excesses of majoritarian democracy, and as an instrument for preventing conflicts or their uncontrollable escalation.

These discourses may also be relevant to the role of the Constitutional Court of the Russian Federation in defending the fundamentals of democracy as well as in the implementation of democracy. Formally, the Constitutional Court judges are not directly elected by the majority of the population but, instead, they are assigned by the Federation Council of the Federal Assembly according to Art. 1(g) of the Constitution of the Russian Federation. At the same time, however, the Constitutional Court must protect not only the Basic Law per se but also the constitutional rights and freedoms of each individual citizen where these rights are violated by the will of the majority, expressed in the law (according to Art. 4 of the Constitution, the

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6 *E.g.*, Barry R. Weingast, *Capitalism, Democracy, and Countermajoritarian Institutions*, 23(1) Supreme Court Economic Review 255 (2015).

7 For more detail, *see* Susan Alberts et al., *Countermajoritarian Institutions and Constitutional Stability* (April 2012) (Feb. 11, 2018), available at https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/LTW-Weingast.pdf.

8 Weingast 2015.

Constitutional Court tests the constitutionality of a law applied or applicable in a particular case according to the procedure prescribed by federal law in response to the complaints of violation of citizens' constitutional rights and freedoms or upon court requests).

Conceptually, the very idea of setting up a special independent body to exercise constitutional control stems from the theory of separation of powers, the need for checks and balances, and the so-called broad understanding of the constitution as not only the body of basic procedural rules but also the core of the substantive law. Therefore, the guarantee of the effectiveness of a constitution should, first and foremost, be based on the possibility of unrestricted abolition of legal acts that contravene the constitution. At the same time, however, based on the meaning of the theory of separation of powers, the abolition of inappropriate acts may not be entrusted to the same entity that has passed these acts.

The institution of the sole Head of State (in the form in which it emerged, developed, and was enshrined in the 1993 Constitution) as well as the institution of constitutional justice are more than just the logical elements in the system of state power. The President and the Constitutional Court were the guardians of the project of designing and building the new State – the model of the desired future for Russia and, at the same time, the drivers of change in the country during the period of major systemic transformation.

3. The President and the Constitutional Court as Institutions Fostering the Implementation of Constitutional Ideas

Owing to the very existence and activities of the institutions of the Presidency and the Constitutional Court of the Russian Federation, the transitional chaos that emerged in the late 1980s and early 1990s was transformed into the modern reality day after day. In a situation not just of the lack of consensus but of the direct confrontation between elites and between branches of power, it was vital for the country to have a single center, a single leader capable of maintaining strategic direction and ensuring the implementation of reforms, including those in the constitutional and legal spheres. Thus, for many years the President and the Constitutional Court performed (and still are performing) a creative, constructive function, helping to implement in all spheres of life the norms and models enshrined in the Constitution of the Russian Federation.[9]

During different historical periods, the constructive function of the Constitutional Court of the Russian Federation has taken different forms: first, promoting the legislative activity at the federal and regional levels in order to expedite the

[9] *See also* the role of the Constitutional Court in ensuring the viability of constitutions: Dainius Žalimas, *Viability of the Constitution and the Role of the Constitutional Court* (May 2015) (Feb. 11, 2018), available at http://www.lrkt.lt/data/public/uploads/2015/10/viability-of-theconstitution-lvivroundtable.pdf.

development of the new legal system in Russia; second, promoting the creation of new institutions and juridical relationships in keeping with the letter and spirit of the Constitution, protecting these institutions and the juridical relationship from attempts to distort or revise them; third, the so-called "negative" lawmaking, i.e. the efforts to screen off legal norms and practices that emerge in the course of the practical implementation of constitutional principles and models, and which are inappropriate from the standpoint of the letter and spirit of the Basic Law;[10] and fourth, explaining and clarifying conceptual fundamentals of the new Russian Constitution to legislators and executors of the law, and thus enhancing the process of implementation of the Basic Law provisions to ensure practical outcomes are consistent with constitutional doctrine.[11]

It should be noted that a legal phenomenon such as the Constitutional Court's stance ("legal position" – "pravovaya pozitsiya") that may be expressed in the form of a court ruling ("postanovleniye") or judgment of dismissal ("otkaznoye opredeleniye") plays an important role in the realization of its constructive function. The Constitutional Court's stances comprise important legal conclusions, principles, and general objectives resulting from the interpretation of the Constitution's letter and spirit. These conclusions (which are figuratively called "the crystallized law revealed by the court"[12] by Professor Gadis Gadzhiev, D. Leg. Sci.) directly affect the quality of lawmaking and law-enforcement practices, and the accuracy of the practical implementation of the constitutional models.

Apart from their constructive function, both the President and the Constitutional Court of the Russian Federation (after 1993) were (and still are) effectively performing the protective function in regard to both the Constitution and democracy at large.

In the early 1990s, it became clear that the untamed element of political freedom that emerged during the Gorbachev era had begun to negatively affect the speed and quality of development of the new foundations of statehood, and hinder the

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[10] There are different viewpoints concerning the usefulness of so-called "negative" lawmaking by the Constitutional Court, i.e. improving a legal system by removing some precepts from it through a declaration of their unconstitutionality. However, the important role of this mechanism cannot be denied at the early stage of formation of a legal system when only a timely "negative selection" was able to prevent the emergence of a whole block of legal acts that are inconsistent with the letter and spirit of the new Russian Constitution.

[11] *See Клишас А.А.* Конституционное правосудие в трансформирующихся обществах: опыт Российской Федерации // Материалы международной научно-практической конференции «Конституция как основа правовой системы государства в XXI веке. 30–31 октября 2008 года» [Andrey A. Klishas, *Constitutional Justice in Transforming Societies: Experience of the Russian Federation* in *Materials of the International Research-to-Practice Conference "Constitution as the Foundation for the State's Legal System in the 21st Century. 30–31 October 2008"*] 26 (Moscow: RUDN, 2009).

[12] *See Гаджиев Г.А.* Правовые позиции Конституционного Суда Российской Федерации как источник конституционного права // Конституционное право: восточноевропейское обозрение. 1999. № 3(28). С. 81–95 [Gadis A. Gadzhiev, *Stances of the Constitutional Court of the Russian Federation as a Source of Constitutional Law*, 3(28) Constitutional Law: East European Review 81 (1999)].

advancement of social and economic reforms. Therefore, different safety mechanisms and special constitutional, political, and legal instruments had to be created to return the processes of change back onto a manageable track.

In fact, for quite a long time, the President of Russia as the supreme *political* arbiter and the Constitutional Court as the supreme *judicial* arbiter (metaphorically speaking) played the role of a steam valve, helping to reduce political pressures building up within society in a situation of confrontation between political elites where the forces on both sides of the barricades were almost equal in strength. The adoption of the law on referendums provided yet another effective instrument to preserve political stability throughout the entire 1990s.

To be fair, it should be mentioned that in the early 1990s when these institutions and mechanisms were being developed and put into practice there was simply no time for in-depth theoretical discussions on the nature of democracy or detailed modeling of the options of parliamentary structure depending on the vote threshold for the parties to be enshrined in the Constitution. At that time, the logic behind choosing any particular solution was actually determined by one objective only: to prevent the escalation of tensions and the breakup of the country. Experience shows that this goal was achieved.

Pondering the lessons of the dramatic events of the early 1990s, it has to be admitted that Przeworski's not-quite-scientific definition of democracy is fair to an extent: Przeworski called democracy "a system for processing conflicts without [political actors] killing one another."[13]

In this paradigm, the Head of State and the Constitutional Court and the law on referendums were the pivotal institutions and the most important protective mechanisms of democracy and the Constitution in every sense. Many times their status and the scope of possibilities available to them allowed the destructive energy of the conflicts to be redirected into a safe course, where, with an approximate balance of power, the parties decided to seek to win in court, conciliation committees, or referendums rather than on the barricades.

Throughout the 1990s, the President of the Russian Federation initiated a great number of conciliation procedures while the Constitutional Court tried dozens of cases concerned with key issues in the relationships between the branches of power, the development of federalism, and the provision of guarantees of equal voting rights throughout the entire country, among others. In the context of major changes, this helped, in no small measure, to keep the political and economic situation within the bounds of a "normal operational mode" and prevent various dangerous conflicts from becoming uncontrollable.

Moreover, when a politically divided State Duma failed for almost a decade to pass the most urgently needed legislation concerning the organization and authorities

[13] Przeworski 1991, at 12, 95, 131.

of the bodies of state power, federalism, electoral law, and protection of citizen's rights and freedoms, it was the rulings of the Constitutional Court of the Russian Federation that allowed this gap to be filled. The decisions of the Constitutional Court and the Court's stances expressed in these decisions helped to set up the elements of case law in Russia.

4. The Constitutional Court: Applying the Framework

During the period from 1995 through 2017, the Constitutional Court of the Russian Federation adopted more than 29,300 decisions (514 of which were rulings – "postanovleniya"), most of which were concerned with the key issues of state-building and development of the new economic system and social relations.

When hearing the disputes (including the heated ones, stemming from practical state-building), the Constitutional Court not only formulated the key principles and parameters for building proper relationships between various state institutions, but also constantly expounded the fundamentals of the country's new constitutional system to society and political subjects.

It is interesting to compare the statistics and thematic distribution of the Constitutional Court's decisions during different periods of contemporary Russian history. The facts demonstrate that, staying away from politics, the Constitutional Court has responded fairly and objectively to high-profile issues of the state-building agenda.

For instance, issues associated with the interpretation of constitutional provisions were often addressed in the first years after the adoption of the new Basic Law, which is very understandable. Of the total number of Constitutional Court decisions made during the period from 1995 through 2017 and concerned with the interpretation of constitutional norms, most of the rulings were passed before 2000.

At the same time, according to statistics published on the Constitutional Court's website, during the period from 2000 through 2017, three-quarters of the more than 40 Constitutional Court decisions on requests associated with the interpretation of provisions of the Basic Law provisions were judgments of dismissal.[14]

The few (nine) decisions on disputes of power between various authorities were also passed before 2000.

Over 350 decisions of the Constitutional Court concerned various aspects of local self-government, and 95 percent of these decisions were passed during the period from 2000 through 2017.

The majority (more than 90%) of Constitutional Court decisions concerning the formation of Russia's current electoral system and safeguarding citizens' right to vote in elections and referendums were also passed after 2000 (*see* Fig. 1).

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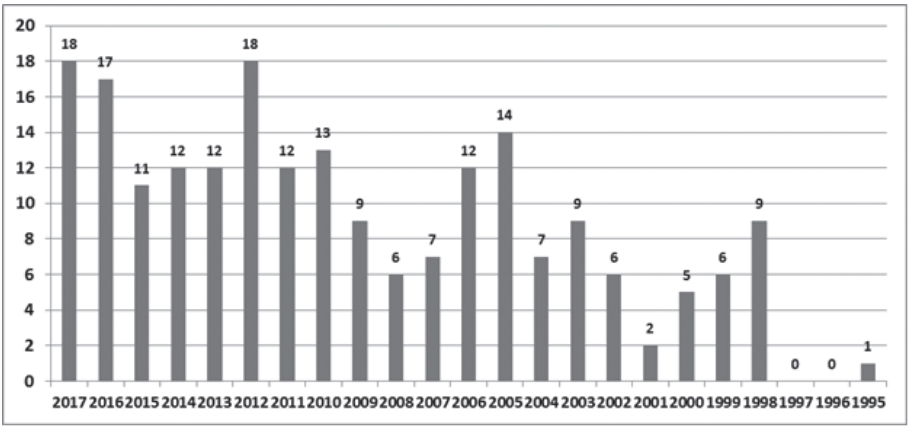
[14] *See* official website of the Constitutional Court of the Russian Federation: www.ksrf.ru.

Fig. 1: Year-by-Year Distribution of Decisions of the Constitutional Court of the Russian Federation Concerned with Voting Legislation and Safeguarding Citizens' Right to Vote in Elections and Referendums[15]



Throughout its entire existence following the adoption of the new Constitution of the Russian Federation, the Constitutional Court has directly helped to resolve conflicts and ensure a coherent interaction of public authorities, facilitated the development of the modern model of federalism and new economic relationships, affected the development of many areas of Russian law, and ensured the protection of citizens' rights and freedoms.

The most impressive and high-profile of the Constitutional Court cases have concerned the protection of citizens' fundamental rights and freedoms, such as the right to freedom of movement and choosing a place to stay and reside, and the right to labor remuneration and old-age social security benefits.

For instance, in 1996 the Constitutional Court reviewed complaints contesting license fees on hiring non-resident specialists, which had been established in some regions, and enshrinement of permissive registration of citizens at their place of residence, which was associated with payment of obligatory fees to the municipal budget.[16]

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[15] Source: official website of the Constitutional Court of the Russian Federation: www.ksrf.ru.

[16] For instance, at the time of the hearing, according to the Moscow Law of 14 September 1994 "On the Levy Compensating for Municipal Budget Costs of the Development of Municipal Infrastructure and Provision of Social and Living Conditions for the Citizens Moving to Moscow to Take Up Permanent Residence," non-resident citizens who bought an apartment in Moscow and intended to live in this apartment were obliged to pay into the municipal budget a levy exceeding *5000-fold* the minimum monthly wage. At the same time, the registration of citizens at the domicile belonging to them by right of property was strictly conditional on the payment of this levy.

For reference: the minimum monthly wage comprised 14,620 rubles in 1994, and 63,250 rubles by the time of the hearing (the spring of 1996).

As noted in the Constitutional Court's ruling, the right to choose a place of residence is part of the freedom of personal self-determination. Public authorities are only mandated to register the result of the expression of a citizen's free will in choosing his or her place of residence.

The citizens' right to choose their place of residence may only be limited by federal law. According to the Constitutional Court, the registration of Russian Federation citizens at the place of their residence by notification, established in the then effective Law of the Russian Federation of 25 June 1993 No. 5242-I "On the Right of Citizens of the Russian Federation to the Freedom of Movement, the Choice of a Place of Stay and Residence within the Russian Federation,"[17] is a permissible restriction of this right. At the same time, in contrast to the federal legislation, the Moscow and Moscow Oblast authorities' requirement of obligatory payment of fees to the regional budget as a precondition for a citizen's registration at the dwelling fully owned by the citizen established the permissive registration and, therefore, was ruled unconstitutional by the Constitutional Court.

The Constitutional Court emphasized that:

> the implementation of [the] constitutional right to choose the place of residence may not be conditional upon the payment (or non-payment) of any taxes and levies, as basic rights of the citizens of the Russian Federation are guaranteed by the Constitution of the Russian Federation without any fiscal conditions attached. Therefore, the denial of registration due to [a] citizen's failure to perform his or her duties to pay taxes and other levies is unconstitutional (Art. 27(1)).[18]

In 1998, the Constitutional Court of the Russian Federation defended the citizens' right to receive retirement pensions to which they are entitled regardless of whether the pensioner changed his or her permanent residence to a foreign country before or after 1 July 1993. According to the Constitutional Court:

> [T]he citizen's rights in the sphere of retirement benefits are derived from his employment or other socially beneficial activities. Old age, long-service and other pensions awarded in connection with employment or other activities

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[17] Закон Российской Федерации от 25 июня 1993 г. № 5242-I "О праве граждан Российской Федерации на свободу передвижения, выбор места пребывания и жительства в пределах Российской Федерации," Собрание законодательства РФ, 1993, № 32, ст. 1227 [Law of the Russian Federation No. 5242-I of 25 June 1993. On the Right of Citizens of the Russian Federation to the Freedom of Movement, the Choice of a Place of Stay and Residence within the Russian Federation, Legislation Bulletin of the Russian Federation, 1993, No. 32, Art. 1227].

[18] Постановление Конституционного Суда РФ от 4 апреля 1996 г. № 9-П, Собрание законодательства РФ, 1996, № 16, ст. 1909 [Ruling of the Constitutional Court of the Russian Federation No. 9-P of 4 April 1996, Legislation Bulletin of the Russian Federation, 1996, No. 16, Art. 1909].

> recognized by the legislator as socially beneficial are earned by previous work or service, by performing socially important duties. This determines the content and nature of the state's duties towards those citizens who have acquired the right to such pensions. Discontinuation of accrual and payment of retirement pensions to the citizens who have moved abroad to take up permanent residence, for the period of their living abroad is the limitation of [the] constitutional right to social security guaranteed by Art. 39(1) of the Constitution of the Russian Federation.
>
> By virtue of Art. 55(3) of the Constitution of the Russian Federation, human and civil rights and freedoms may only be restricted to the extent necessary for the purposes of protecting the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, for ensuring the country's defense and state security. The restriction of human and civil rights and freedoms established by the Law of the Russian Federation "On the Payment of Pensions to Citizens Leaving the Russian Federation to Take Up Permanent Residence Abroad" is inconsistent with these purposes and, thus, contravenes Art. 55(3) of the Constitution of the Russian Federation.[19]

It should be noted that modern democratic states advocating the universality of various democratic rights and liberties often come to a standstill when the cases of competing, equally important and valuable but, at the same time, formally conflicting principles and values are considered; for instance:

- inviolability of the territorial integrity of the state, and exercising the right of nations to self-determination;
- sovereignty of the federal state and autonomy of its constituent entities;
- guarantees of equal protection of public and private interests;
- guarantees of economic freedom and the social nature of the state; and
- the employer's equally important duties to remunerate labor and pay legitimate taxes and levies to the State (even in a situation of financial and economic crisis).

Many experts regard equally protected but, at the same time, "competing" constitutional principles either as an insolvable problem or as a deliberate use of double standards that allows values to be prioritized depending on political expediency. One must admit, however, that all of these formally opposing values and principles are equally important for individuals, society, and the State. The art of managing social development consists in fitting practical policy solutions into the narrow "corridor of possibilities" and charting a political course between the Scylla and Charybdis of sometimes opposing but equally important values and principles.

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[19] Постановление Конституционного Суда РФ от 15 июня 1998 г. № 18-П, Собрание законодательства РФ, 1998, № 25, ст. 3003 [Ruling of the Constitutional Court of the Russian Federation No. 18-P of 15 June 1998, Legislation Bulletin of the Russian Federation, 1998, No. 25, Art. 3003].

At the same time, in each particular case the trajectory can bend towards one side or the other, but it is important to be able to timely identify an unwanted bias, prevent or correct dangerous excesses that can upset the balance of interests and disrupt social harmony.

Practitioners know that no universal solutions exist and, in changing circumstances, in a changing world, what seems fair and right in one situation may be harmful and dangerous in another. Tribute should be paid to the Constitutional Court of the Russian Federation: in the most difficult situation where public consensus was lacking and there was a strong political opposition within the Federal Assembly of the Russian Federation, the Constitutional Court undertook a mission of not only expounding the meaning of constitutional provisions but also consistently showing to all branches of power the ways for finding an effective balance between equal constitutional values that define the contours of the new political reality and the "corridor" of legislative possibilities.

Thus, for instance, in its Ruling of 23 December 1997 No. 21-P on the case of testing the constitutionality of Art. 55(2) of the Civil Code of the Russian Federation ("On the Fundamentals of the Tax System in the Russian Federation"), the Constitutional Court pointed out to the legislator that:

> [T]he constitutional duties to remunerate labor and pay lawfully established taxes and levies may not be opposed to each other, since placing a rigid priority on only one of these duties means the impossibility of exercising and, hence, the derogation of equally protected rights and legitimate interests of one or other groups of citizens, which also contravenes Art. 55(2) of the Constitution of the Russian Federation.[20]

And in its well-known ruling in the "Chechen case," the Constitutional Court provided a detailed explanation of how the constitutional principle of state integrity and the right of nations to self-determination are consistent with each other. The Constitutional Court emphasized that the integrity of the State is one of the fundamentals of the constitutional system of the Russian Federation, an important condition of equal legal status for all citizens regardless of their place of residence, one of the guarantees of their constitutional rights and liberties. The constitutional objective of the preservation of the integrity of the Russian State is consistent with universally accepted international norms on a people's right to self-determination. It follows from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted on 24 October 1970, that:

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[20] Постановление Конституционного Суда РФ от 23 декабря 1997 г. № 21-П, Собрание законодательства РФ, 1997, № 2, ст. 5930 [Ruling of the Constitutional Court of the Russian Federation No. 21-P of 23 December 1997, Legislation Bulletin of the Russian Federation, 1997, No. 2, Art. 5930].

> [E]xercising people's right of self-determination shall not be "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples."[21]

These and many other stances of the Constitutional Court are of profound theoretical and, at the same time, direct practical importance for both contemporary Russia and the entire global community which sometimes only begins to seek answers to challenges that have already become history for Russia.

As a result of the activities of this institution, which is extremely important for ensuring the Constitution's viability, the rigid legal contours necessary for developing the new system of Russian law were being unflinchingly created. The trajectories were set for all participants in the legislative process to move forward so that the legal reality consistent with the ideas, norms, and principles stipulated in the country's new Basic Law would be born in practice. The fact that, at present, political life is relatively stable does not mean that the constructive and protective role of the Constitutional Court has been exhausted.

Conclusion

The history of the new Russian state and law formation provides many arguments to support the hypothesis that the viability of democratic constitutions, as well as political stability, increases if the constitutional model provides for the existence of countermajoritarian institutions and ensures their effective action. It can be argued that in post-crisis societies, the constitutional model of "countermajoritarian democracy" ensures stability and sustainable development of the new political system more effectively and reliably than attempts to implement the "pure version" of classical majoritarian democracy.

The Russian Constitution of 1993, formed on a model with countermajoritarian features, has proved its evidence-based effectiveness and can serve as an example of good practice in designing a viable democratic constitution.

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COMMENTS

THE TRANSFER OF INTERMEDIATED SECURITIES AND OF THE CORRESPONDENT RUSSIAN LAW TERM

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The recent reform of the Russian Civil Code (hereinafter RCC) has also considerably touched the regulation of uncertificated securities. Such issues as the legal nature, the protection of a bona fide purchaser and the transfer, including the creation of security interests were precised by the legislator in the Code. As for the transfer, we may affirm that this was one of the main points of the reform in respect of those securities.

What about the Swiss legislation, we can also affirm that the disposition of the intermediated securities was one of the key elements of the Federal Intermediated Securities Act, also known as FISA.

In this article we intend to analyze precisely the methods of transfer applicable to intermediated securities under Swiss law and compare them with those which are governed by the modified dispositions of the RCC. In order to finalize our analysis on that subject we will also touch some points raised in the previous article. Thus, the present work will be the consequent continuation of the discussion started in my previous article.

Keywords: Russian law; securities; UNIDROIT; legal reform; Geneva Securities Convention; intermediated security; uncertificated security; Russian Civil Code (RCC); Federal Intermediated Securities Act (FISA).

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Introduction

The definition of security has neither been clarified by the life,
nor by the legal science, nor by the legislation.[1]

Professor Gabriel Shershenevich

As you may have already noticed, I have recently written a comparative research devoted to the issue of the legal nature of intermediated securities and the correspondent term under Russian law.[2] In order to understand the context of the reform, I kindly refer you to my previous article published in the BRICS Law Journal.[3] I would like to continue the discussion started at that article. However, this time I would like to concentrate specifically on the question of the transfer of intermediated securities and of the correspondent term under Russian law. The present article is not intended to give a general description of the methods but has the purpose to give the precise analysis of each method in the chosen jurisdictions. *Firstly*, we are going to summarize our notes regarding the recent reform of the relevant provisions of the Russian Civil Code (hereinafter RCC). In this chapter we will somehow continue the discussion raised in my previous article. I will discuss in the beginning such questions as the legal nature of those securities, the problem of vindication in relation to uncertificated securities under Russian law and compare the results of the reforms in Switzerland and in the Russian Federation. *Secondly*, we will examine the methods of transfer applicable to intermediated securities. We are going to analyze the one under Art. XI of the Geneva Securities Convention which is called "*debits and credits*." In particular we will analyze and compare the legal nature of the instruction [*передаточное распоряжение*] under the chosen legal orders. *Finally*, we are going to analyze "*other methods of transfer*" governed by Art. XII of the Geneva Securities Convention. They are usually used to create a security interest upon intermediated securities. Those methods are: the designating entry, the control agreement and the creation of an interest in favour of the relevant intermediary. In this Chapter we will also present our conclusions on the usage of abstraction and causality principles in relation to the transfer of securities held in a dematerialized form.

Before we start to analyze the methods of transfer under the respective legal orders, I would like to return to the issues raised in my previous article and discuss the results of the reforms in Switzerland and in Russia in relation to those securities. As our reader might notice, the terms employed by the two legal orders are not

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[1] *Шершеневич Г.Ф.* Курс торгового права. Т. II: Товар. Торговые сделки [Gabriel F. Shershenevich, *The Course of Commercial Law. Vol. II: Merchandise. Commercial Transactions*] (4th ed., St. Petersburg: Izdanie Bratiev Bashmakovykh, 1908) (Aug. 17, 2017), also available at http://base.garant.ru/6185553/.

[2] Mikhail Botvinov, *Geneva Securities Convention and Russian Civil Legislation Reform: Comparative Perspectives*, 4(1) BRICS Law Journal 26 (2017).

[3] *Id.*

the same. From time to time we will use such denominations as *"securities held in a dematerialized form," "electronic securities" or "dematerialized securities"* in order to designate both legal institutions.

1. Comparative Remarks on the Reform of the Provisions Governing the Regime of the Uncertificated Securities under the Modified RCC

1.1. The Legal Definition and the Meaning of the Dematerialization in Relation to Securities

As an epigraph to our research we have decided to quote the statement of the professor Gabriel Shershenevich.[4] Later, in 1929, another brilliant Russian legal scholar Mikhail Agarkov has said that

> the general theory of securities and the doctrine covering particular types of securities relates to one of the most complex sections of the legal science.[5]

In this respect we cannot but mention that this scholar has referred in his work to the notable Swiss lawyer Eugen Huber and his project that had a specific chapter (chapter IV) devoted to securities.[6] Somehow, the professor Mikhail Agarkov has set us the direction for our research. In the present work we also refer to the Swiss legislation in order to find proper solutions for our Russian legal system. The above quoted statements have been said when securities existed only in a paper form. Nowadays, we have dematerialized them. However, the number of legal problems we face has increased significantly since that time. It appears that traditional legal concepts that match perfectly to securities paper form cannot always be applied in relation to those that exist in dematerialized form. This statement applies in particular to the question of vindication. The security in a dematerialized form is not a chattel. Thus, it cannot be vindicated. This postulate has been apprehended by the Swiss legislator which decided to introduce into its' legal order a new legal object: the intermediated security.[7] It combines the features of a claim and a chattel.[8] As for the

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[4] The statement of the professor Gabriel Shershenevich was personally translated by the author. In Russian this statement is: "…*Само понятие о ценных бумагах не успело до сих пор выясниться ни в жизни, ни в науке, ни в законодательстве*…"

[5] *Агарков М.М.* Основы банковского права. Учение о ценных бумагах [Mikhail M. Agarkov, *The Essentials of Banking Law. The Doctrine of Securities*] 218 (3rd ed., Moscow: Wolters Kluwer, 2005).

[6] *Id.*

[7] Message relatif à la loi fédérale sur les titres intermédiés et à la Convention de La Haye sur les titres intermédiés du 15 novembre 2006, at 8841 (Aug. 31, 2017), available at https://www.admin.ch/opc/fr/federal-gazette/2006/8817.pdf. In this work we will name it as follows: "Explanatory Report."

[8] *Id.*

Russian legislator, the problem is quite complex. We will discuss it later. We would like also to note in this respect that tangible property concepts still apply in relation to those securities. For instance, this is the case of France.

Before we proceed further in our analysis it seems important for us to explain the meaning of the term "*dematerialization*." We find the answer in the Glossary prepared by the Basel Committee.[9] The Glossary defines dematerialization as

> The elimination of physical certificates or documents of title that represent ownership of securities so that securities exist only as accounting records.[10]

The institutions at the international level such as the Basel Committee and the International Organization of Securities Commissions (IOSCO) have also highly recommended to national legislators to immobilize and dematerialize the securities "*to the greatest extent possible*." We refer to the recommendation number VI of the Recommendations for Securities Settlement Systems prepared by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in November 2001.[11] According to that document, the dematerialization allows to eliminate the risk of loss, manual errors, lowers costs and provides investors with safety during the transactions. The key question that we ask is whether this phenomenon requires new legal approaches from a legislator? Secondly, one may demand us what should be those approaches? The answer to the first question is certainly positive. As our reader may understand, it seems impossible to apply rules on chattels concepts in relation to intangible assets that exist in electronic form. As for the second question, the answer has been given by the Swiss legal doctrine and by the legislator. For instance, the professor Paul-Henri Steinauer considers that

> the developments in a business sphere and in the possibilities offered by the informatics have led the banking circles to search for more flexible legal approaches. The purpose is to conserve the legal security comparable to those provided by a paper-form security and to remove the restraint resulting from the presence of a chattel to which a right is linked.[12]

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[9] *See* A glossary of terms used in payments and settlement systems elaborated by the Committee on Payment and Settlement Systems (Aug. 7, 2017), available at http://www.bis.org/cpmi/publ/d00b.htm.

[10] *Id.*

[11] *See* Recommendations for Securities Settlement Systems prepared by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions (November 2001) (Aug. 28, 2017), available at http://www.bis.org/cpmi/publ/d46.pdf.

[12] Paul-Henri Steinauer, *Les droits réels face à la dématérialisation des papiers-valeurs* in *Le centenaire du Code civil suisse. Colloque du 5 avril 2007* 145 (Paris: Association franco-suisse de Paris II, 2008).

This statement perfectly reflects the methods used by the Swiss legislator during the preparation of the FISA. We underline once again that the application of this approach resulted in the appearance of the new legal object: "intermediated security."

In some countries, the legislator does not resort to these flexible approaches. This is the case of the French Republic. Some scholars consider that dematerialization in France has been done only within the technical meaning of that term.[13] For example, reputable French scholars affirm that dematerialization in France was only "*a technical measure which does not bring any legal consequences*" [*mesure d'ordre technique qui n'emporte pas les consequences juridiques*].[14] Mr. Antoine Maffei has expressed even more radically on that problem. He affirmed that the Cassation Court in France has not even dematerialized those securities[15] [*n'a pas dématérialisé les valeurs mobilières; elle les a détitrisées*]. According to French scholars, the dematerialization supposes that the provisions relating to tangible property shall not be applied to those securities.[16] French scholars affirm in this respect that the dematerialization supposes to exclude "*traditio*" [*la dématérialisation semble exclure le don manuel*].[17] We absolutely agree with this statement. However, the courts have chosen a different approach. According to the decision of the Cassation Court, the record at the relevant account "*imitates and substitutes for the 'traditio'*"[18] [*imite et substitue à la tradition*]. We agree with French scholars that the dematerialization in France is perceived only as a technical measure.

As for the Russian Federation, the situation is more delicate. In 2013, the RCC has been amended by the legislator. According to modified Art. 142 RCC securities are considered to be documents and claims against the issuer. The paper-form securities are documents while those uncertificated are claims (Art. 142, para. 1 RCC). The legislator has introduced the new rules on the protection of the titleholder deprived from his securities. Art. 149.3 uses the term "*restitution of the same quantity of the correspondent securities*" ["*возврат такого же количества соответствующих ценных бумаг*"]. What does it practically mean? The doctrine is not anonymous. The question is perplex. We will later develop this point in the specific paragraph.

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13 *See* Luc Thévenoz, *Intermediated Securities, Legal Risk, and the International Harmonization of Commercial Law*, 13 Stanford Journal of Law, Business, and Finance 384, 396 (2008); Antoine Maffei, *De la nature juridique des titres dématérialisés intermédiés en droit français*, 10(1/2) Uniform Law Review 237, 248 (2005).

14 Hubert de Vauplane & Jean-Pierre Bornet, *Droit des marchés financiers* 49 (Paris: LITEC, 1998).

15 Maffei 2005, at 248.

16 Christian Cavalda & Jean Stoufflet, *Droit bancaire. Institutions – Comptes – Opérations – Services* 406 (5th ed., Paris: LITEC, 2002).

17 *Id.*

18 De Vauplane & Bornet 1998, at 48.

We have decided to explain the situation in France in order to illustrate possible solutions to the problem. At this stage we affirm that the modified RCC is somehow between the French and the Swiss approaches. In our opinion it would obviously be better to follow the Swiss legislator who has successfully managed to perceive the legal nature of those securities.

Thus, the statement of the professor Gabriel Shershenevich remains relevant even for the current moment. Modern Russian scholars recognize and develop that point of view.[19] For instance, the docent of the Saint Petersburg University, Andrei Bushev [доц. А. Бушев] affirms that in relation to securities which exist in an electronic form the accent has made on the "*substance*" while the definition of securities in paper form focuses on the "*form*."[20] According to the opinion of Andrei Bushev, the formal approach [*формальный подход*] encompasses the external expression of the security: the documentary form. As for the substantial approach [*содержательный подход*], it relies on the rights that a security represents. The docent Andrei Bushev affirms that this approach focuses on the substance which means that a security is a special right with specific features.[21] He adds that this approach has in particular touched the investment securities.[22] We decided to refer to the article of Mr. Bushev because he has underlined the essence of the problem we are trying to analyze:

> the competition between form and substance for gaining the priority in the definition of security has not ended yet [*Можно предположить, что конкуренция между формой и содержанием в борьбе за приоритетность при определении понятия ценной бумаги не завершена*].

As we see, the above made statement is absolutely true and relevant in relation to uncertificated securities under Russian law. If we apply the approach of the docent Andrei Bushev to the securities under the chosen legal orders, we may allege that intermediated securities under Swiss law base mainly on the substantial approach [*содержательный подход*] while in France the correspondent legal term relies basically

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[19] *Бушев А.Ю.* Об экономическом и юридическом значении родового понятия ценной бумаги // Закон. 2006. № 7. С. 14–23 [Andrei Yu. Bushev, *On an Economic and Legal Meaning of the Generic Term of Security*, 7 Law 14 (2006)] (Aug. 15, 2017), also available at http://base.garant.ru/5281640/. *See also Кирилловых А.А.* Понятие ценной бумаги: теория, практика и современные законодательные новации // Законодательство и экономика. 2014. № 12. С. 43–55 [Andrei A. Kirillovykh, *The Definition of Security: Theory, Practice and Modern Legislative Novelties*, 12 Legislation and Economics 43 (2014)] (Sep. 4, 2017), also available at http://base.garant.ru/57480437/.

[20] *Id.*

[21] The statement of the docent Andrei Bushev in Russian is as follows: "*Для электронных ценных бумаг акцент был теперь сделан не на форму, а на содержание. Ценная бумага – это особое право, обладающее специфическими свойствами. В наибольшей степени такой подход коснулся инвестиционных ценных бумаг.*"

[22] *Id.*

on the traditional tangible property concept and thus on the "formal approach" ["*формальный подход*"]. Why do we qualify the approach of the Swiss legislator as the substantial one? The answer is quite clear. Art. 3, para. 1, let. "a" and "b" of the FISA (Federal Intermediated Securities Act) defines intermediated securities as

> personal and corporate rights of a fungible nature against the issuer which are credited to the securities account; and may be disposed of by the account holder in accordance with the provisions of this Act.

Hence, we may assert that the Swiss legislator has followed so called the "substantial approach."

What about the modified RCC, we consider that for the current moment the legislator has chosen the "substantial approach" while before 2013, the relevant provisions of the RCC were based on the formal one. The modified RCC (Art. 149) sets forth that a security constitute not only a document but also a right against the issuer. Thus, the situation has significantly changed. Although, in my previous article I have criticized heavily the reform, I should recognize that the legislator has achieved a certain progress in such issues as: defining the legal nature of those securities, the transfer including the creation of interest, the protection of the holder of those securities, etc.

1.2. The Problem of Vindication in Respect of Uncertificated Securities under Russian Law

The application of vindication was heavily criticized by the legal doctrine in Russia. The Concept of Development of Civil Legislation of the Russian Federation mentioned (para. 1.1.9) that the application of vindication in relation to uncertificated securities is inappropriate.[23] The authors of the Concept propose to replace vindication by the claim filed by a former titleholder to a person who is legitimatized by the record on the account.[24] According to the Concept, taking into account the particular features of the rights constituting the substance of those securities, *the conditions of satisfaction and the burden of proof necessary for filing that lawsuit shall be the same as for the classic securities in paper form*. The key question is whether the legislator in Russia has renounced from vindication? The second question is how can we qualify the claim applicable to "uncertificated securities" under Art. 149.3 RCC? The legal doctrine is not unanimous. In order to simplify, we divide the relevant doctrine in several groups. *The*

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[23] Концепция развития гражданского законодательства Российской Федерации (одобрена Советом при Президенте РФ по кодификации и совершенствованию гражданского законодательства 7 октября 2009 г.), Вестник ВАС РФ, 2009, № 11 [Concept of Development of Civil Legislation of the Russian Federation of 7 October 2009, Bulletin of the Supreme Arbitration Court of the Russian Federation, 2009, No. 11] (Jan. 11, 2017), also available at http://base.garant.ru/12176781/.

[24] *Id.* at Chapter VI, para. 1.1.9.

first group of scholars consider that the vindication governing paper form securities is not applicable to those in an electronic form. This group is represented by the docent Sergei Grishaev [доц. С.П. Гришаев]. He asserts that the titleholder under Art. 149.3 RCC may claim for the restitution of the same quantity of securities and not the same securities ["*истребовать возврата такого же количества ценных бумаг, а не тех же самых*"].[25] This scholar also affirms that the terms "restitution" and "to restitute" ["*истребовать*"] cannot be applied to uncertificated securities because they do not have tangible form.[26]

Another group of scholars prudently affirms that the conditions of the restitution of uncertificated securities under Art. 149.3 RCC are similar to those applicable to the vindication of paper form securities to a named person.[27] However, the method under Art. 149.3 RCC has specific features resulting from the nature of uncertificated securities.[28]

The third group of scholars also believes that the traditional vindication does not apply to electronic securities. However, they analyze that question deeper: they estimate that the legislator has precised the conditions of vindication regarding the object of the restitution. According to this group, the method under Art. 149.3 RCC has become closer to the rules on the unjust enrichment or in Latin "*condictio*."

As for the case law, in one of the recent decisions in relation to uncertificated securities under Art. 149.3 RCC, the judges of the Supreme Court of the Russian Federation state that

> Art. 149.3 RCC has established a distinct regulation in order to protect the titleholders deprived from their securities whereas before the adoption of this Article, the rights of those persons were protected in compliance with the similar rules fixed by Arts. 301 and 302 RCC using the method of analogy.[29]

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[25] *Гришаев С.П.* Ценные бумаги: виды и практика применения // Редакция "Российской газеты". 2016. № 2. С. 3–175 [Sergei P. Grishaev, *Securities: The Types and the Application Practice*, 2 Library of the Russian Newspaper 3 (2016)] (Sep. 2, 2017), also available at http://base.garant.ru/57320384/. *See also* Гришаев С.П. Эволюция законодательства об объектах гражданских прав [Sergei P. Grishaev, *Evolution of the Legislation Governing the Objects of Civil Law*] (SPS "Garant," 2015).

[26] *Id.*

[27] *See Агешкина Н.А., Баринов Н.А., Бевзюк Е.А., Беляев М.А., Бирюкова Т.А., Вахрушева Ю.Н., Гришина Я.С., Закиров Р.Ю., Кожевников О.А., Копьёв А.В., Кухаренко Т.А., Морозов А.П., Морозов С.Ю., Серебренников М.М., Шадрина Е.Г., Юдина А.Б.* Комментарий Гражданскому кодексу Российской Федерации. Часть первая от 30 ноября 1994 г. № 51-ФЗ [Natalya A. Ageshkina et al., *Commentary of the Civil Code of the Russian Federation. Chapter I of 30 November 1994 No. 51-FZ*] (SPS "Garant," 2014) (Jan. 11, 2017), also available at http://base.garant.ru/57518292/.

[28] *Id.*

[29] Определение Верховного Суда РФ от 22 января 2015 г. № 301-ЭС14-7093 [Decision of the Supreme Court of the Russian Federation No. 301-ES14-7093 of 22 January 2015] (Sep.1, 2017), available at www.garant.ru.

In other decisions based on the relevant provisions of the modified RCC, the lower courts have stated that from the moment of a relevant account record at the account, a person becomes "*proprietor of uncertificated securities*."[30] The plaintiff argued for the restitution of uncertificated securities from the possession of the defendant. The objections of the defendant regarding the undue method of protection were rejected. The higher court confirmed that decision.[31]

After having analyzed the relevant doctrine with the case law, it seems to us that the vindication has not completely disappeared in relation to uncertificated securities. As we have already mentioned the question is perplex. From our point of view, the second group of scholars should be followed. However we should note that the claim we face is not a pure vindication claim. The object is not a chattel. Thus, in relation to uncertificated securities under Russian law the expression quasi-vindication also seems correct to us.[32]

As we have seen in my previous article, in Switzerland the Federal Tribunal ruled that vindication is not applicable to the correspondent term: "intermediated securities."[33] The rules on the unjust enrichment apply. In this respect we note that it would certainly be better to apply the rules on the unjust enrichment in the Russian legal order. This will terminate the discussion. It is interesting to mention that Art. 149.3 RCC repeats word to word the formulation prescribed by Art. 29, para. 2 FISA. Indeed, the wording in Russian [*возврат такого же количества соответствующих ценных бумаг*] perfectly correlates to the one in French [*restituer des titres intermédiés en même nombre et de même genre*]. Despite terminological similarity, the solutions chosen by the legal orders in question are different from the legal point of view. In my opinion, the Swiss approach should be followed. The legal doctrine in Russia has recently started the discussion on the application of the rules upon the unjust enrichment to uncertificated securities.

In order to summarize the discussion on that point, we allege, the following conclusions:

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[30] Постановление Пятого арбитражного апелляционного суда от 28 октября 2014 г. № 05АП-12170/2014 по делу № А51-8705/2014 [Resolution of the Fifth Arbitration Court of Appeal No. 05AP-12170/2014 with Regard to Case No. A51-8705/2014 of 28 October 2014] (Sep. 1, 2017), available at www.garant.ru.

[31] Постановление Арбитражного суда Дальневосточного округа от 24 февраля 2015 г. № Ф03-6296/14 по делу № А51-8705/2014 [Resolution of the Arbitration Court of the Far Eastern District No. F03-6296/14 with Regard to Case No. A51-8705/2014 of 24 February 2015] (Sep.1, 2017), available at www.garant.ru.

[32] *Селивановский А.С., Сенюк Г.В.* Ценные бумаги в Гражданском кодексе РФ: изменения правового регулирования // Хозяйство и право. 2014. № 10. С. 20–36 [Anton S. Selivanovsky & Georgy V. Seniuk, *The Securities under the Civil Code of the Russian Federation: The Modifications of the Legal Regulation*, 10 Economy and Law 20 (2014)] (Sep. 11, 2017), also available at http://www.hozpravo.ru/ru/e-version/1995-2014.

[33] ATF 138 III 137 consid. 5.2.1.

1) Firstly, the modified RCC (Art. 149) and the FISA (Art. 3, para. 1, let. "a" and "b") are based mostly on so called the "substantial approach."

2) Secondly, we came to the conclusion that it is impossible to renounce completely from traditional tangible property concepts in respect of the securities held in dematerialized form. In Switzerland the legislator has defined those securities as a *sui generis* or independent legal object that constitutes neither claim nor chattel. I have widely discussed that point in my previous article. As we have analyzed, the situation in the Russian Federation is more delicate. Some legal practitioners, for example, Viktor Petrov [В. Петров] estimate that vindication of uncertificated securities to a named person according to the case law remains the most efficient method to protect the holder who was deprived from his securities against his own will.[34] The doctrine is not unanimous. The RCC defines the securities as the rights against the issuer according to Art. 149 RCC. Can we vindicate rights? The answer is certainly no. One may ask what is the best solution in this case? In my opinion the courts and the legislator should declare those securities as a *sui generis* legal object which combines the features of a claim and a chattel and apply the rules upon the unjust enrichment to those securities. This solution will allow us to eliminate all previously raised contradictions.

3) Thirdly, I still insist that an awkward term "*бездокументарная ценная бумага*" or "uncertificated security" should be replaced by the new one: "intermediated security."

4) Finally, I suggest to the Russian legislator to ratify the UNIDROIT Convention on Substantive Rules for Intermediated Securities also known as "Geneva Securities Convention." I also suggest this ratification to the Swiss legislator.

2. The Transfer of Intermediated Securities and of the Correspondent Russian Law Term: The FISA, the RCC and under the "Geneva Securities Convention"

2.1. General Overview of All Methods of Transfer

In chapter 2 of our previous article, we have discussed the methods transfer chosen by the respective legislators.[35] I kindly refer you to that previous article.[36] Those methods are: "debits and credits," designating entry, control agreement and a grant of an interest to the relevant intermediary. The method pursuant to Art. XI

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[34] *Петров В.* Защита прав владельцев бездокументарных именных ценных бумаг путем предъявления виндикационного иска // Рынок ценных бумаг. 2016. № 2. С. 69 [Viktor Petrov, *The Protection of the Titleholder of the Uncertificated Securities to a Named Person by Means of Filing a Vindication Lawsuit*, 2 The Securities Market 69 (2016)], also available at https://www.vegaslex.ru/analytics/publications/_the_inspectors_are_unable_to_get_to_the_warehouse_and_counted_us_all_vat_is_it_legal_/.

[35] Botvinov 2017, at 34.

[36] *Id.*

of the Geneva Securities Convention called "*debits and credits*" is used mainly for transferring the securities while methods under Art. XII are used to create a security interest upon securities. The method under Art. XI is universally recognized and called by the professor Luc Thévenoz "*the golden standard of the holding pattern worldwide.*"[37] In order to refresh the results of our previous research on this subject we present the following scheme:

Scheme I: Methods of Disposition under Russian Law, Swiss Law and Pursuant to the Geneva Securities Convention

Methods of Disposition	Swiss Law	Russian Law	Geneva Securities Convention
Debits and credits	+	+	+
Control Agreement	+	–	+
Designating entry	–	+	+
Security interest in favor of the relevant intermediary	+	–	+

2.2. Debits and Credits

This method is mainly used to transfer securities. It could also be used to create an interest on intermediated securities according to the Official Commentary of the Geneva Securities Convention[38]. The transfer of the respective securities requires in both legal orders the following pillars: an instruction, a debit at the account of the transferor and the credit at the account of the transferee. We are going to analyze in this chapter the above mentioned institutions within the scope of the two chosen legal orders.

2.2.1. The Legal Nature of the Instruction

Under the modified RCC (Art. 149.2) and the FISA (Art. 24, paras. 1 and 2) the transfer of intermediated securities requires an instruction from the titleholder to the relevant intermediary and the records at the accounts of the transferor and the

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[37] *Intermediated Securities: The Impact of the Geneva Securities Convention and the Future European Legislation* 138 (P.-H. Conac et al. (eds.), Cambridge: Cambridge University Press, 2013).

[38] Hideki Kanda et al., *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* 68 (Oxford: Oxford University Press, 2012).

transferee. The conclusion of the contract is not enough. This rule applies not only in relation to transfer but also regarding to the constitution of an interest (Art. 149, para. 3 RCC). However, we should precise the application of this rule in Switzerland. As we have mentioned earlier, the Swiss legislator has chosen different methods: the control agreement (Art. 25[1] FISA) and the grant of an interest in favor of the relevant intermediary (Art. 26[1] FISA). According to Art. 26[1] FISA, the grant of an interest in favor of the relevant intermediary becomes valid from the conclusion of the contract. As for the control agreement, the rule is the same.

Article 149.2, para. 4 RCC grants the right to the person in favor of whom the transfer should be affected or an interest created, the right to claim in courts for the making of the relevant records at the accounts in case the transferor avoids presenting an instruction to an intermediary. In Switzerland, the doctrine also considers that an acquirer is protected by the same type of legal action, called in French: "*action en inscription.*"[39]

As we have seen, in both legal orders one cannot transfer the respective securities without an instruction to an intermediary. The Explanatory Report prepared by the Swiss legislator qualifies the instruction as "*a unilateral act of the titleholder…*"[40] Swiss law distinguishes an act of disposition [*acte de disposition*; *распорядительная сделка*] from the underlying contract, while the Russian legal order did not follow that approach for quite a long time.[41] We will explain this problem below.

What about Russian law, we shall note that the attitude to that problem was controversial. It has seriously evolved in the recent time. In 2001, the Court ruled that an instruction constitute a unilateral legal act.[42] In 2002, the Court has qualified the instruction as a

> dispositive action serving to execute the underlying contract. The instruction is not an independent act. Hence, we cannot recognize it invalid.[43]

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[39] Denis Piotet, *Titres intermédiés: ruptures avec les principes généraux de la codification* in *Placements collectifs et titres intermédiés: le renouveau de la place financière suisse: travaux de la journée d'étude organisée à l'Université de Lausanne le 7 novembre 2007* 107, 115 (J.-T. Michel (ed.), Lausanne: CEDIDAC, 2008).

[40] *Id.* The statement in French is the following: "*acte juridique unilatéral du titulaire du compte, c'est-à-dire une déclaration de volonté sujette à réception par le dépositaire et qui tend au transfert de titres à un acquéreur.*"

[41] Explanatory Report, at 8859.

[42] Постановление Федерального арбитражного суда Московского округа от 24 июля 2001 г. № КГ-А40/3720-01 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/3720-01 of 24 July 2001] (Feb. 11, 2016), available at www.garant.ru.

[43] Постановление Федерального арбитражного суда Северо-Западного округа от 19 августа 2002 г. № А05-1233/02-52/17 [Resolution of the Federal Arbitration Court of the Northwestern District No. A05-1233/02-52/17 of 19 August 2002] (Feb. 11, 2016), available at www.garant.ru. In Russian the extract from the resolution is as follows: "*передаточное распоряжение является*

In 2006 another court has ruled that it erroneous to consider the instruction as a unilateral act.[44] It constitutes according to the court

> a notification of the titleholder regarding the accomplishment of the transaction.

This approach has been maintained by the courts in the Russian Federation for quite a long time.[45] The situation has improved significantly. The courts have recognized that the instruction constitute a unilateral act.[46] In particular, the courts have ruled that an instruction constitute a

распорядительным действием, совершенным во исполнение обязательств, вытекающих из договора купли-продажи акций, а не самостоятельной сделкой, следовательно, не может быть признано недействительным."

[44] Постановление Федерального арбитражного суда Московского округа от 2 октября 2006 г. № КГ-А40/9109-06-П-2,3 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/9109-06-P-2,3 of 2 October 2006] (Feb. 11, 2016), available at www.garant.ru. In Russian the conclusion of the judges is as follows: "*Анализ указанной нормы позволяет сделать вывод, что передаточное распоряжение само по себе не является документом, на основании которого осуществляется переход прав на ценные бумаги, а является лишь уведомлением владельца о состоявшейся сделке и содержит его требование о внесении изменений в систему ведения реестра с обязательным указанием основания перехода права собственности на ценные бумаги.*"

[45] Постановление Федерального арбитражного суда Восточно-Сибирского округа от 10 марта 2011 г. по делу № А10-1026/08 [Resolution of the Federal Arbitration Court of the East-Siberian District with Regard to Case No. A10-1026/08 of 10 March 2011] (Sep. 7, 2017), available at www.consultant.ru. In this case the court has come to the conclusion that an instruction is not act and thus cannot be contested. In Russian the argumentation of the Arbitration Court is as follows: "…*что передаточное распоряжение не влечет, само по себе, перехода права собственности на бездокументарные ценные бумаги, сделкой не является, в связи с чем недействительным признано быть не может*…" This resolution was later uphold by the Presidency of the Supreme Arbitration Court of the Russian Federation. *See* Постановление Президиума Высшего Арбитражного Суда РФ от 17 ноября 2011 г. № 7994/11 по делу № А10-1026/08 [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 7994/11 with Regard to Case No. A10-1026/08 of 17 November 2011] (Sep. 8, 2017), available at www.consultant.ru. *See also* Постановление Федерального арбитражного суда Поволжского округа от 16 ноября 2011 г. № Ф06-9153/11 по делу № А57-9198/2010 [Resolution of the Federal Arbitration Court of the Volga District No. F06-9153/11 with Regard to Case No. A57-9198/2010 of 16 November 2011] (Feb. 11, 2016), available at www.garant.ru. The Court have decided that an instruction is a "*dispositive action which is made for executing the contact of sale.*" The conclusion of the Court is as follows: "*передаточное распоряжение – это распорядительное действие, совершаемое во исполнение договора купли-продажи акций, являющееся по своей правовой природе уведомлением владельца акций о состоявшейся сделке и содержащее его требование о внесении изменений в систему ведения реестра с обязательным указанием основания перехода права собственности на ценные бумаги.*"

[46] Постановление Четвертого арбитражного апелляционного суда от 24 мая 2017 г. № 04АП-7366/2015 по делу № А58-4275/2015 [Resolution of the Fourth Arbitration Court of Appeal No. 04AP-7366/2015 with Regard to Case No. A58-4275/2015 of 24 May 2017] (Sep. 5, 2017), available at www.consultant.ru. In this case the Court has come to the conclusion the instruction is an act within the meaning of Art. 153 RCC. Thus it could be challenged. In Russian the arguments of the Court are as follows: "*Соответственно, передаточное распоряжение не только содержит в себе обращение*

dispositive act by virtue of which the re-registration of the securities holder is affected, i.e. it entails the legal consequences of an act.[47]

Derogative decisions are quite rare.[48] For instance, the Sixteenth Arbitration Court of Appeal has ruled that the instruction does not entail itself the transfer of property rights. It constitute only the dispositive action [*распорядительное действие*]. Thus,

к регистрирующему органу на переход права собственности на бездокументарные ценные бумаги, но и непосредственно является актом (действием) по передаче бездокументарных ценных бумаг от продавца к приобретателю таких бумаг. Следовательно, по смыслу ст. 153 Гражданского кодекса Российской Федерации передаточное распоряжение фактически отвечает критериям сделки, которой признается, в частности, действие юридического лица, направленное на установление, изменение или прекращение гражданских прав и обязанностей." Other courts also follow that argumentation. *See in particular* Постановление Девятнадцатого арбитражного апелляционного суда от 8 февраля 2017 г. № 19АП-3945/2016 по делу № А14-14020/2015 [Resolution of the Nineteenth Arbitration Court of Appeal No. 19AP-3945/2016 with Regard to Case No. A14-14020/2015 of 8 February 2017] (Sep. 5, 2017), available at www.consultant.ru. In this case the appellant argued that instructions do not constitute acts. According to his position they do not imply the creation, modification or termination of the rights and obligations. The court has rejected those arguments and recognized instructions as acts (the term act means in Russian: "сделка"). The Court has ruled that the appellant has interpreted the provisions of the material law incorrectly. The instruction according to the Court confirms the accomplishment of the transfer for value of shares from one person to another. In Russian the extract from the ruling is as follows: "*Данный довод заявителя подлежит отклонению как основанный на ошибочном толковании норм материального права, так как передаточное распоряжение является документом, подтверждающим совершение сделки по возмездной передаче акций от одного лица к другому, поскольку передаточное распоряжение не только содержит в себе обращение к регистрирующему органу на переход права собственности на бездокументарные ценные бумаги, но и непосредственно является актом (действием) по передаче бездокументарных ценных бумаг от продавца к приобретателю таких бумаг.*" Постановление Двенадцатого арбитражного апелляционного суда от 26 сентября 2016 г. № 12АП-6691/2016 по делу № А12-6026/2016 [Resolution of the Twelfth Arbitration Court of Appeal No. 12AP-6691/2016 with Regard to Case No. A12-6026/2016 of 26 September 2016] (Sep. 5, 2017), available at www.consultant.ru.

47 *See* Постановление Девятого арбитражного апелляционного суда от 14 июля 2017 г. № 09АП-19873/2017-ГК по делу № А40-215838/14-87-1139 [Resolution of the Ninth Arbitration Court of Appeal No. 09AP-19873/2017-GK with Regard to Case No. A40-215838/14-87-1139 of 14 July 2017] (Sep. 10, 2017), available at www.consultant.ru. In Russian the conclusion of the Arbitration Court is as follows: "*Передаточное распоряжение даже при отсутствии договора является распорядительным документом, на основании которого производится переоформление владельца акций, то есть влечет юридически значимые правовые последствия сделки*." Practically identical conclusion was retained in another resolution. *See* Постановление Арбитражного суда Поволжского округа от 5 июня 2017 г. № Ф06-21239/2017 по делу № А12-33476/2016 [Resolution of the Arbitration Court of the Volga District No. F06-21239/2017 with Regard to Case No. A12-33476/2016 of 5 June 2017] (Sep. 5, 2017) available at www.consultant.ru.

48 Постановление Шестнадцатого арбитражного апелляционного суда от 7 августа 2017 г. № 16АП-1867/2016 по делу № А20-1584/2014 [Resolution of the Sixteenth Arbitration Court of Appeal No. 16AP-1867/2016 with Regard to Case No. A20-1584/2014 of 7 August 2017] (Sep. 11, 2017), available at www.consultant.ru. In Russian the conclusion of the Arbitration Court is as follows: "*Из названных положений закона следует, что передаточное распоряжение само по себе не влечет перехода права собственности на бездокументарные ценные бумаги и, следовательно, по смыслу статьи 153 ГК РФ не является сделкой, которой признается действие гражданина или юридического лица, направленное на установление, изменение или прекращение гражданских прав и обязанностей*."

it cannot be considered as an act within the meaning of Art. 153 RCC.[49] The judges refer in this respect to Federal Securities Market Act and the relevant legislation governing the transfer of uncertificated securities.[50] In my opinion, these arguments retained in this decision are not persuasive. These conclusions are absolutely different to the one which figure in the other recent decisions.

The doctrine in Russia was not unanimous at that point. On the one hand, some scholars criticize the approach retained by the courts and consider that an instruction constitute a unilateral legal act. This group is represented by Dimitriy Murzin and Roman Bevzenko.[51] On the other hand, other scholars, for example Konstantin Lebedev [доц. К.К. Лебедев], the docent of the Saint-Petersburg University estimate that an instruction under Russian law cannot be qualified as a unilateral act.[52] In particular, Konstantin Lebedev affirms that an instruction under Russian law cannot be distinguished from the underlying contract.[53] The instruction according to the docent Konstantin Lebedev cannot be compared with a banking guarantee which constitute a unilateral and abstract act.[54] He also affirms that the transfer of uncertificated securities cannot be made without the consent of the transferee.[55] We do not share this opinion.

According to the first group, the instruction under Russian law is a legal act. In this respect Roman Bevzenko [доц. Р. Бевзенко] refers to the Resolution of the Federal Arbitration Court of the Moscow District of 24 February 2004 No. KG-A40/556-04.[56] In that case the Court had to examine the substance of the instruction due to the absence of the written contract between the parties. The judges have come to the conclusion that

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49 Resolution of the Sixteenth Arbitration Court of Appeal No. 16ÀP-1867/2016, *supra* note 48.

50 Федеральный закон от 22 апреля 1996 г. № 39-ФЗ "О рынке ценных бумаг," Собрание законодательства РФ, 1996, № 17, ст. 1918 [Federal law No. 39-FZ of 22 April 1996. On the Securities Market, Legislation Bulletin of the Russian Federation, 1996, No. 17, Art. 1918].

51 *See Бабкин С.А., Бевзенко Р.С., Белов В.А., Блинковский К.А., Григораш И.В., Субботин М.В., Тарасенко Ю.А., Шевцов П.В.* Корпоративное право. Актуальные проблемы теории и практики [Sergei A. Babkin et al., *Corporate Law. The Actual Problems of Theory and Practice*] (V.A. Belov (ed.), Moscow: Urait, 2015) (Feb. 17, 2016), also available at http://base.garant.ru/57354462/.

52 *Лебедев К.К.* Защита прав обладателей бездокументарных ценных бумаг (материально- и процессуально-правовые аспекты разрешения споров, связанных с отчуждением бездокументарных ценных бумаг) [Konstantin K. Lebedev, *The Protection of the Rights of the Titleholders of Uncertificated Securities (Material and Procedural Aspects of Claims Regarding the Alienation of Uncertificated Securities)*] 59 (Moscow: Wolters Kluwer, 2007).

53 *Id.*

54 *Id.*

55 *Id.*

56 Постановление Федерального арбитражного суда Московского округа от 24 февраля 2004 г. № КГ-А40/556-04 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/556-04 of 24 February 2004] (Sep. 5, 2017), available at http://www.consultant.ru/.

> the circumstances linked with the draft and the signature of the instruction and its presentation to the intermediary have changed the civil rights and obligations. Thus, it may be regarded as the part of the transaction, which resulted into the transfer of the property rights upon the securities.[57]

As we have said, we share the position of the first group of scholars on that question.

What about Swiss law, we have already mentioned earlier that the instruction constitute a unilateral act. The legislator distinguishes the underlying contract from the act of disposition.[58]

The question whether those acts are unilateral or bilateral is controversial. The doctrine in Switzerland is not unanimous at this point. The FISA contains three acts of disposition that we are going to analyze separately: the first one under Art. 24 FISA, another one under Art. 25^1 FISA and the last one according to Art. 26^1 FISA. The first group of scholars consider that the act of disposition under Art. 24 FISA is an abstract and unilateral act while those under Arts. 25^1 and 26^1 FISA are bilateral. This group is represented by the professors of the University of Geneva Luc Thévenoz and Bénédict Foex.[59] The professor Bénédict Foex considers that the instruction is act of disposition *stricto sensu* for the act under Art. 24 FISA. Contrary to the first group, Joël Leibenson believes that the act under Art. 24 FISA is bilateral.[60] Joël Leibenson argues that from the point of view of the Property Law and from the point of view of the intermediate holding system.[61] As for the Property Law, he invokes that the acts of disposition under Property Law are usually bilateral.[62] The consent of another party for the transfer according to Joël Leibenson is necessary.[63] What about the arguments based on the intermediate holding system, he argues that the act of disposition requires the consent of the transferee which is manifested

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57 Resolution of the Federal Arbitration Court of the Moscow District No. KG-À40/556-04, *supra* note 56. The formulation in Russian is as follows: "*По данному делу суд апелляционной инстанции не учел, что в отсутствие письменного договора обстоятельства, связанные с составлением и подписанием передаточного распоряжения, а также с его представлением реестродержателю, повлекли за собой изменение гражданских прав и обязанностей и поэтому могут рассматриваться как часть сделки, результатом которой стал переход прав собственности на ценные бумаги.*"

58 Explanatory Report, at 8860.

59 Luc Thévenoz, *Du dépôt collectif des valeurs mobilières aux titres intermédiés: un saut épistémologique* in *Wirtschaftsrecht zu Beginn des 21 Jahrhunderts. Festschrift für Peter Nobel zum 60. Geburtstag* 708 (R. Waldburger et al. (eds.), Bern: Stämpfli, 2005). *See also* Bénédict Foex, *Les actes de disposition sur les titres intermédiés* in *Placements collectifs et titres intermédiés*, *supra* note 39, at 83, 90.

60 Joël Leibenson, *Les actes de disposition sur les titres intermédiés* 200 (Zurich: Schulthess, 2013).

61 *Id*. at 202.

62 *Id.*

63 *Id*. at 203.

in the contract. He affirms again that the transfer of securities cannot be affected without the consent for the acquisition. In our opinion, this argumentation is not persuasive. It seems that Joël Leibenson confuses the underlying contract with the act of disposition. This is contrary to the Explanatory Report prepared by the Swiss Legislator. The reasoning given by Joël Leibenson is quite similar to the one presented by the docent Konstantin Lebedev. Thus, we conclude that the act of disposition under Art. 24 FISA is unilateral.

2.2.2. The Definition of the Debit and the Credit

Pursuant to Art. 149.2 RCC the transfer of rights upon uncertificated securities is affected by means of debit at the account of the transferor and the credit at the account of the transferee in virtue of the instruction of the transferor. Apart from the instruction, the transfer under the modified RCC requires the debit and the credit at the relevant accounts.

In Switzerland, the act of disposition upon intermediated securities also requires an instruction of the transferor to a relevant intermediary and the "credit" at the account of the transferee (Art. 24, para. 1 FISA). The doctrine in Switzerland qualifies those institutions as accounting operations.[64]

The UNIDROIT Convention on Substantive Rules for Intermediated Securities adopted on the 9 October 2009 in Geneva does not prescribe the definitions of those terms. In the Convention we find the definition of the "securities account" which means an *account maintained by an intermediary to which securities may be debited and credited* (Art. 1(c)). The authors of the Official Commentary deduct from that definition that the "credit" is an entry in a securities account.[65] The authors state that the definition of the credit is governed by the Non-Convention law[66]. As for the "debit", the authors of the Official Commentary refer to the comments on the "credit" which apply *mutatis mutandis*.[67] The Convention prescribes that subject to Art. 16, intermediated securities are acquired by an account holder by the credit of securities to that account holder's securities account (Art. 11, para. 1). The same Article states in para. 2 that no further step is necessary, or may be required by the Non-Convention law or any other rule of law applicable in an insolvency proceeding, to render the acquisition of intermediated securities effective against third parties. This paragraph according to the authors of the Official Commentary addresses the effectiveness of a credit against third parties.[68] As we see, our two

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64 *The Federal Intermediated Securities Act (FISA) and the Hague Securities Convention (HSC)* 377 (H. Kuhn et al. (eds.), Berne: Stämpfli, 2010).

65 Kanda et al. 2012, at 70.

66 *Id.* at 71.

67 *Id.* at 74.

68 *Id.* at 73.

chosen legal orders are in full compliance with the Convention at this point. The credit constitutes the key moment for the creation of the effectiveness against third parties.

2.3. Other Methods of Transfer

As for other methods of transfer, we note that the choice of the two legislators is different. The Russian legislator has chosen the designating entry within the meaning of Art. 1, let. "l" of the UNIDROIT Convention on Substantive Rules for Intermediated Securities. We have already discussed this topic in our previous article.[69] As for the Swiss legislator, the FISA contains apart from debits and credits also two other methods. They are the control agreement (Art. 25^1 FISA) and the constitution of an interest in favor of a relevant intermediary (Art. 26^1 FISA). One may find a lot of works dedicated to the general description of those methods.[70] Contrary to "debits and credits" under Art. 24 FISA, the control agreement and the constitution of interest in favor of the relevant intermediary do not require an entry at the account. They base on contractual mechanisms. The conclusion of the contract is enough and no entry is required.[71] The authors of the Official Commentary on the Convention note that a Contracting State is free to choose one, two or three methods available.[72] However, some delegations expressed the idea that the designating entry is superior to other methods.[73] I share this point of view. Indeed, the entry at the account certainly creates more security to the grantee than other methods. It is interesting to mention in this respect that Swiss scholars also recognize weak points of the control agreement and suggest having always a writing form.[74] For the present moment Swiss law does not require the control agreement to be in a written form.[75]

The Convention distinguishes between positive and negative control (Art. 1, lit. "k" and "l"). Positive control enables the grantee to give instructions to the relevant intermediary without the consent of the account holder while the latter means that the relevant intermediary is not entitled to comply with the instructions from

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69 Botvinov 2017, at 36.

70 *See The Federal Intermediated Securities Act (FISA)*, *supra* note 64; *Intermediated Securities*, *supra* note 37; Denise Brügger, *La nouvelle loi fédérale sur les titres intermédiés* in *Perspectives et risques de nouveautés juridiques 2008/2009* 23 (D. Lengauer & G. Rezzonico (eds.), Zurich: Schulthess Verlag AG, 2009); Martin Hess & Katja Stöckli, *Bestellung von Sicherheiten an Bucheffekten*, 106 Schweizerische Juristen-Zeitung 153 (2010).

71 Kanda et al. 2012, at 79.

72 *Id.*

73 *Id.* at 84.

74 *The Federal Intermediated Securities Act (FISA)*, *supra* note 64, at 388.

75 *Id.*

the account holder without the consent of the grantee.[76] The Russian legislator has chosen the designating entry as a method for the creation of interests. We deduct this from the provisions of Art. 149.2, para. 3 RCC. The creation of an interest such a pledge requires according to that article a relevant entry at the account of the titleholder. The control established by means of the designating entry under the Russian legislation is negative. We refer in this respect to Art. 51.6, para. 4 FSMA. This Article states that the grantor is not entitled to dispose of the pledged securities without the consent of the grantee unless otherwise provided by the agreement or by the Federal law.

As for the Swiss legal order, we note that Art. 25^1 FISA prescribes that an account holder may conclude an agreement with an intermediary by virtue of which the intermediary obliges to execute irrevocably the instructions of the grantee without any further consent or cooperation of the account holder. The Explanatory Report prepared by the Swiss legislator states that the account holder is deprived of the control over the securities.[77] This allows us to conclude that the control over securities is positive.

The third option available under Swiss law is the grant of an interest in favor of the relevant intermediary under Art. 26^1 FISA. It is done by means of agreement. The security interest becomes effective against third parties from the conclusion of agreement (Art. 26^1 FISA).

In this paragraph we would like to continue the discussion started previously regarding the unilateral or bilateral nature of the acts of disposition under the FISA. We have concluded that the act under Art. 24 FISA is unilateral. What about the acts pursuant to Arts. 25^1 and 26^1 FISA, we affirm that they are bilateral. As we have established earlier, the Swiss legislator distinguishes the underlying contract from the act of disposition.[78] Apart from the conclusion of the control agreement and the agreement with the relevant intermediary under the relevant articles of the FISA, the parties need to have an underlying contract. For instance, pledge agreement. The conclusion of a pledge agreement is not sufficient to create an interest upon intermediated securities. In two cases we have agreement as an act of disposition which is distinguished from an underlying contract. Thus, the acts of disposition pursuant to Arts. 25^1 and 26^1 FISA are bilateral. We illustrate our conclusions on this subject as follows:

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[76] Kanda et al. 2012, at 83.

[77] Explanatory Report, at 8870. The text in French is as follows: "*Bien que les titres intermédiés gagés restent comptabilisés sur son compte, le constituant, du fait même de la constitution de la sûreté, renonce à exercer une maîtrise exclusive sur ces titres.*"

[78] Explanatory Report, at 8859.

Scheme II: The Acts of Dispositions under the FISA

	Debits and Credits under Art. 24	The Control Agreement under Art. 25[1]	The Grant of an Interest in Favor of the Relevant Intermediary Within the Meaning of Art. 26[1]
Acts of disposition	Unilateral	Bilateral	Bilateral

2.4. The Battle Between Causality and Abstraction in Relation to the Act of Disposition upon Securities Held in a Dematerialized Form

This question is quite controversial. In civil law countries, the doctrine distinguishes abstract and casual acts [*абстрактные и казуальные сделки*]. The abstractedness [abstraction] is defined as a relation between two economically linked legal reports engaging different parties which means that the objections relating to the first report cannot be invoked regarding the second one. The opposite institution to this is the causality.[79] An abstract act is independent from its cause contrary to the causal act.[80] As for the transfer, the causality principle means that the validity of the act of disposition relies on the one of the underlying contract.[81] The abstraction principle has an opposite meaning.[82]

As we have said the problem is complex and the legal doctrine in Switzerland is not unanimous. One the one hand a group of legal scholars believe that the acts of disposition upon intermediated securities under the FISA rely on the causality principle; on the other hand another group of scholars consider that these acts of disposition have an abstract nature.[83] In order to solve this problem, we have to analyze again each act separately. Among various doctrinal opinions, we believe that the one presented by Joël Leibenson is correct. He thinks that all acts of disposition upon intermediated securities under Chapter V FISA have causal nature. I share his point of view. He argues that the Explanatory Report is quite contradictory in relation to the act governed by Art. 24 FISA[84]. One cannot exclusively rely on Art. 15 FISA.

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79 Christine Chappuis & Sylvan Marchand, *Du jargon et de la raison en droit des obligations: définitions et prétentions* 6 (Genève: Université de Genève, Faculté de droit, 2010).

80 *Id.* at 7.

81 Leibenson 2013, at 139.

82 *Id.*

83 Antoine Eigenmann, *Projet de loi sur le dépôt et le transfert des titres intermédiés, aspects choisis* in *Revue suisse de droit des affaires et du marché financier* 104 (P. Nobel et al. (eds.), Zurich: Schulthess Juristische Medien AG, 2006); Leibenson 2013, at 172; Bénédict Foex, at 87.

84 Leibenson 2013, at 173.

In this respect, he asserts that the fact that an intermediary is not entitled to verify the legal grounds for the instruction does not mean that the instruction is valid.[85] Hence, Joël Leibenson concludes that the legislator has not decided whether the act in question is abstract or causal. This is the first point he mentioned. Secondly, he affirms that causality principle grants more legal security. The introduction of the regime protecting the *bona fide* purchaser constitute according to Joël Leibenson the sign that the act of disposition should base on a valid contract.[86] He argues that the application of the abstractedness allows to the acquirer in bad faith to get a title upon the securities without cause.[87] I absolutely agree with this point of view.

As for the acts of disposition which base on contractual mechanisms (Arts. 25^1 and 26^1 FISA), we affirm that they are also causal. Contrary to the act under Art. 24 FISA, we cannot invoke Art. 15, para. 2 FISA regarding the execution of the instruction by the intermediary without verifying the cause.

Scheme III: The Application of Causality Principle Regarding the Acts of Disposition on Intermediated Securities under the FISA

	Debits and Credits under Art. 24	**The Control Agreement under Art. 25^1**	**The Grant of an Interest in Favor of the Relevant Intermediary Within the Meaning of Art. 26^1**
Acts of disposition	Causal	Causal	Causal

In the Russian Federation, the courts have ruled that the validity of an instruction relies on the one of the underlying contract.[88] If the underlying contract is invalid, the

[85] Leibenson 2013, at 173.

[86] *Id.* at 177.

[87] *Id.* at 176.

[88] Постановление Восьмого арбитражного апелляционного суда от 27 июня 2016 г. № 08АП-4837/2016 по делу № А46-13527/2014 [Resolution of the Eighth Arbitration Court of Appeal No. 08AP-4837/2016 with Regard to Case No. A46-13527/2014 of 27 June 2016] (Sep. 5, 2017), available at www.consultant.ru. In that Resolution the Court has ruled that the invalidity of the contract implies also the invalidity of the instruction. In Russian the text is as follows: "*Поскольку недействительная сделка – договор № 02-12/ГТ от 20.07.2012, послужила основанием для составления передаточного распоряжения от 18.03.2013, указанное передаточное распоряжение также является недействительным.*" Постановление Девятого арбитражного апелляционного суда от 2 апреля 2015 г. № 09АП-8847/2015 по делу № А40-56112/13 [Resolution of the Ninth Arbitration Court of Appeal No. 09AP-8847/2015 with Regard to Case No. A40-56112/13 of 2 April 2015] (Sep. 7, 2017), available at www.consultant.ru. The ruling of the Court is given in Russian as follows: "*Таким образом, признание недействительными действий по передаче паев в соответствии со статьей 167 ГК РФ повлекло недействительность передаточных распоряжений.*"

instruction is also invalid. Hence, the instruction under Russian law is a casual act. In recent decisions arbitration courts have ruled that the instruction not only addresses to the intermediary regarding the transfer of property rights upon securities but also constitutes an act (action) of transfer of uncertificated securities from the buyer to the acquirer of those securities ["*Соответственно, передаточное распоряжение не только содержит в себе обращение к регистрирующему органу на переход права собственности на бездокументарные ценные бумаги, но и непосредственно является актом (действием) по передаче бездокументарных ценных бумаг от продавца к приобретателю таких бумаг*"[89]]. The similar conclusion was retained in other decisions.[90]

Conclusion

Although we have heavily criticized the Russian legislator for the reform, the significant progress has been achieved in such areas as the transfer, the protection of the titleholder including the *bona fide* purchaser, the definition of the securities. We present our conclusions as follows:

1) Firstly, the modified RCC (Art. 149) and the FISA (Art. 3, para. 1, let. "a" and "b") are based mostly on so called the "substantial approach."

2) Secondly, we came to the conclusion that it is impossible to renounce completely from traditional tangible property concepts in respect of the securities held in dematerialized form. In Switzerland the legislator has defined those securities as a *sui generis* or independent legal object that constitutes neither claim nor chattel. In my opinion the Russian courts and the legislator should declare those securities the *sui generis* legal object which combines the features of a claim and a chattel. This solution will allow us to eliminate all previously raised contradictions.

3) Thirdly, the Russian legislator has not renounced completely from the principle of vindication. The doctrine calls the method under Art. 149.3 RCC as quasi-vindication. I agree with this statement. However I suggest to replace it and to apply the rules upon the unjust enrichment to those securities in order to protect the titleholder. This solution has been retained by the Swiss legislator.

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[89] Постановление Девятнадцатого арбитражного апелляционного суда от 8 февраля 2017 г. № 19АП-3945/2016 по делу № А14-14020/2015 [Resolution of the Nineteenth Arbitration Court of Appeal No. 19AP-3945/2016 with Regard to Case No. A14-14020/2015 of 8 February 2017] (Sep. 5, 2017), available at www.consultant.ru.

[90] Постановление Четвертого арбитражного апелляционного суда от 24 мая 2017 г. № 04АП-7366/2015 по делу № А58-4275/2015 [Resolution of the Fourth Arbitration Court of Appeal No. 04AP-7366/2015 with Regard to Case No. A58-4275/2015 of 24 May 2017] (Sep. 5, 2017), available at www.consultant.ru. *See also* Постановление Двенадцатого арбитражного апелляционного суда от 26 сентября 2016 г. № 12АП-6691/2016 по делу № А12-6026/2016 [Resolution of the Twelfth Arbitration Court of Appeal No. 12AP-6691/2016 with Regard to Case No. A12-6026/2016 of 26 September 2016] (Sep. 5, 2017), available at www.consultant.ru.

4) I still insist that an awkward term "бездокументарная ценная бумага" or "uncertificated security" should be replaced by the new one: "intermediated security."

5) I suggest to the Russian legislator to ratify the UNIDROIT Convention on Substantive Rules for Intermediated Securities also known as "Geneva Securities Convention." I also suggest this ratification to the Swiss legislator.

6) In relation to transfer of the securities, the two legislators in question have chosen different solutions. Apart from the method under Art. XI of the UNIDROIT Convention on Substantive Rules for Intermediated Securities, there are three options available under Art. XII: the designating entry, the control agreement and the grant of an interest in favor of the relevant intermediary. The Russian legislator has chosen the designating entry while his Swiss colleague has decided two choose the control agreement and the grant of an interest in favor of the relevant intermediary.

7) The Swiss legal order distinguishes the act of disposition from the underlying contract [*titre d'acquisition*]. In our opinion the act of disposition under Art. 24 FISA is unilateral and causal, while the remaining two (Arts. 25^1 and 26^1 FISA) are bilateral and also causal. As for the Russian Federation, arbitration courts qualify the instruction as a unilateral and causal act. Previously, arbitration courts in the Russian Federation refused to consider the instruction as a unilateral act.

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TRIPS FLEXIBILITIES AND INDIA'S PLANT VARIETY PROTECTION REGIME: THE WAY FORWARD

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Article 27.3(b) of the TRIPS Agreement provides that members shall provide for protection of plant varieties either by patents or by an effective sui generis protection or both. While WTO member countries can choose from among intellectual property strategies to protect plant varieties, they may not choose to exclude plant varieties from IP rights protection without facing trade sanctions from the WTO dispute resolution body. The open-ended language of the article creates a flexible standard of protection sympathetic to developing nations' socio-economic priorities, provided that the effectiveness requirement is satisfied. This flexibility presents a range of possibilities from systems like the plant patent regime of the United States or specific variety protection systems of the European Union to the possibility of customized plant protection regimes suited to the needs of developing nations.

India, while complying with the requirements of the TRIPS Agreement for the protection of plant varieties, enacted the Protection of Plant Varieties and Farmers' Rights Act. The fundamental ideology of the PPVFR Act is to address India's concerns about protecting the rights of small and marginal farming communities, while at the same time promoting plant breeding by vesting adequate IP rights protection which will boost further research and innovation in this field.

This paper argues that as it is necessary to recognize and protect the rights of farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties, the PPVFR Act has maintained a balance between breeders' rights and farmers' rights. The PPVFR Act protects farmers' rights to save, use, exchange and share all farm produce, including

seeds that fall within the purview of the Act, and it provides protection of indigenous knowledge against unwary monetization.

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Introduction

For decades, Indian policy on plant varieties and seeds was based on the principle of the common heritage of mankind. Post-independence, Indian governments adopted a system wherein plant breeding activities were largely confined to the public sector post-independence to address national food security issues.[1] This policy to a large extent succeeded when at the end of the 1970s India achieved the milestone of transitioning from being an importer of foodgrains to achieving self-sufficiency in food.[2] India did not want monopolies to develop in crucial areas like agriculture and hence the government produced seeds through its own agencies and distributed them cheaply to the public. India's move towards promoting farming trade was partly prompted by the entry of overseas seed corporations into the Indian market in the early 1980s, which gave rise to demands for Intellectual Property (IP) rights protection.[3] Further, India, being a World Trade Organization (WTO) member was required to adhere to the standards set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) for the protection of plant varieties.[4] From there, India had to shift its age-old principle of common heritage and was obliged to provide protection to plant varieties either through patent or a *sui generis* system, or a combination of both.

The Protection of Plant Varieties and Farmers' Rights (PPVFR) Act, 2001[5] is primarily considered as an upshot of the pressures from India's membership in

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1 N.S. Gopalakrishnan, *An "Effective" Sui Generis Law to Protect Plant Varieties and Farmers' Rights in India*, 4(1) Journal of World Intellectual Property 157, 158 (2001).

2 India: Economic Development: Evolution of Policy (September 1995) (Feb. 10, 2018), available at http://www.country-data.com/cgi-bin/query/r-6093.html.

3 *Id*.

4 TRIPS Agreement, Art. 27.3(b) (Feb. 10, 2018), available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

5 The Protection of Plant Varieties and Farmers' Rights Act, No. 53 of 2001, India Code (2001), Vol. 64, at 1 (Feb. 10, 2018), available at http://www.plantauthority.gov.in/pdf/PPV&FRAct2001.pdf (hereinafter PPVFRA).

the WTO by the developed countries, as well as the entry of overseas corporations into the Indian market. Exercising the flexibility given under the TRIPS Agreement with regard to the defence for Plant Varieties Protection (PVP), India chose a *sui generis* structure to protect plant varieties with a view to balancing the interests of both breeders' rights and farmers' rights without succumbing to the pressures of developed countries to became a member of the International Union for the Protection of New Varieties of Plants (UPOV) Convention (1961) or to enact a law for plant varieties protection based on the UPOV model. Since India is also a member of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which has got substantial provisions on farmers' rights and contains a chapter on it, makes it obligatory on the member state to provide for its safeguard through the national legislative process.

Below, the unique features of the PPVFR Act are discussed in order to understand how India has tried to maintain a balance between two very important rights through one piece of legislation, i.e. the PPVFR Act, so as to fulfil the effectiveness test under Art. 27.3(b) of the TRIPS Agreement.

1. Indian Initiative for the Protection of Plant Varieties and Farmers' Rights

The PPVFR Act differs significantly from the UPOV model to the extent it emphasizes the rights of farmers

> in respect of their contribution made at any time in conserving, improving, and making available plant genetic resources for the development of new plant varieties.[6]

The PPVFR Act protects farmers' rights to save, use, exchange, and share all farm produce, including seeds that fall within the purview of the Act and it provides protections of indigenous knowledge against unwary monetization.[7] Having said that, this Act also does not disregard the breeders' rights and to a large extent provide the analogous criteria for protection of new varieties of plant as provided under the UPOV 1991 Act, which has been the subject matter of considerable debate.

The fundamental philosophy of the PPVFR Act is to address India's concerns about protecting the rights of small and marginal farming communities, while at the same time promoting plant breeding by vesting adequate IP rights protection which will boost further research and innovation in this sphere. It is evident from the very objective of this Act that it has been enacted to

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[6] PPVFRA, Preamble.

[7] *Supra* note 5.

> provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants[8]… [as] it is considered necessary to recognize and safeguard the rights of the farmers in respect of their contributions made since time immemorial in conserving, improving and making available plant genetic resources for the development of new plant varieties.
>
> Further, to augment agricultural development in the country, it was necessary to protect plant breeders' rights so as to stimulate investment for research and development, both in the public and in the private sector, for the development of new plant varieties, as such protection will expedite the growth of the seed industry in the country which in turn will ensure the availability of high quality seeds and planting material to the farming communities.[9]

The Preamble further elaborates that to give effect to the aforesaid objectives it is necessary to undertake processes for the protection of the rights of farmers and plant breeders, and as India has ratified the TRIPS Agreement it should *inter alia* make facility for giving effect to TRIPS provisions in this regard, i.e. subpara. (b) of para. 3 of Art. 27 in Part II relating to protection of plant varieties. The PPVFR Act provides for plant varieties in three protected categories:

(a) New Varieties,

(b) Extant Varieties, which refer to existing varieties revealed for the first time, and

(c) Farmers' Varieties, based on public property concepts.[10]

The salient features of the PPVFR Act will be examined in order to understand the layers of protection it provides both to breeders' rights and to farmers' rights.

1.1. New Variety

Under the PPVFR Act, a variety is eligible for protection provided it is novel, distinct, uniform and stable.[11] However, it is contended that while making these criteria for the protection of a new variety, the requirement for novelty is quite similar to the UPOV 1991 Act which also contains the same criteria for the protection of a new plant variety. Further varieties not "sold or otherwise disposed of" in India more than a year prior to filing, or outside India for more than four or six years, depending on the type of plant, can pass the novelty test under the PPVFR Act.[12]

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8 PPVFRA, Preamble.

9 *Id.*

10 *Id.* at Sec. 15(2).

11 *Id.* at Sec. 15.

12 *Id.* at Sec. 15(3)(a).

In this situation, becoming "a matter of common knowledge" on the date of application, by any methods other than by sale or disposal, does not affect the novelty of the proposed new plant variety for protection under the PPVFR Act.[13] On the line of the novelty criteria, the descriptions of distinctiveness, uniformity and stability under the PPVFR Act also follow the UPOV 1991 Act definitions.[14] Due to this, it has been contended that despite that India is not a member of UPOV Convention, but due to the acute pressure from developed countries, it has adopted some of the key provisions of the UPOV 1991 Act and incorporated them in the PPVFR Act, which is something that is not beneficial for its national interests.

Under the PPVFR Act, any breeder, farmer or community of farmers may apply for registration of a new variety.[15] The difference with the PPVFR Act lies in the registration system, which enables protection for new varieties while at the same time recognizing the role of indigenous and traditional farmers. For instance, every application for registration must include a denomination of the variety and explain (1) the geographical source of the material and (2) all information regarding the contribution of the farmer, community or organization in the growth of the variety.[16] Further, the application for registration under the PPVFR Act must state that all genetic or parental material used to develop the variety has been legally acquired.[17]

Furthermore, Sec. 40 of the PPVFR Act requires the breeder to disclose information "regarding the use of genetic material conserved by any tribal or rural families in the breeding or development of such new variety."[18] The information in the application is intended to simplify benefit sharing, introduced to protect farmers' rights. Contrasted with the UPOV 1991 Act, the PPVFR Act contains a set of public-interest exceptions to the registration of a new variety as a safeguard to take care of larger national interests. For example, a new variety will not be registrable if it is likely to misinform the public, hurt the religious sentiments of any class or section of Indians or cause confusion regarding the variety's identity, or is not different from every denomination which designates a variety of the same botanical species or of a closely related species registered under the Act.[19]

While the farmers' role is secured by the benefit-sharing arrangement, the breeders' rights are also taken care of by using a mix of exclusive rights and severe

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13 PPVFRA, Sec. 15(3) proviso.

14 *Id.* at Sec. 15.

15 *Id.* at Sec. 16(1)(d).

16 *Id.* at Sec. 18(1)(e).

17 *Id.* at Sec. 18(l)(h).

18 *Id.* at Sec. 40.

19 *Id.* at Sec. 15(4).

penalties for infringement of the exclusive rights of the breeders. The PPVFR Act provides the breeders exclusive commercial rights over the variety, once registered, including licensing, production, sales, marketing, distribution and importing and exporting.[20] The statute tries to deter infringement by providing stringent penalties, at rupees 50,000 (ca. euros 640.00) or imprisonment for a minimum of three months, which is provided to safeguard the breeders' interests and motivation to innovate without the fear of infringement.

1.2. Extant Variety

This is an exceptional provision under the PPVFR Act, as the introduction of extant variety and farmers' variety was meant to create a balance between breeders' rights and the rights of farmers and to give them a level playing field. The extant variety category itself was introduced to safeguard traditional knowledge and indigenous rights.[21] The extant variety register serves as a gathering of matters known and existing in the public domain. Under the PPVFR Act, an extant variety encompasses a farmers' variety, or a variety about which there is common knowledge, or a variety in the public domain, as well as any variety included under Sec. 5 of the Seeds Act.[22]

Considering that the extant variety register is a record of materials available in the public domain, the registration requirements are not very thorough. To register an extant variety, it need not be novel, although the requirements of distinctiveness, uniformity and stability are regulated by administrative notifications issued (which are made by the Protection of Plant Variety and Farmers' Rights Authority of India (hereinafter Plant Authority)) from time to time.[23] By making farmers' variety a subcategory of the extant variety, the PPVFR Act reassures farmers that to register varieties they have cultivated for ages will ensure that they are not misappropriated. The most significant benefit is that registration or compilation of extant varieties creates an advance standard for distinctness for registering "new" varieties under the PPVFR Act. In that sense, it prevents protection of infinitesimal innovations by plant breeders. To that extent, the PPVFR Act deviates from the UPOV approach by creating a more careful instrument to maintain the exclusivity of the protected varieties.

However, the deficiency is that the condition for registration of extant varieties is not noticeably provided in the PPVFR Act. What is provided under the PPVFR Act is that

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[20] PPVFRA, Sec. 28.

[21] *Id.* at Sec. 14(b).

[22] *Id.* at Sec. 2(j).

[23] *Id.* at Sec. 15(2).

> Notwithstanding anything contained in sub-section (1), an extant variety shall be registered if it conforms to distinctiveness, uniformity and stability as specified under the regulations[24]

by the Plant Authority. Hence, it is obvious from this provision that the novelty criterion is not required for registering an extant variety.

These regulations were set down in "The Gazette of India" notification issued by the Indian government on 7 December 2006.[25] According to this "Gazette" notification, the Plant Authority established an Extant Variety Registration Committee, which was given the assignment of making recommendations for the registration of extant variety of notified variety as provided under the Seeds Act 1966.[26] This "Gazette" notification also states that the distinctiveness, uniformity and stability (DUS) criteria for registration of extant varieties will vary from species to species and they shall be notified by the Plant Authority in "The Gazette of India" from time to time.[27] Since the registration of the extant variety does not necessitate the fulfilment of the novelty criteria, the registration of such varieties is not the same as those for the newly developed varieties or new varieties.

Under the PPVFR Act, an extant variety may be registered by a breeder, farmer, community of farmers, a university or a public sector.[28] Although a breeder can also register an extant variety, the breeder is not entitled to exclusive rights over the extant variety.[29] Section 28 of the PPVFR Act provides that the government, as the owner of the extant varieties, enjoys the rights to determine their production, sale, marketability, distribution, importation or exportation.[30]

The objective of having such a unique provision for extant varieties is to protect biodiversity by empowering the administration to bargain with such entities that require biodiversity materials for creating agro-biotechnology innovations. Nevertheless, Sec. 24 of the PPVFR Act creates the right to exploit an extant variety, over specific applicants, for a period of up to 15 years from the date of publication.[31] In doing this, it prevents any private attainment of materials in the public domain. Since any person can make an application for registration of an extant variety under Sec. 16,

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24 PPVFRA, Sec. 15(2).

25 Notification, Ministry of Agriculture, 7 December 2006 (Feb. 10, 2018), available at http://www.plantauthority.gov.in/pdf/indgazette.pdf.

26 *Id*. at Chapter III, Sec. 6.

27 *Id*.

28 PPVFRA, Sec. 14.

29 *Id.* at Sec. 28.

30 *Id*.

31 *Id.* at Sec. 24(6)(ii).

it permits the government to confer rights on the applicant for using the variety for a definite period. However, the difficulty with the extant registration is a twin problem. First, by imposing a term of protection for extant varieties it creates the impression that matters in the civic domain are not available in perpetuity. Secondly, allowing any third party to register an extant variety could apparently put some species in the public domain that are unregistered. Plants that are not commercially operational or are being used may never be registered, which will make the registry incomplete. In any case, it seems difficult to imagine that this mechanism would result in registration of all plants which are available in the public domain.

1.3. Farmers' Variety

One of most significant provisions of the PPVFR Act is in regard to the farmers' varieties. While doing so, it defines farmers from a public rights perspective as those who "cultivate crops by cultivating the land," and those who oversee farming directly or indirectly through other people, or anyone who

> conserves and preserves, severally or jointly, with any other person through selection and identification of their useful properties.[32]

Under the PPVFR Act, a farmers' variety is one

> which has been traditionally cultivated and evolved by the farmers in their fields, or is a wild relative or land race of a variety about which the farmers possess the common knowledge.[33]

The emphasis on common acceptance strengthens community rights, a notion which is completely ignored by the UPOV Convention. As far as determination of novelty and distinctiveness for registering a new variety is concerned, a variety becomes a matter of common knowledge only if it is protected or registered in any convention country.[34] Other forms of common knowledge may not overthrow novelty or distinctiveness. For other purposes, the term "common knowledge" has been left largely undefined. Remarkably, even though the definitions of novelty and distinctiveness under the PPVFR Act follow the UPOV 1991 Act, the overall protection regime envisaged under the Act lessens some of the concerns. The manner of providing protection of a farmers' variety echoes a deep sense of consideration for the farmers and traditional community rights by including provisions for benefit-sharing, community compensation, immunity from prosecution for innocent infringement and

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[32] PPVFRA, Sec. 2(k).

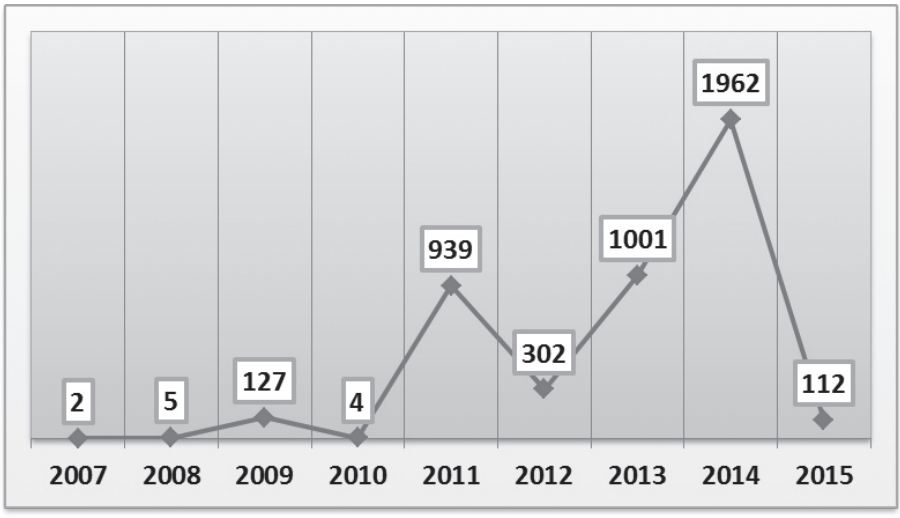
[33] *Id.* at Sec. 2(1).

[34] *Id.* at Sec. 15(3)(a) proviso.

the creation of a Gene Fund to accumulate breeders' annual fees.[35] Each of the rights provided in this regard not only signifies a departure from the UPOV Convention but also exhibits the rights contoured to suit distinctive national conditions, which is a point worth noting for other developing countries that are in the process of formulating their plant varieties laws in compliance with the TRIPS Agreement.

However, many critics point out that discretely categorizing a farmers' variety creates economic inadequacy in prosecuting claims for registering because farmers may be breeders, and vice versa. Though a farmer can be a breeder qualifying to register a new variety, a community of farmers that creates a new variety, for example, will not qualify for registration of the breeders' variety. The most important aspect of a farmers' variety is not to mollify farmers, but to create community property rights, different to that of the breeders' variety. The critics may be correct, however, when considering that farmers' variety is a subset of extant variety. While the extant variety encompasses everything in the public domain, farmers' variety is limited to materials traditionally cultivated by farmers or over which farmers own common knowledge. On the contrary, the breeders' variety is based on the developed countries notion of IP rights. However, creating two different systems of registrations has resulted in operative issues as the number of farmer's varieties which are registered are very fewer in number than new varieties and extant varieties.

Table 1: Year-Wise Trends of Filing of Application for Farmers' Varieties[36]



[35] PPVFRA, Secs. 39–46.

[36] Available at http://www.plantauthority.gov.in.

With regard to the filing of applications for the registration of farmers' varieties, which commenced in 2007, the trend appears to be inconsistent. For the first three years it was an ascending trend with a sudden increase in filings of 127 applications during 2009. However, the trend in 2010 was far from favourable, with only four applications filed. On the contrary, during 2011 there was an unexpected rise in the filing of applications, namely 939, while in 2012 there was an abrupt drop with the filing of only 302 applications. Furthermore, during 2013 there was a record number of 1,001 applications received and the same tendency continued with 1,962 applications filed in 2014 and 112 applications by 21 January 2015 (the last date data were available), which was relatively an encouraging number, given the year was still so young.

Despite that PPVFR Act allows for the registration of a variety through two possible options, some critics have argued that the NDUS (i.e. novelty, distinctiveness, uniformity and stability) and DUS criteria (in case of extant variety) used for commercial breeders may not be suitable for farmer's variety, because these criteria are more suited for modern scientific methods of breeding and laboratory-based research, which the majority of survival farmers in a country such as India do not undertake.[37] Moreover, since registration of a new variety is the only way to get protection under the PPVFR Act for farmers, many varieties developed by farmers will not enjoy any protection.[38]

It has been argued by many critics that the standards for registration in the PPVFR Act were taken from the UPOV 1991 Act, which was designed by developed countries that dominate the commercial breeders for the protection of plant varieties developed by commercial breeders who have the competence to a undertake modern and systematic research.[39] In other words, the registration criterion, for registering farmer's varieties, in the PPVFR Act was not made to suit the hands-on situation that surrounds most of the farmers in India.

Although all stakeholders', i.e. commercial breeders, public research institutions and farmers can register their varieties, in practice only commercial plant breeders and public research institutions will be able to register their varieties, as they have the ability to undertake modern scientific breeding to fulfil the NDUS criteria or DUS criteria in the case of the registration of an extant variety.

Farmers in India, unlike the commercial plant breeders, follow conventional and not modern breeding processes or laboratory-based research. Hence, varieties developed by farmers may not be able to fulfil the NDUS criteria or DUS criteria in the event the farmers wish to register their varieties as extant varieties. As a result, very few farmers' varieties will benefit from the registration system provided in the PPVFR Act.[40]

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37 Gopalakrishnan 2001, at 165.

38 *Id*.

39 Philippe Cullet, *Intellectual Property Protection and Sustainable Development* 277 (New Delhi: LexisNexis, Butterworths, 2005).

40 *Id*.

2. Other Prominent Features

The most significant features of the PPVFR Act lie in areas where it deviates from the UPOV 1991 Act. As discussed below, these departures are the major pillars upon which rest attempts towards increasing the effectiveness of the PPVFR Act, addressing other worries particularly those of indigenous farmers and traditional communities.

2.1. Right to Re-Sow

One of the most extraordinary distinctions of the PPVFR Act is exhibited by its allowing the traditional and indigenous farmers to retain their age-old right to save and reuse seeds from their harvests.[41] Under the PPVFR Act, a farmer is permitted to "save, use, sow, re-sow, exchange, share or even sell his produce," including non-branded seed, even if it is a protected variety.[42] This provision is a total departure from the UPOV 1991 Act which totally restricts this right of farmers. With a view to enabling the use of the right by farmers, Sec. 18 of the PPVFR Act further specifies that every application for a new variety be submitted along with an affidavit that the protected variety does not comprise any gene or gene succession involving terminator technology.[43] However, the only restriction to re-saving is that the farmer cannot use the breeder's brand name while reselling his harvest to anybody else.[44] This condition safeguards the interests of the breeders so that the breeders maintain their commercial interests intact.

Nonetheless, it is submitted that while the objective of having these provisions is indeed commendable, the poorly drafted language of the section may lead to abuse of the provision. For example, extant varieties or farmers' varieties, which can be re-sowed, can be branded to prevent reuse by farmers. Considering the high level of illiteracy in India amongst the farmers, whether a farmer will be able to distinguish between new varieties and extant varieties is not very clear.

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41 Suman Sahai, *India's Plant Variety Protection and Farmers' Rights Act*, Bridges Comment (Feb. 10, 2018), available at http://iprsonline.org/ictsd/docs/SahaiBridgesYear5N8Oct2001.pdf.

42 PPVFRA, Sec. 39(1)(iv): "(iv) a farmer shall be deemed to be entitled to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act: Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.

Explanation: For the purposes of clause (iv), 'branded seed' means any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act."

43 *Id.* at Sec. 18(1)(c): "Every application for registration under section 14 shall be accompanied by an affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology."

44 *Id.* at Sec. 39(1)(iv).

Termed "brown-bagging" by Western countries, farmers' traditional right to reuse protected varieties for re-sowing has been a touchy subject and one not given due recognition by developed countries that have adopted the UPOV Convention for providing protection for plant varieties. The UPOV 1991 Act does not recognize the right to reuse protected seeds, as discussed in the previous section. Breeders claim that the reusing of protected varieties by farmers takes away a part of their rightful compensation for the second generation seeds which they are not ready to part with. The breeders and the seed companies oppose the right to re-sow on the grounds that it is contrary to the principles of an effective IP rights system and would be an infringement of their rights and therefore should not be allowed. However, contrary to this notion, India has incorporated the provision whereby farmers' rights have been duly recognized and protected, which is something that has not gone down well with the developed countries that have interests in Indian markets.

Farmers, on the other hand, consider re-sowing as their intrinsic right. Many non-governmental organizations (NGOs) such as Gene Campaign emphasize that the right to re-sow is significant for farmers to maintain their livelihoods and for a nation to remain self-sufficient.[45] For example, farmers account for 87 percent of Indian seed production.[46] Denying the right to re-sow would result in private corporations replacing farmers as the country's major seed producers. In countries like India where the farming population is significant, it is important to make welfare exceptions to keep the national interest ahead of commercial interests.

By introducing the right to save, use, sow, re-sow, exchange, share or sell his farm crops, the PPVFR Act eliminates the most crippling impediment to introducing formal plant variety protection in other developing nations without succumbing to the largely objectionable provisions in this regard of the UPOV 1991 Act by most of the developing countries. This exemption signifies a balance between fully allowing re-sowing (subject to not selling as branded varieties), on the one hand, and the UPOV arrangement tending towards preventing brown-bagging in total, on the other.

2.2. Protecting Biodiversity

The PPVFR Act puts weight on conventional and traditional farming practices to protect biodiversity. Traditional farmers are encouraged under the Act to conserve and improve inherited land resources, and for doing that they will be recognized and rewarded from the Gene Fund.[47] The PPVFR Act has established a fund for this purpose called "Gene Fund" to reward farmers whose existing variety or material

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[45] Suman Sahai, *India's Plant Variety Protection and Farmers' Rights Act, 2001*, 84(3) Current Science 407, 409 (2003) (Feb. 10, 2018), also available at http://www.iisc.ernet.in/currsci/feb102003/407.pdf.

[46] *Id*.

[47] PPVFRA, Sec. 39(1)(iii): "[A] farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund."

is used as a source to create a new variety.[48] This Gene Fund under the PPVFR Act is a common fund fashioned by the central government for the assistance and recognition of the farmers.[49] Funds collected as royalties, funds collected towards benefit-sharing and other funds collected under that become due to farmers will be placed into the Gene Fund.[50] The central government will use the funds towards

> expenses for supporting the conservation and sustainable use of genetic resources including in-situ and ex-situ collections and for strengthening the capability of the village Panchayats for carrying out such projects.[51]

Moreover, if a farmer breeds a new variety, it would be subject to the same levels of protection and obligations, like benefit-sharing or community rights.[52] If a breeder derives an essentially derived variety from a farmers' variety, then the breeder of the protected variety needs the authorization of the farmer or the community to commercialize the essentially derived variety.[53] The underlying assumption is that any efforts that result in benefit-sharing should be used to encourage genetic diversity.[54]

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48 PPVFRA, Sec. 39(1)(iii).

49 *Id*. at Sec. 45: "(1) The Central Government shall constitute a Fund to be called the National Gene Fund and there shall be credited thereto –

(a) the benefit sharing received in the prescribed manner from the breeder of a variety or an essentially derived variety registered under this Act, or propagating material of such variety or essentially derived variety, as the case may be;

(b) the annual fee payable to the Authority by way of royalty under sub-section (1) of section 35;

(c) the compensation deposited in the Gene Fund under sub-section (4) of section 41;

(d) the contribution from any national and international organization and other sources.

(2) The Gene Fund shall, in the prescribed manner, be applied for meeting –

(a) any amount to be paid by way of benefit sharing under sub-section (5) of section 26;

(b) the compensation payable under sub-section (3) of section 41;

(c) the expenditure for supporting the conservation and sustainable use of genetic resources including in-situ and ex-situ collections and for strengthening the capability of the Panchayat in carrying out such conservation and sustainable use;

(d) the expenditure of the scheme relating to benefit sharing framed under section 46."

50 *Id.*

51 *Id*.

52 *Id*. at Sec. 39(1).

53 *Id*. at Sec. 43: "Notwithstanding anything contained in sub-section (6) of section 23 and section 28, where an essentially derived variety is derived from a farmers' variety, the authorization under sub-section (2) of section 28 shall not be given by the breeder of such farmers' variety except with the consent of the farmers or group of farmers or community of farmers who have made contribution in the preservation or development of such variety."

54 *Id*.

In this way, the PPVFR Act promotes innovation amongst the traditional farmers, at the same time recognizing and rewarding the contributions made by indigenous farmers, and also protecting biodiversity.

2.3. Community Rights

Another extraordinary deviation from the UPOV 1991 Act under the PPVFR Act lies in prescribing a right to community compensation in recognition of traditional knowledge from villages and communities. In this regard, Sec. 43 of the PPVFR Act is a significant departure from Western IP rights philosophy and particularly from the UPOV 1991 Act as this section reflects the community property philosophy by providing that breeders wanting to use farmers' varieties for creating essentially derived varieties cannot do so without the direct permission of the farmers engagement in the conservation of such varieties.[55] Communities can stake a claim alongside the breeders if a new variety is derived from any lead or contribution made by the local farmers or community.[56] If the community's claim for compensation is proved, the breeder is obligated to deposit the compensation in the Gene Fund through which the money will be distributed to the actual beneficiaries thereafter.[57]

2.4. Benefit-Sharing

The concept of benefit-sharing refers to the idea of sharing a fraction of the benefits accruing to a breeder of a new variety with qualifying claimants who could

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[55] PPVFRA, Sec. 43.

[56] *Id*. at Sec. 41: "(1) Any person or group of persons (whether actively engaged in farming or not) or any governmental or nongovernmental organization may, on behalf of any village or local community in India, file in any centre notified, with the previous approval of the Central Government, by the Authority, in the Official Gazette, any claim attributable to the contribution of the people of that village or local community, as the case may be, in the evolution or any variety for the purpose of staking a claim on behalf of such village or local community.

(2) Where any claim is made under sub-section (1), the centre notified under that sub-section may verify the claim made by such person or group of persons or such governmental or nongovernmental organization in such manner as it deems fit, and if it is satisfied that such village or local community has contributed significantly to the evolution of the variety which has been registered under this Act, it shall report its findings to the Authority.

(3) When the authority, on a report under sub-section (2) is satisfied, after such inquiry as it may deem fit, that the variety with which the report is related has been registered under the provisions of this Act, it may issue notice in the prescribed manner to the breeder of that variety and after providing opportunity to such breeder to file objection in the prescribed manner and of being heard, it may subject to any limit notified by the Central Government, by order, grant such sum of compensation to be paid to a person or group of persons or governmental or nongovernmental organization which has made claim under sub-section (1), as it may deem fit.

(4) Any compensation granted under sub-section (3) shall be deposited by the breeder of the variety in the Gene Fund.

(5) The compensation granted under sub-section (3) shall be deemed to be an arrear of land revenue and shall be recoverable by the Authority accordingly."

[57] *Id*.

be indigenous groups, individuals, farmers or communities.[58] The concept of benefit-sharing is very close to the community rights concept as elaborated above. The PPVFR Act provides that before registering any new variety, the Plant Authority should call for claims for benefit-sharing.[59] Farmers or persons or groups can respond based on two criteria:

(a) the extent and/or nature of use of genetic material in the development of the new variety, and

(b) the commercial utility and demand in the market for the new variety.[60]

Only citizens of India or firms or organizations formed or recognized in India are eligible to claim benefits.[61] However some critics claim that the benefit-sharing

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[58] PPVFRA, Sec. 2(b): "…benefit sharing, in relation to a variety, means such proportion of the benefit accruing to a breeder of such variety or such proportion of the benefit accruing to the breeder from an agent or a licensee of such variety, as the case may be, for which a claimant shall be entitled as determined by the Authority under section 26."

[59] *Id*. at Sec. 26: "(1) On receipt of copy of the certificate of registration under sub-section (8) of section 23 or sub-section (2) of section 24, the Authority shall publish such contents of the certificate and invite claims of benefit sharing to the variety registered under such certificate in the manner as may be prescribed.

(2) On invitation of the claims under sub-section (1), any person or group of persons or firm or governmental or nongovernmental organization shall submit its claim of benefit sharing too such variety in the prescribed form within such period, and accompanies with such fees, as may be prescribed:

Provided that such claim shall only be submitted by any –

(i) person or group of persons, if such person or every person constituting such group is a citizen of India; or

(ii) firm or governmental or non-governmental organization, if such firm or organization is formed or established in India.

(3) On receiving a claim under sub-section (2), the Authority shall send a copy of such claim to the breeder of the variety registered under such certificate and the breeder may, on receipt of such copy, submit his opposition to such claim within such period and in such manner as may be prescribed.

(4) The Authority shall, after giving an opportunity of being heard to the parties, dispose of the claim received under sub-section (2).

(5) While disposing of the claim under sub-section (4), the Authority shall explicitly indicate in its order the amount of the benefit sharing, if any, for which the claimant shall be entitled and shall take into consideration the following matters, namely –

(a) the extant [sic] and nature of the use of genetic material of the claimant in the development of the variety relating to which the benefit sharing has been claimed.

(b) the commercial utility and demand in the market of the variety relating to which the benefit sharing has been claimed.

(6) The amount of benefit sharing to a variety determined under this section shall be deposited by the breeder of such variety in the manner referred to in clause (a) of sub-section 45 in the National Gene Fund.

(7) The amount of benefit sharing determined under this section shall, on a reference made by the Authority in the prescribed manner, be recoverable as an arrear of land revenue by the District Magistrate within whose local limits of jurisdiction the breeder liable for such benefit sharing resides."

[60] *Id*.

[61] *Id*.

provision is disconnected from the farmers, and onerous to implement.[62] Critics assert that farmers may not be observant in applying for benefits, considering social, economic and other conditions of the local communities.[63] Subsequently, critics assert that the communities will be left uncompensated for breeders' misappropriations and the actual benefit will not be passed on to the actual claimants.

Further, it has been pointed out by critics that safeguards for local communities are inadequate because the breeder is not required to show prior informed consent by the community or group from which he obtained the traditional knowledge.[64] Moreover, the lack of regional offices in the local communities could exacerbate the procedural complications for farmers, requiring them to apply to distant offices.[65] To overcome this problem, it is imperative that NGOs or government bodies be permitted to apply for benefit-sharing on a farmer's behalf.

2.5. Protection against Innocent Infringement

Another important protection outlined in Sec. 42 of the PPVFR Act refers to innocent infringement of protected varieties. Innocent infringement, which is a defence against infringement, requires evidence of lack of knowledge or awareness of the protected status of the varieties at the time of infringement.[66] Such proof can include substances such as the level of literacy of the farmer or the lack of licenses written in his local language. This exception is very important for a country such as India, considering that:

(a) a large number of farmers in India are illiterate, with limited knowledge of their rights and almost negligible knowledge of intellectual property rights mechanisms, and

(b) breeders are generally pitiless in prosecuting infringement, innocent or otherwise, alleged to be done by anyone, and in the case of plant varieties it would be mostly farmers.

The exception is remarkable, with a distinctive national interest. If read together, the right to re-sow and the exemption from accidental infringement provide protection for the farmers' customary way of life and will give them a great sense

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62 Sahai 2003, at 409–410.

63 Gopalakrishnan 2001, at 18.

64 *Id*.

65 *Id*.

66 PPVFRA, Sec. 42: "Notwithstanding anything contained in this Act, –

(i) a right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right; and

(ii) a relief which a court may grant in any suit for infringement referred to in section 65 shall not be granted by such court, nor any cognizance of any offence under this Act shall be taken, for such infringement by any court against a farmer who proves, before such court, that at the time of the infringement he was not aware of the existence of the right so infringed."

of certainty to carry out their farming activities without undue fear of infringement cases being filed against them even when they are alleged to be an infringer, as they can claim the defence of innocent infringer.

This provision of the PPVFR Act becomes more significant in the Indian context where the majority of farmers are small and marginal farmers, mostly illiterate and with no knowledge of intellectual property rights. This provision comes to the rescue of all such farmers and also shows the direction to other developing countries that are in the process of formulating their plant varieties protection laws, and that have similar literacy rates and lack of awareness amongst the farming community about intellectual property rights, to overcome such challenges efficiently through including such provisions in their national laws which they have enacted or are going to enact in compliance with the TRIPS Agreement.

2.6. Compensation in Lieu of Spurious Seed

To defend farmers from overly optimistic breeders, the PPVFR Act requires breeders to reveal the expected performance.[67] It provides that if the varieties do not succeed in performing as disclosed by the breeders, then farmers, as consumers, may seek compensation from the breeders.[68] The Plant Authority shall determine whether the breeder has made spurious claims, and, if so, whether the farmer is entitled to compensation.[69] The goal is to ensure that quality is not met only halfway in the zeal to market new varieties and that a farmer should not feel embittered after buying seeds from the breeder and after paying him the price as asked by the breeder.

The benefit of the provision is that it forces breeders to adhere to minimum quality specifications and lessens the natural tendencies of big breeders to over publicize.[70] However, critics have opined that the clause vests limitless discretion in the Plant Authority.[71] This aspect of unlimited discretion to the Plant Authority can be overcome by limiting the language of the breeders' terms of license, which will presumably demonstrate adequate exceptions.

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[67] PPVFRA, Sec. 39(2): "Where any propagating material of a variety registered under this Act has been sold to a farmer or a group of farmers of any organization of farmers, the breeder of such variety shall disclose to the farmer or the group of farmers or the organization of farmers, as the case may be, the expected performance under given conditions, and if such propagating material fails to provide such performance under such given conditions, the farmer or the group of farmers or the organization of farmers, as the case may be, may claim compensation in the prescribed manner before the Authority and the Authority, after giving notice to the breeder of the variety and after providing him an opportunity to file opposition in the prescribed manner and after hearing the parties, may direct the breeder of the variety to pay such compensation as it deems fit, to the farmer or the group of farmers or the organization of farmers, as the case may be."

[68] *Id*.

[69] *Id*.

[70] *Id*. at Sec. 39.

[71] Sahai 2003, at 410.

2.7. Research Exemptions & Essentially Derived Variety

The PPVFR Act further encourages research on protected varieties by permitting anyone to use a registered variety for "piloting experiment or research" or as an "initial source of variety for the purpose of creating other varieties."[72] However, for this purpose, the PPVFR Act requires authorization from the owner of the original variety to derive the second-generation variety.[73] Such authorization is required only where "repeated use of such variety as a parental line is necessary for commercial production of such newly developed variety."[74]

This provision encourages research while preventing the premature exploitation of protected varieties in the garb of research. In this context, the PPVFR Act takes a stand totally different from that of the UPOV 1991 Act, which vests rights up to two generations of essentially derived varieties in the breeder, and is considered as giving too many rights to the breeders.

Despite the fact that the PPVFR Act defines "essentially derived" similarly to the UPOV 1991 Act, it additionally grants rights over the essentially derived variety (EDV) to the farmer or breeder (second generation breeder) who derived it, and not to the breeder of the initial variety, unless the essentially derived variety was also developed by the breeder of the new variety.[75] Due to this, it becomes a unique provision of the PPVFR Act. Essentially derived variety can also be registered providing it is supplemented by the required credentials. Critics, however, raise a distressing alarm in this regard stating that the PPVFR Act grants very limited rights to researchers because of the acknowledgement of EDV, which is defined in detail in the UPOV Convention.[76]

According to the extensive definition of EDVs, it is observed that all types of research will become focussed on the breeders' permission if a protected variety is to be used for research. Under the PPVFR Act, the breeders' permission is needed for

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[72] PPVFRA, Sec. 30: "Nothing contained in this Act shall prevent –

(a) the use of any variety registered under this Act by any person using such variety for conducting experiment or research; or

(b) the use of a variety by any person as an initial source of variety for the purpose of creating other varieties;

Provided that the authorization of the breeder of a registered variety is required where the repeated use of such variety as a parental line is necessary for commercial production of such other newly developed variety."

[73] *Id*. at Sec. 28.

[74] *Id*. at Sec. 30.

[75] *Id*. at Sec. 23(6): "The rights of the breeder of a variety contained in section 28 shall apply to the breeder of essentially derived variety:

Provided that the authorization by the breeder of the initial variety to the breeder of essentially derived variety under subsection (2) of section 28 may be subject to such terms and conditions as both the parties may mutually agree upon."

[76] B. Sharma, Paper presented at Workshop on Suitability of UPOV for Developing Countries, Gene Campaign, New Delhi, 10 July 2002.

making EDVs. The processes for making EDV have been made so all-encompassing in the UPOV 1991 Act – i.e. natural selection, mutant selection, back crosses and transformation by genetic engineering – that all known forms of creating new varieties will be covered. This would restrict the researcher's space to the extent that for almost any kind of research on the protected variety, the permission of the breeders will be needed, establishing their control on a great part of germplasm.[77] This may very well as a result go against the very objective of the introduction of this provision under the PPVFR Act.

2.8. Public Interest Exceptions & Compulsory Licensing

The public interest exception of the PPVFR Act is much broader than that in the UPOV 1991 Act and shields protection of

> public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment.[78]

Correspondingly, varieties embodying technology (including inherited and terminator technology), which may be injurious to the public or animals, are condensed non-registrable under the PPVFR Act.[79] Connected closely with the public interest exception is the all-embracing compulsory license provision. This provision is articulated in Sec. 84 of the Indian Patent Act 1970. It provides that at the end of three years, any protected variety can be subject to compulsory licensing if the

> reasonable requirements of the public for seed or other propagating material of the variety have not been satisfied or that the seed or other

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77 Sahai 2003.

78 PPVFRA, Sec. 29: "(1) Notwithstanding anything contained in this Act, no registration of a variety shall be made under this Act in cases where prevention of commercial exploitation of such variety is necessary to protect public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment.

(2) The Central Government shall, by notification in the Official Gazette, specify the genera or species for the purposes of registration of varieties other than extant varieties and farmers' varieties under this Act.

(3) Notwithstanding anything contained in sub-section (2) and sub-sections (1) and (2) of section 15, no variety of any genera or species which involves any technology which is injurious to the life or health of human beings, animals or plants shall be registered under this Act.

Explanation: For the purposes of this sub-section, the expression 'any technology' includes genetic use restriction technology and terminator technology.

(4) The Central Government shall not delete any genera or species from the list of genera or species specified in a notification issued under sub-section (2) except in the public interest.

(5) Any variety belonging to the genera or species excluded under sub-section (4) shall not be eligible for any protection under this Act."

79 *Id*.

propagating material of the variety is not available to the public at a reasonable price.[80]

Price shall also be a consideration in determining whether the practical requirements of the public are satisfied. The purpose of this is to use compulsory licensing as a deterrent in order to keep prices of protected varieties low-slung. While granting such compulsory licenses to safeguard the interests of the commercial breeders, the PPVFR Act provides for reasonable compensation to the breeder of the variety relating to the compulsory license having regard to the nature of the variety, the outlay sustained by such breeder in breeding the protected variety or for developing it, and other pertinent aspects.[81]

2.9. National Gene Fund for Promoting PGR Activities

India is a country of rich biodiversity and plant genetic resources. On the basis of the richness of its agro-biodiversity – i.e. the number of crop classes, crop varieties, wild relatives of various crop species cultivated, social significance, wild varieties of crop species occurring in the region, and the number of classes tamed and the uniqueness of the agro-ecosystems – the Plant Authority has identified 22 agro-biodiversity hotspot regions in India as per the above picture.

Farmers who have been involved in conservation and preservation of plant genetic resources (PGR) of land races and wild relatives of commercial plants and their improvement through selection and preservation in these identified 22 agro-biodiversity hotspots receive recognition and rewards through the National Gene Fund. This provision, when taken in combination with the provisions relating to the farmers' privilege, is similar to the concept of Farmers' Rights contained in the ITPGRFA, which prescribes such provisions while recognizing farmers' rights.

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[80] PPVFRA, Sec. 47: "(1) At any time, after the expiry of three years from the date of issue of a certificate of registration of a variety, any person interested may make an application to the Authority alleging that the reasonable requirements of the public for seed or other propagating material of the variety have not been satisfied or that the seed or other propagating material of the variety is not available to the public at a reasonable price and pray for the grant of a compulsory license to undertake production, distribution and sale of the seed or other propagating material of that variety.

(2) Every application under sub-section (1) shall contain a statement of the nature of the applicant's interest together with such particulars as may be prescribed and the facts upon which the application is based.

(3) The Authority, after consultation with the Central Government, and if satisfied after giving an opportunity to the breeder of such variety to file opposition and after hearing the parties, on the issue that the reasonable requirements of the public with respect to the variety have not been satisfied or that the seed or other propagating material of the variety is not available to the public at a reasonable price, may order such breeder to grant a license to the applicant upon such terms and conditions as it may deem fit and send a copy of such order to the Registrar to register the title of such applicant as licensee under sub-section (4) of section 28 on payment of such fees by the applicant as is referred to in that sub-section."

[81] *Id*. at Sec. 51(1)(i).

2.10. Exemption to Farmers from Fees

In order to promote the filing of applications of farmers' variety and for other processes, the PPVFR Act exempts a farmer or group of farmers or village community from paying any fees in any proceeding before the Authority or Registrar or the Tribunal or the High Court under this Act or the rules made thereunder.[82]

While the PPVFR Act is not free from flaws, the Act showcases that farmers' and breeders' rights can be adequately and concurrently protected under a single piece of legislation so as to take care of the interests of both the stakeholders.[83] In a country like India, ensuring food security by providing farmers' rights is important for economic steadiness.[84] The PPVFR Act's effectiveness lies in catering to the requirements of the nations that desires to promote innovation and technological advancement without intimidating farmers' livelihood.[85]

The TRIPS Agreement grants members the flexibility to rank farmers in shaping a policy for plant variety protection. The PPVFR Act is adept in its ability to exploit the flexibilities in the TRIPS Agreement. India should now work on eliminating the ambiguities in the PPVFR Act.

3. Trends of Application under the PPVFR Act

An analysis of the plant variety application trends from the period 2007 to 2014 aims at finding out the effectiveness of the PPVFR Act. As on 31 December 2014, the PPVFR Authority received 1,364 applications from the public sector, 2,751 applications from the private sector and 4,349 applications from farmers.

Table 2: Applications Filed Year-Wise under the PPVFR Act[86]

Sector	2007	2008	2009	2010	2011	2012	2013	2014	Total
Public	287	322	193	31	125	129	141	136	**1364**
Private	143	220	368	505	295	266	534	420	**2751**
Farmers	2	5	127	4	941	304	1002	1964	**4349**
Total	**432**	**547**	**688**	**540**	**1361**	**699**	**1677**	**2520**	**8464**

82 PPVFRA, Sec. 44: "A farmer or group of farmers or village community shall not be liable to pay any fees in any proceeding before the Authority or Registrar or the Tribunal or the High Court under this Act or the rules made thereunder."

83 Gopalakrishnan 2001, at 3.

84 Sahai 2003.

85 *Id*.

86 Available at http://www.plantauthority.gov.in.

The performance of public sector institutions in filing applications for PVP was encouraging in the beginning, as a good number of applications were received between 2007 and 2009. However, from 2010 to 2012 the filing slowed down. In comparison to the private sector, except for filing applications under the extant variety category, the performance was not encouraging. Public institutions, as a social commitment, submitted more applications in "high volume and low value crops" such as self-pollinated crops.

The performance of the private sector in filing applications for PVP is encouraging from the beginning of the registration of plant varieties in comparison to the public seed industry. Private seed companies showed more interest in filing their plant variety applications, particularly in "high value, low volume crops" such as cotton, maize, sorghum, bajra, rice, vegetables, etc.; as a result, a record number of 2,751 applications were filed in comparison to the public institutions, which filed only 1,364 applications, indicating that the Indian legislation is a balanced Act, and is friendly is both the public and the private seed industry.

Table 3: Registration Certificates Issued Year-Wise under the PPVFR Act[87]

Sector	2007	2008	2009	2010	2011	2012	2013	2014	Total
Public	–	–	149	49	95	154	154	250	**851**
Private	–	–	16	–	21	55	104	124	**320**
Farmers	–	–	3	–	–	3	46	459	**511**
Total	–	–	**168**	**49**	**116**	**212**	**304**	**833**	**1,682**

With regard to the issue of PVP certificates, more certificates (851) were issued to the public seed industry in comparison to the private seed companies (320). This is mainly because the certificates issued to the public institutions are mostly Extant Varieties Notified under the Seeds Act 1966, while private institutions mostly submitted their applications under the New Variety, VCK and EDV categories, which require testing for DUS and additional time.

Conclusion

The PPVFR Act showcases that farmers' and breeders' rights can be adequately and concurrently protected under a single piece of legislation so as to take care of the interests of both the stakeholders and despite its significant difference from the UPOV model which primarily focuses on breeders' rights. In a country such as India, ensuring food security by providing farmers' rights is important for economic stability. The

[87] Available at http://www.plantauthority.gov.in.

PPVFR Act's effectiveness lies in catering to the needs of nations that wish to promote innovation and technological advancement without threatening farmers' livelihoods.

The PPVFR Act is exemplary in its ability to capitalize on the flexibilities in the TRIPS Agreement. India should now work on eliminating a few of the loopholes in the PPVFR Act. Strengthening the theoretical framework of the Act can result in a resourceful *sui generis* model for plant varieties as well as farmers' rights protection tailored towards objectives of promoting innovation and cutting-edge research, on the one hand, and recognizing and safeguarding the contributions and rights of farmers, on the other, which has also become a model legislation for many developing countries. For that purpose, there is an urgent need for the harmonization of parallel laws including the Biological Diversity Act, the Seeds Bill and the PPVFR Act in order to better serve the purpose without overlapping.

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CONFERENCE REVIEW NOTES

BRICS AND DEVELOPING COUNTRIES LEGAL EXPERTS FORUM: EMERGENCE OF INTERNATIONAL COORDINATION IN ECONOMIC AND TAX LAW

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Introduction

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 Yekaterinburg, 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 – Fig. 1*);

– the share of the BRICS countries in the world imports of goods ranged from 16% to 15% over the same period (*Attachment – Fig. 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 – Fig. 3*);

– the highest export of fuel and mining products was in Russia, the highest import was in China (*Attachment – Fig. 4*);

– the highest imports and exports of manufacture products were in China, the least exports and imports – in South Africa (*Attachment – Fig. 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.

1. Development of an Effective System for Settlement of Cross-Border Tax Disputes in BRICS Countries

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. This standard can also apply to relations of BRICS members with third countries.

1.2. 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.

1.3. However, it is noted that the existing constitutional and legal framework may require some amendments or modifications.

2. Simplification of the Mechanisms for Eliminating of International Double Taxation and Tax Administration

2.1. 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 U.S. 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.

2.2. 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.

Fig. 1

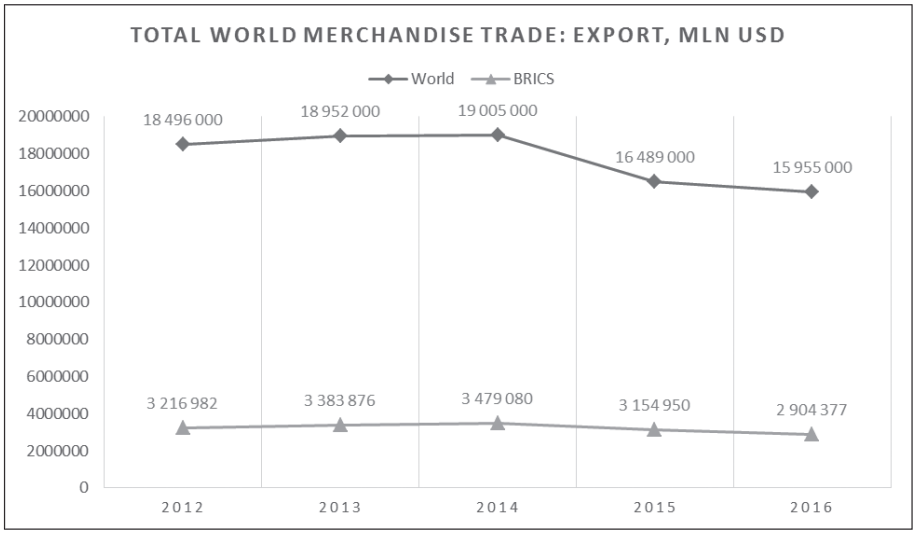
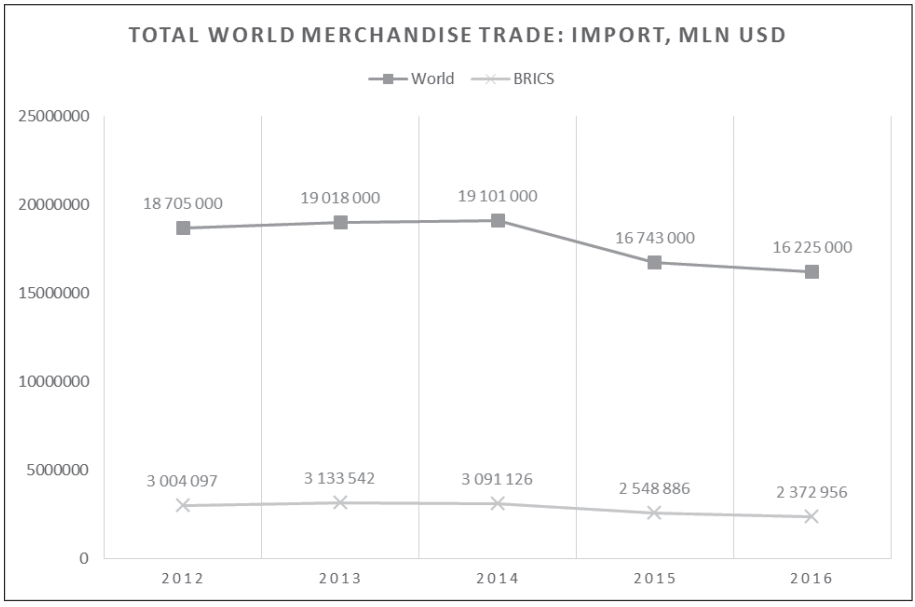

TOTAL WORLD MERCHANDISE TRADE: EXPORT, MLN USD
World
BRICS
20000000
18000000
16000000
14000000
12000000
10000000
8000000
6000000
4000000
2000000
0
18 496 000
18 952 000
19 005 000
16 489 000
15 955 000
3 216 982
3 383 876
3 479 080
3 154 950
2 904 377
2012
2013
2014
2015
2016

Fig. 2


TOTAL WORLD MERCHANDISE TRADE: IMPORT, MLN USD
World
BRICS
25000000
20000000
15000000
10000000
5000000
0
18 705 000
19 018 000
19 101 000
16 743 000
16 225 000
3 004 097
3 133 542
3 091 126
2 548 886
2 372 956
2012
2013
2014
2015
2016

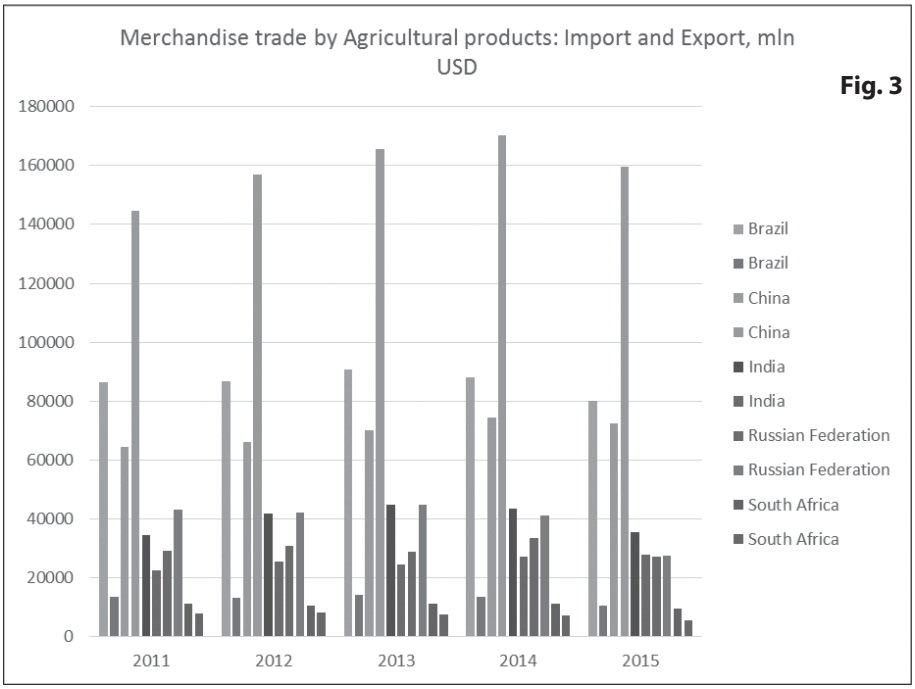

Merchandise trade by Agricultural products: Import and Export, mln USD
180000
160000
140000
120000
100000
80000
60000
40000
20000
0
2011
2012
2013
2014
2015
Brazil
Brazil
China
China
India
India
Russian Federation
Russian Federation
South Africa
South Africa

Fig. 3

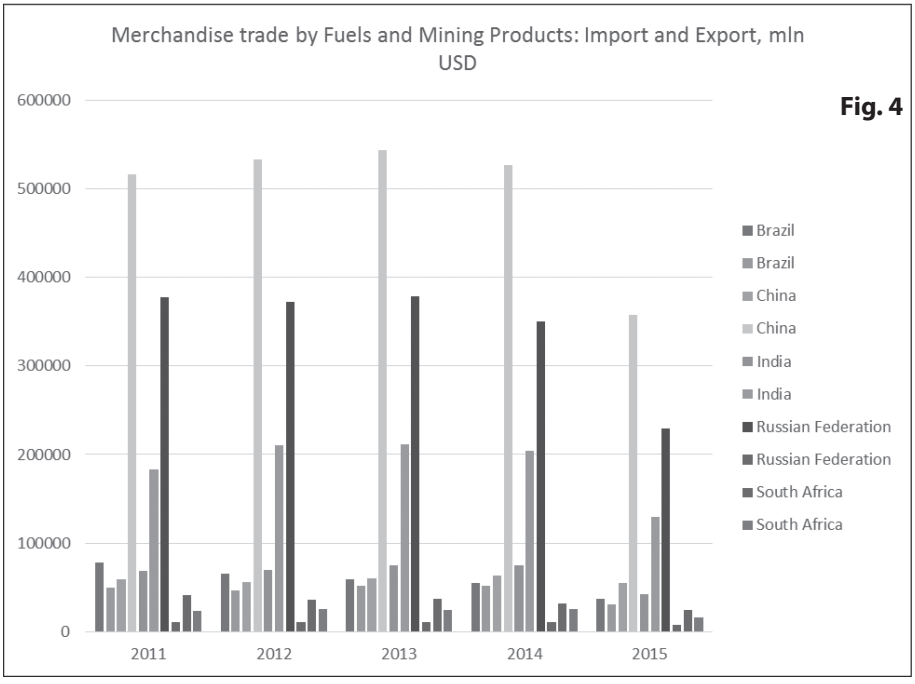

Merchandise trade by Fuels and Mining Products: Import and Export, mln USD
600000
500000
400000
300000
200000
100000
0
2011
2012
2013
2014
2015
Brazil
Brazil
China
China
India
India
Russian Federation
Russian Federation
South Africa
South Africa

Fig. 4

Fig. 5

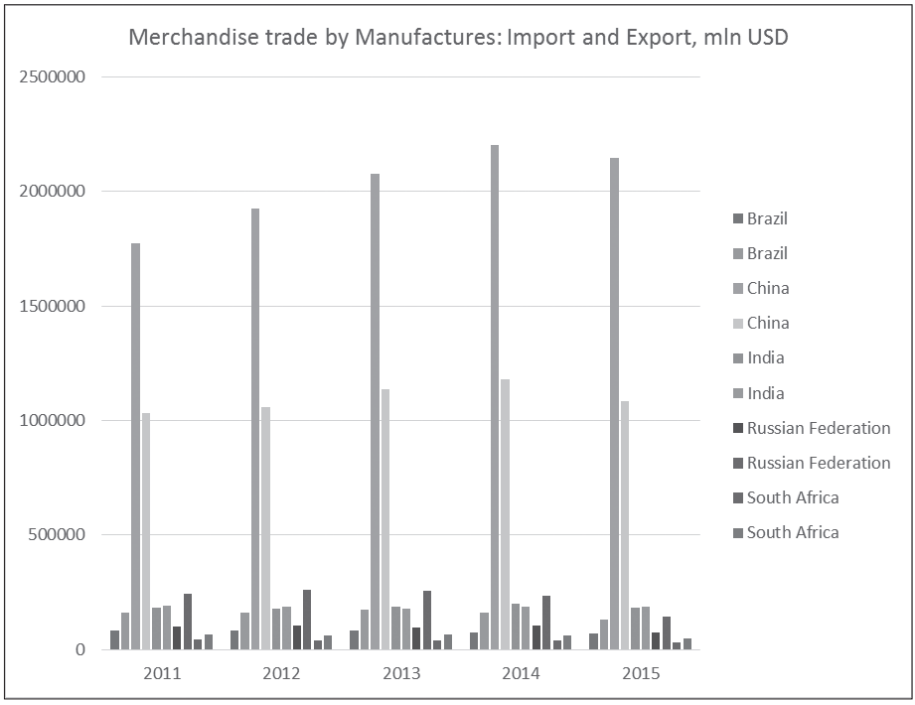

Merchandise trade by Manufactures: Import and Export, mln USD
2500000
2000000
1500000
1000000
500000
0
2011
2012
2013
2014
2015
Brazil
Brazil
China
China
India
India
Russian Federation
Russian Federation
South Africa
South Africa

Fig. 6

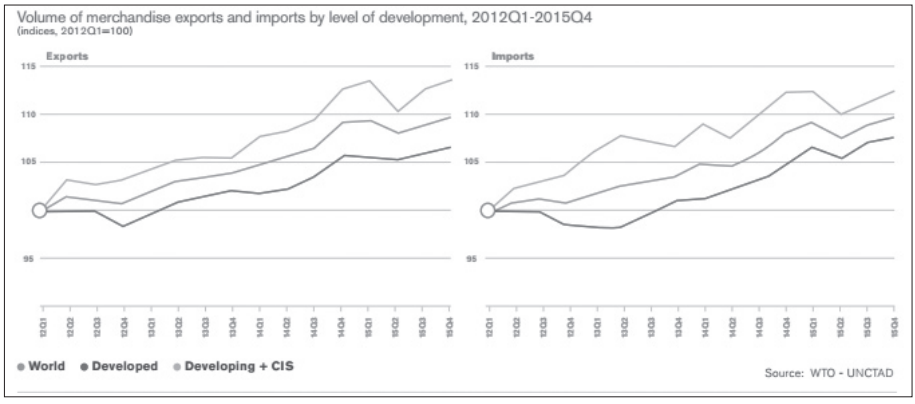

Volume of merchandise exports and imports by level of development, 2012Q1-2015Q4
(indices, 2012Q1=100)
Exports
Imports
115
110
105
95
World
Developed
Developing + CIS
Source: WTO - UNCTAD

Fig. 7

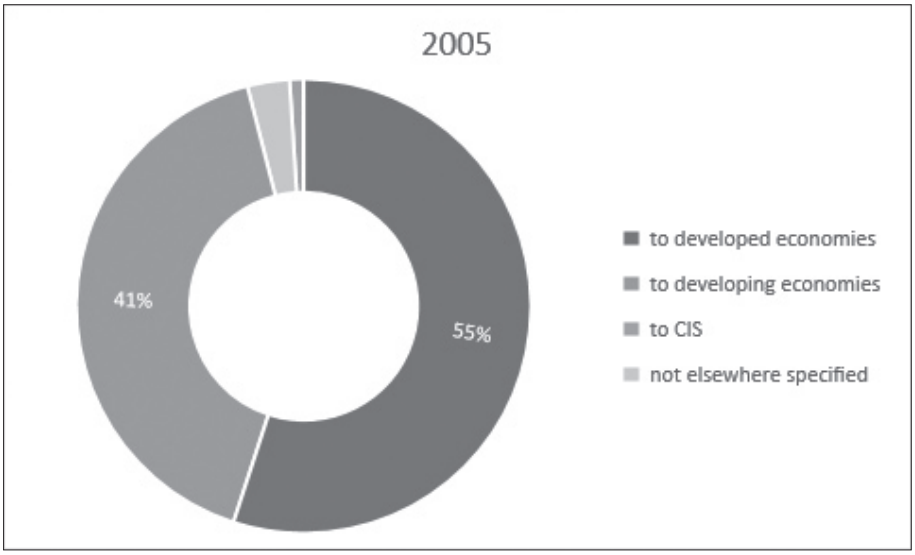
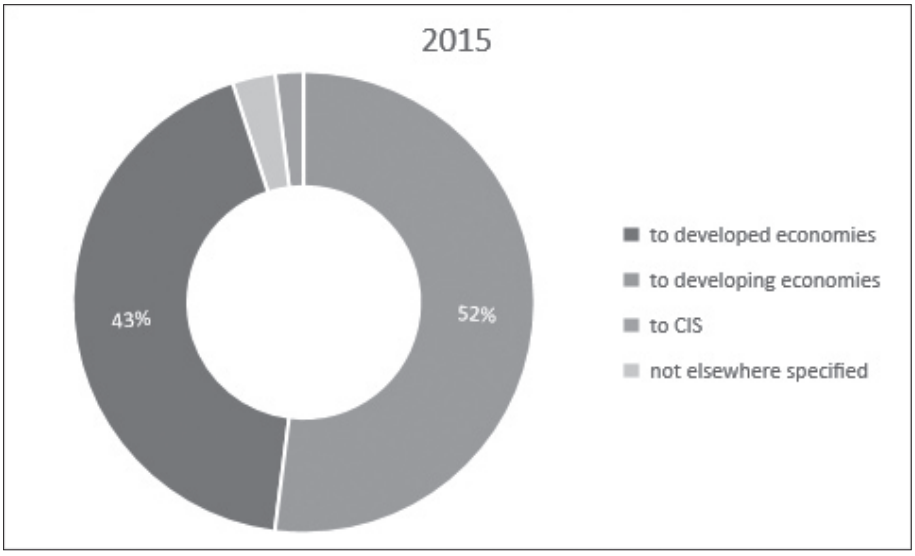

2005
55%
41%
to developed economies
to developing economies
to CIS
not elsewhere specified

Fig. 8


2015
52%
43%
to developed economies
to developing economies
to CIS
not elsewhere specified

3. Draft – Multilateral Convention between the Government of Brazil, the Government of the Russian Federation, the Government of India, the Government of People's Republic of China and the Government of Republic of South Africa for Settlement of Cross-Border Tax Disputes

Article 1. Persons Covered

This Convention shall apply to persons who are residents of one or several Contracting States.

Article 2. Subject of the Convention

This Convention applies to unresolved cross-border tax disputes arising from the application and (or) interpretation of any bilateral or multilateral tax treaty involving two or more Contracting States ("Covered Conventions").

Article 3. The Right to Tax Arbitration

1. Where a mutual agreement procedure between the competent authorities of the Contracting States provided for in the Covered Conventions of the Contracting States does not eliminate taxation that does not comply with the Covered Conventions, the person initiating the mutual agreement procedure may refer the unsettled dispute to the tax arbitration, accompanied by the necessary documents and information, provided the amount of the dispute exceeds $100,000 or the equivalent amount in the national currency of the Contracting States.

2. Such a request shall be submitted to the competent authority of the Contracting State of which the person is a resident or enterprise within two years from the expiry of the time limit for filing an application with the competent authorities in accordance with the applicable Covered Convention.

The competent authority that received such a request shall notify the competent authority of the other Contracting State and transmit to it copies of the application, as well as the enclosed documents and information within 30 days.

Article 4. Tax Arbitration

1. Each competent authority shall appoint one arbitrator within 60 days from the date of filing a request for the settlement of a cross-border tax dispute.

2. Two appointed arbitrators unanimously elect a third arbitrator within 10 days from the day of their appointment.

3. The arbitrators shall be selected from natural persons who are citizens of Contracting States competent in the field of international taxation, having academic titles and degrees, impartial and independent from the competent authorities of the Contracting States and the applicant, and otherwise not interested in the outcome of the case.

4. Three arbitrators shall form an Arbitration Panel competent to deal with the tax dispute.

The Arbitration Panel shall develop rules of procedure to be approved by the competent authorities of the Contracting States within a reasonable time.

Article 5. The Decision of Tax Arbitration

1. The Arbitration Panel shall hear the dispute within a period not exceeding 1 year from the date of its formation in accordance with the rules of procedure.

2. The decision of the Arbitration Panel shall be final and binding on the competent authorities of the Contracting States and the applicant. The decision of the Arbitration Panel may be regarded as a precedent should the competent authorities of the Contracting States mutually express such an intention.

3. The Arbitration Panel's decision shall not apply if the judicial authority of one of the Contracting States participating in the dispute has made a final decision on the same subject and with respect to the same applicant or has found the Arbitration Panel's decision void.

The competent authorities of the Contracting States shall independently implement the decision of the Arbitration Panel, and, if necessary, determine the procedure for its implementation in the course of the mutual agreement procedure provided for in the Covered Conventions within a reasonable time.

Article 6. Arbitration Costs

The Contracting States participating in the dispute shall bear the costs associated with the hearing of the tax dispute in the Arbitration Panel, including the organization and maintenance of the dispute settlement procedure, the remuneration of arbitrators, etc., in equal shares.

Article 7. Relation to Other Conventions and International Agreements

1. This Convention modifies the provisions of international agreements concluded between the Contracting States relating to the same subject.

2. The provisions of previous international agreements relating to the same issues that are affected by this Convention shall apply only to the extent that they are compatible with the provisions of this Convention.

Article 8. Term

This Convention shall be valid for five years after its effective date. Upon the expiry of that period, this Convention shall be automatically extended, each time for another five-year term.

Article 9. Done on _____ 2018 at _____, in five counterparts, in the Russian, English, Chinese and Portuguese languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

4. Draft – Multilateral Convention between the Government of the Brazil, the Government of the Russian Federation, the Government of India, the Government of People's Republic of China and the Government of Republic of South Africa for the Avoidance of Double Taxation with Regard to Certain Kinds of Income

Article 1. Persons Covered

This Convention shall apply to persons who are residents of one or several Contracting States.

Article 2. Taxes Covered

1. This Convention shall apply to taxes on income and other obligatory contributions imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income or on elements of income, including taxes on the total amounts of wages or salaries paid by enterprises.

3. There shall be regarded as other obligatory contributions in particular state insurance contributions and other similar contributions related to obligatory pension, social or medical insurance.

4. The existing taxes to which the Convention shall apply are in particular:

(a) (in Brazil): .....

(b) (in the Russian Federation): .....

(b) (in India): .....

(b) (in People's Republic of China): .....

(b) (in Republic of South Africa): .....

5. The existing obligatory contributions to which the Convention shall apply are in particular:

(a) (in Brazil): .....

(b) (in the Russian Federation): .....

(b) (in India): .....

(b) (in People's Republic of China): .....

(b) (in Republic of South Africa): .....

The Convention shall apply also to any identical or substantially similar taxes and obligatory contributions which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of significant changes made to their tax law.

Article 3. Income from Employment

1. Income derived by a national person of a Contracting State, which is a resident thereof, from employment in the other Contracting State shall be taxable and an

obligatory contribution shall be paid in this other Contracting State only, unless otherwise is not provided for in paragraph 3 hereto.

2. Income from employment of national persons of the Contracting States, referred to in paragraph 1 hereof, shall be taxable in the source State of such income beginning from the first day of employment at the tax rates applicable for income of natural persons – residents of the source State.

Should the amount of income received at a time or in aggregate for a tax period determined by the national law of the source State of income exceeds U.S. $100,000 or the equivalent amount in the currency of the source, such excess income may also be taxed by the state of residence, however, the tax rate in the latter state in respect of the amount of income exceeding 100,000 U.S. dollars or the equivalent amount in the currency of the source state, shall not exceed 15%.

Article 4. Income of Artists and Sportspersons

1. Income derived by a national person and a resident of a Contracting State as an entertainer of a theatre, film, radio or television, musician or sportsman from his personal activities as such carried out in the other Contracting State shall be taxed and other mandatory payments shall be paid only in that other State, unless otherwise provided for in paragraph 5 of this article.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

3. Notwithstanding the provisions of paragraphs 1 and 2, income derived by entertainers or sportsperson who are residents of a Contracting State shall be exempt from tax in the other Contracting State in which these activities are exercised if the activities are exercised within the framework of a visit which is substantially supported by either State, a local authority or a public institution thereof.

4. The income referred to in paragraph 1 of this article shall be taxed in the source country of such income from the first day of such activity at the tax rates provided for similar incomes of natural persons resident in that state.

Should the amount of income received at a time or in aggregate for a tax period determined by the national law of the source State of income exceeds U.S. $100,000 or the equivalent amount in the currency of the source, such excess income may also be taxed by the state of residence, however, the tax rate in the latter state in respect of the amount of income exceeding 100,000 U.S. dollars or the equivalent amount in the currency of the source state, shall not exceed 15%.

Article 5. Income of Teachers and Researchers

1. Income derived by a national person of a Contracting State, which is a resident thereof, from teaching or research activity in the other Contracting State shall be

taxable and an obligatory contribution shall be paid in this other Contracting State only, unless otherwise is not provided for in paragraph 3 hereto.

2. Income from teaching and research activity of national persons of the Contracting States, referred to in paragraph 1 hereof, shall be taxable in the source State of such income beginning from the first day of the activity at the tax rates applicable for income of natural persons – residents of the source State.

Should the amount of income received at a time or in aggregate for a tax period determined by the national law of the source State of income exceeds U.S. $100,000 or the equivalent amount in the currency of the source state, such excess income may also be taxed by the state of residence, however, the tax rate in the latter state in respect of the amount of income exceeding 100,000 U.S. dollars or the equivalent amount in the currency of the source state, shall not exceed 15%.

Article 6. Business Profit

1. The profits of an enterprise of a Contracting State from business activities in the other Contracting State carried out through a permanent establishment therein, shall be taxable only in in this other Contracting State and insofar as these profits effectively attributable to that permanent establishment (unless otherwise is provided for in paragraph 2 of this Article).

2. Should the amount of income received at a time or in aggregate for a tax period determined by the national law of the source State of income exceeds U.S. $100,000 or the equivalent amount in the currency of the source, such excess income may also be taxed by the state of residence of enterprise, however, the tax rate in the latter state in respect of the amount of income exceeding 100,000 U.S. dollars or the equivalent amount in the currency of the source state, shall not exceed 15%.

The Contracting States shall not apply its internal laws on controlled foreign companies, transfer pricing and thin capitalization with regard to the income of an enterprise of a Contracting State not exceeding the limits set forth in paragraph 2 of this Article.

Article 7. Non-Discrimination

1. The taxation and levying the other obligatory contributions on business profits or income from other independent personal activities with respect to the permanent establishment or fixed base, accordingly, which an enterprise of a Contracting State or a natural person who is an individual entrepreneur or similar to it self-employed person – resident of one Contracting State, has in the other Contracting State, shall not be less favourable in that other State than the taxation or levying the other obligatory contributions on income from similar business or personal independent activities of a natural person which is an individual entrepreneur or similar to it self-employed person – resident of that other State.

2. The taxation and levying the other obligatory contributions on income from employment, income of artists and sportspersons and income of teachers and

researchers from such activities referred to in Articles 3, 4 and 5 of the Convention, in the other Contracting State shall not be less favourable than the taxation and levying the other obligatory contributions on similar income of residents of that other State, including tax deductions, discounts and other privileges and preferences.

The provisions of this Article, notwithstanding the provision of Article 2 hereof, apply to taxes of every kind and description, including special tax regimes.

Article 8. Relation to Other Conventions and International Agreements

1. This Convention modifies the provisions of international agreements concluded between the Contracting States relating to the same subject, unless otherwise provided for in paragraph 3 of this Article.

2. The provisions of previous international agreements relating to the same issues that are affected by this Convention shall apply only to the extent that they are compatible with the provisions of this Convention.

3. Persons referred to in Articles 3 to 6 of this Convention are free to choose the most favourable provisions of this Convention or international agreements concluded between the Contracting States.

Article 9. Administration of Income

The competent authorities of a Contracting State, which is the source of income stipulated in Articles 3–6 hereof, shall periodically inform the competent authorities of the other Contracting State on the amount of income for a taxable period received by a person or an enterprise – resident of that other Contracting State.

Article 10. Term

This Convention shall be valid for five years after its effective date. Upon the expiry of that period, this Convention shall be automatically extended, each time for another five-year term.

Article 11. Done on _____ 2018 at _____, in five counterparts, in the Russian, English, Chinese and Portuguese languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

5. Draft – BRICS Multilateral Convention on Cooperation in the Fields of Culture, Education, Science and Information

PREAMBLE OF THE CONVENTION

The Governments of the states participating in the Convention ……., hereinafter referred to as «Parties»,

Taking into consideration the importance of cultural cooperation for better understanding among peoples inhabiting the BRICS countries,

Wishing to strengthen their cultural ties and to continue their efforts aimed at developing cooperation in the fields of culture, education, science and information among the BRICS countries,

Determined to observe the international legal norms relating to cultural and scientific cooperation,

Wishing to use in a most efficient way the wealth of millennia-old traditions, cultural heritage and cultural creative activities, the fruitful contacts and interferences among various cultures which confer specific features to the BRICS cultural area,

Considering that the respect and protection of the past values should be paralleled by the interest in supporting and promoting contemporary creative activities,

Acknowledging the necessary to encourage a closer and wider cooperation among the future generations and cultivation of mutual respect, understanding and tolerance,

Noting the importance of cooperation with UNESCO and other international organizations agreed as follows:

Article 1

1. By the present Treaty, the Contracting Parties establish among themselves a **BRICS International Agency on Cooperation in Culture, Education, Science and Information**.

2. The Agency shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings.

3. All States Parties to this Convention shall be members of the Agency. A State Party shall not be deprived of its membership in the Agency.

4. The seat of the Headquarters of the Organization shall be _____.

The Agency shall act on the basis of a separate agreement («Statute of the BRICS International Agency on Cooperation in Culture, Education, Science and Information») and its own internal regulations.

Article 2

The Parties shall encourage the development of relations between their countries in the field of education, science and information by:

a) encouraging and facilitating direct co-operation, contacts and exchanges between people, universities and other institutions, establishments and organizations concerned with education, science and information in the countries;

b) encouraging and facilitating the study of, instruction in and more widespread knowledge of the languages and literature of each other's country;

c) encouraging and facilitating co-operation and exchanges in areas such as teaching methods and materials, education standards, curriculum development and examinations and other means of testing;

d) providing scholarships and bursaries and facilitating placements at universities and other educational institutions, and promoting study and research;

e) encouraging and facilitating the exchange of information on international events in the fields of education and research.

Article 3

1. The parties will facilitate the mutual recognition of diplomas and certificates of higher education, academic degrees and titles in accordance with the legislation of each Party.

2. The parties will develop scientific cooperation in areas of mutual interest through the exchange of specialists, researchers, researchers and experts, information and documents, joint development and implementation of scientific projects and programs.

The parties will promote cooperation between the Academies of Sciences and relevant research institutions, institutes, universities and centres.

Article 4

1. The Parties shall facilitate the establishment or functioning of joint educational and (or) research centres (institutes), studying issues of interest for the BRICS countries.

2. Such centres (institutes) shall be involved in the work of the authorized bodies of the Parties on the subject of this Convention, work in advisory and other bodies and meetings of representatives of the Parties aimed at implementing the provisions of this Convention, including work in the International Agency on Cooperation in Culture, Education, Science and Information.

Article 5

The parties will cooperate on the issues of training and retraining of pedagogical, academic and research staff and specialists on a mutually beneficial contract basis, support the conclusion of direct agreements between the educational institutions of the Parties on the exchange of students, trainees, graduate students, teachers, scientists and methodologists with the aim of improving the quality of instruction, exchange of experience in the field of methods of organizing the educational process.

Article 6

The parties will exchange normative and legal documentation on education in order to ensure uniform requirements with a focus on world standards, facilitate the receipt and exchange of information on legislative and regulatory acts in the field of education, state educational standards, scientific and pedagogical research, development of joint scientific programs on educational problems. When creating a joint information educational databank, accessing regional and world educational databases, the Parties will carry out cooperation both on a bilateral and multilateral basis.

Article 7

This Convention shall be valid for five years after its effective date. Upon the expiry of that period, this Convention shall be automatically extended, each time for another five-year term.

Article 8

Done at _____, in five counterparts, in the Russian, English, Chinese and Portuguese languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

6. Selected Experts – Participants of the Coordination Committee of the BRICS Law Institute and of the BRICS and Developing Countries Legal Experts Forum Proposed the Supplements to the General Declaration (Summary of the Discussion)

6.1. *Prashant Kumar (India), Elected President of the Bar Association of India:*

The Third BRICS Legal Forum took place in New Delhi (10–12 September 2016). After signing two successful declarations in Brazil (2014) and Shanghai (2015), within the framework of the BRICS Legal Forum the third declaration was signed in New Delhi (2016). While all BRICS nations – Brazil, Russia, India, China and South Africa – have their own system and structure for international law and domestic dispute resolution, the forum supported the idea of an arbitration forum for these countries.

Co-chairing the forum, Attorney General of India Mukul Rohatgi said,

> The BRICS countries collectively constitute more than half of the population and economy of the world. In such a scenario, these nations should come together and form a common law and ease into common dispute resolution. This systematic synchronization of law will be a helpful setup.

Themed on developing responsive, inclusive and collective solutions primarily through arbitration, the forum discussions were focused on financial and legal cooperation between BRICS countries.

Appreciating and welcoming the endeavour to set up a cohesive cooperation mechanism, Union Minister of Law Ravi Shankar Prasad said,

> Dispute resolution system has a slant of the old in the world which is going forward. However, now we are quite keen to have a robust arbitration system. An alternative and efficacious dispute redressal system is the need of the hour today.

Articulating on the impending liberalisation in the legal field, Lalit Bhasin of the Society of Indian Law Firms said,

The BRICS forum is like a family and, therefore, liberalisation of the legal forum of India can start with BRICS.

In the light of the above-mentioned in is important to develop the Results of the III BRICS Legal Forum, in particular:

– the establishment of International Dispute Resolution Centre for BRICS and Emerging Economies at New Delhi (New Delhi Centre), which will have its own expert committee on lines of the Shanghai Expert Committee and will co-opt members from other BRICS jurisdictions and in cooperation with the Mediation Centre for BRICS and Developing Countries at Yekaterinburg (Russia);

– the establishment a Professional Committee(s) for BRICS Dispute Resolution and Mediation to furthering deepen the development of "diversified dispute resolution mechanism" created during the Second BRICS Legal Forum with the objectives to create a platform for experience sharing and to work together to finalize its membership and goals to achieve the objective of creating world class institutions which will emerge as a fora of choice for dispute resolution for not only BRICS countries but for the entire emerging world;

– sign a Memorandum of Understanding to create a BRICS Expert Committee(s) on Financial and Tax Law, taking forward the intention of BRICS countries to strengthen financial cooperation announced firstly in the third BRICS Summit in Sanya in 2011 where Sanya Declaration was signed;

– recognizing the importance of establishment of BRICS New Development Bank that provides a powerful instrument for increasing BRICS financial cooperation, being mindful of a context where emerging market economies and developing countries continue to face financial constraints and legal barriers to address sustainable development needs.

6.2. *Romero J.S. Tavares (Brazil), International Tax Policy Advisor to the National Confederation of Industry of Brazil*:

The post-cold-war world wherein the U.S. would reign supreme in geopolitics and the European Union would emerge as a unified economic superpower never quite materialized. The glorious emergence of China, the growing influence of the BRICS in geopolitics and in the world economy, and the relevance of developing economies have indeed shaped a new world order. The world of law now needs to follow suit.

The depth and breadth of the global role of each of the BRICS, however, is yet undefined. There are certainly regional or sectorial areas of economic might and of political influence exerted by each of the BRICS. However, the global impact of each of the BRICS pales in comparison with what the impact of this group of countries could be if they were to truly act in unison, as a unified front, in areas of common interest – and particularly in the area of law.

Brazil, Russia, India, China and South Africa have a lot more in common than what may superficially appear. Russia, Brazil and South Africa have historically benefited from the richness of their lands as endowed production factors – mining and metals

industries, the oil and gas value chain, agribusiness in Brazil, have supported these nations' economies; nonetheless, the human capital of India and China and their well-designed trade and investment policies have enabled them to become deeply embedded in global value chains, and have spurred higher levels of sustainable growth in these nations which serve as examples for Brazil, Russia and South Africa. The BRICS can learn from one another, from their economic policies and legislation. And if they can truly become a unified coalition, their influence in geopolitics will be paramount – not in the least because they will attract and influence broader clusters of developing countries in the four corners of the world.

However, tax policies and tax laws in the BRICS lag decades behind what has been achieved by the U.S. and by the more traditional Western European members of the OECD. Most BRICS still overtax domestic consumption, and are still plagued with undue tax uncertainty (in legislative processes and dispute resolution), while Brazil overtaxes international trade. Brazil and India still operate an overly complex system of transactional taxes that triggers massive controversy, which dampens their economic growth, reduces foreign direct investment (FDI), and distorts their domestic mobilization of resources.

Brazil and Russia remain too dependent upon commodity trading, and miss out of high-value "links" of global supply chains for their own commodities. China was incredibly successful in its policy of attracting and retaining FDI through the use of special tax zones and other industrial policies, but it has to face massive challenges in areas such as environmental law, and intellectual property law, which are more evolved in Brazil. Russia and China have their own brand of democratic representation wherein individual and economic freedoms – which are key for entrepreneurialism and economic growth – can still be improved.

Brazil, India and South Africa have their own issues with fragmented or biased political representation, their own brands of democratic deficits. Passing tax reforms Brazil and India can be quite a challenge – arguably more so than in many other countries. Whilst learning from one another, the BRICS can also shape the world of law – particularly in the area of taxation.

It is clear that the U.S., particularly under President Trump, is not leading the way to anything – let alone tax reform. France and Germany, and the EU post-Brexit, instead, have a unique opportunity to re-emerge geopolitically, partly filling the void left by the U.S., and their views on taxation are now the most likely to influence the world. The BRICS can emerge geopolitically not only within their own regions, but to counterbalance the remaining powers of the U.S., and the regained powers of Europe in the shaping of international trade and international tax laws. Trade, investment, jobs, and tax revenues are at stake.

The proliferation of tax treaties post-BEPS can be done using a new treaty model that goes beyond BEPS, beyond the OECD, and beyond the UN. A model that can only be developed and promoted by the BRICS. Global transfer pricing can be more adequate, more accurate and more just if old paradigms are not viewed as sacrosanct,

and if the arm's length principle can evolve. Permanent establishment notions can evolve. Withholding taxation can serve to effectively redistribute revenues more responsibly and with more justice.

Any such rules however cannot be unilateral. Brazil suffered from its own unilateral policies – no matter how right or wrong they might have been from a technical perspective, isolationist policies trigger insulation from global value chains, and lead countries to serve as suppliers of commodities or as dampened consumer markets with overpriced goods and services.

This is what the OECD and the U.S. can teach the BRICS: safeguarding their own unilateral interests by implementing their own interests multilaterally has been key to the economic success of historically richer nations. The BRICS must therefore act cooperatively, in the areas of trade (including environmental law, intellectual property protection, and labour rights), in the area of investment and taxation.

Standard and simplified VAT regimes that exist within Europe, can serve as models to improve systems within the BRICS. Tax technology used by the tax administration in Brazil can be a model for tax administrations worldwide. Chinese and Indian transfer pricing policies can be used in Brazil – and as a group, the BRICS can influence the OECD and the world of transfer pricing.

Whereas Russia's seemingly simpler system can inspire simplifications in other BRICS. Brazil's experiences with transfer pricing and with VAT anti-abuse rules can nonetheless create useful safe harbours and inspire useful policies worldwide.

BRICS-developed policies can shape the world, and truly develop a new world order. Cooperation amongst the BRICS, and between the BRICS and the European Union, nonetheless, is key for the true emergence of this new world order.

6.3. *Dikshit Prasad Sengupta (India), Principal Consultant to the National Institute of Public Finance and Policy, New Delhi:*

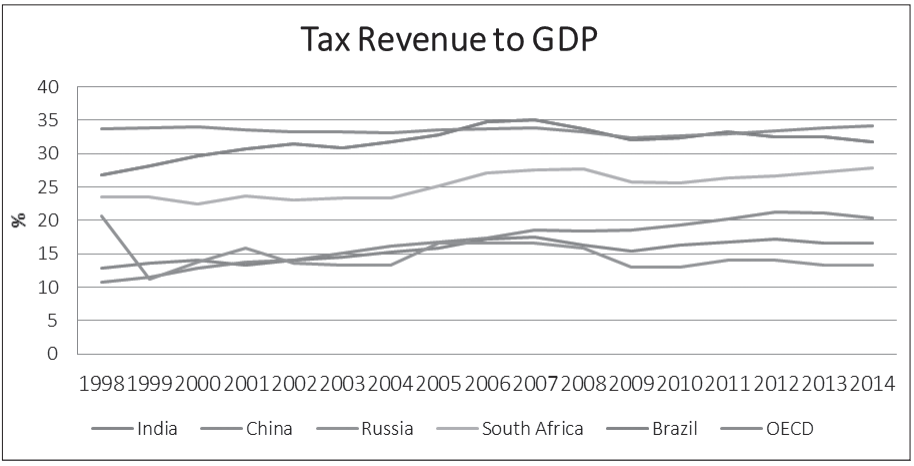
BRICS member countries have bilateral treaties in many areas. We restrict the discussion to treaties relating to tax and investment. Countries have entrenched positions on certain issues and a final bilateral treaty is the result of bargaining and give and take. Therefore, generally speaking, no two bilateral treaties can be exactly the same in language and scope and complete harmonization of a network of bilateral treaties will be difficult.

Nevertheless, there are areas where a group of countries can identify a minimum standard in relation to some important issues and use that standard in their treaty negotiation with other countries. In the area of international taxation, there are examples of such coordination amongst a group of homogeneous countries.

BRICS as a grouping might have lost some of its sheen owing principally to the less than flattering GDP growth figures in the member countries. Nevertheless, the combined strength of BRICS is still significant and considering the current pushback against some aspects of globalization and free trade, BRICS countries need to play a major role in setting standards. However, for identifying and articulating such areas

of commonality, considerable research needs to be done and the various research organizations of the BRICS member countries need to work towards the same.

In the area of direct taxes, particularly of the corporate taxes, one sees a disturbing trend of increasing tax competition. Considering the reliance on corporate taxes in developing countries, unbridled tax competition in this area is definitely harmful. While there may be a case for some moderation in headline rates, it needs to be remembered that modern countries are built on the strength of tax revenue. Talking of BRICS countries in particular, as the accompanying chart will show, there is still a lot of catching up to do when we compare tax GDP ratio of BRICS (except for Brazil) to that of the OECD countries.



[Source: China: http://www.chinatax.gov.cn/eng/n2367736/index.html; Revenue statistics for Brazil, South Africa, OECD; India: IPFS, total tax revenue to GDP, Russia: World Bank]

As for international taxation, it has to be ensured that the tax treaty networks that were put in place for avoiding double taxation, do not end up in no taxation or abysmally low rate of taxation for multinational corporations. The volume of literature produced in connection with the OECD BEPS project is testimony to the fact that such companies, particularly those operating in the digital space, exploited the loopholes of the present system to achieve that precise result. The advent of digital companies, as the BEPS report on digital economy shows, has made the permanent establishment based taxation of business profits almost obsolete. It is also fairly well known that BRICS countries, indeed almost all the developing countries that participated in the BEPS project, wanted some definitive solution to emerge from the deliberations. It was, after all, action point 1 of the BEPS project. But owing to the opposition from some OECD member countries, no consensus could emerge and countries, including some OECD member countries have been forced to adopt

uncoordinated unilateral methods to tackle the issue. This is therefore very obviously one area where BRICS countries can try to harmonize their views.

The BEPS work on action points 8–10 relating to transfer pricing also indicate that the actual working of the arm's length standard is unsatisfactory. There is also difference of opinion about sharing of profits of the multinationals. While some progress has been made, the important point raised relating to contribution of market in generating profits of a company has still not been recognized. Again, this is an area where there is commonality of interest in BRICS countries and work needs to be done to carry the same forward.

While tax is very important, investment is also important for developing countries. The investment protection agreements in place are meant to facilitate investments with the foreign investors being granted some protection under these treaties. However, the experience of some of the BRICS member countries with the actual working of these agreements has not been good. The very expansive definition of "investor" and "investment" in these agreements, coupled with the ease of forming shell companies and legitimacy given to these companies, are areas of concern.

These are then some of the areas where BRICS can provide some guiding light for its own members and for the rest of the world.

6.4. *Salvatore Mancuso (South Africa), Director of the Centre for Comparative Law in Africa, University of Cape Town; Honorary Professor of African Law, Centre for African Laws and Society, Xiangtan University; Member of the Editorial Board of the Journal on Comparative Law in Africa:*

The BRICS area is a promising research field for comparative lawyers. If the question of the legal research in the ambit of the BRICS is considered using the traditional approach linked to the classifications of legal systems into legal families, we have a different framework. We have indeed a situation with three countries generally considered as belonging to the civil law family (Brazil, Russia and China), one common law country (India) and a mixed jurisdiction (South Africa).

The above mentioned classification is obviously debatable. Russian company law has been highly influenced by U.S. company law.

Modern Chinese law is commonly associated to the civil law legal family due to the great influence that the civil law legal tradition exercised on it, and to its "codification" through detailed statutory law and its development made following the Romano-Germanic path.

Anyway, the strong presence of the socialist pattern and the common law influences deriving from the adoption of Hong Kong institutions could lead to consider Chinese law as a hybrid mixed system.

There are many advantages of having a mixed jurisdiction in the group. With its mixture of Roman-Dutch and common law South Africa shares both civil law and common law experiences.

Its legal background can serve as a bridge and element of dialogue between the two main legal traditions of the world and facilitate the methodological approach

on how to highlight similarities among the five BRICS countries, taking also into account the other commonalities described above.

Any international contract involves comparative considerations. A contract with foreign elements potentially deals with the laws of a variety of countries, like the laws of the countries where each of the parties has its place of business, the laws of the countries where the performance of the contractual obligations will take place, the laws of the other jurisdictions with which the transaction might have connections.

The choice of the law that will be governing the contract is a matter to be dealt with using the private international law principles.

Then, an international contract is – in theory – subject to the national law of a single country and private international law helps to understand which is this applicable law.

In principle, therefore, it should be sufficient to get proper knowledge about such law to properly deal with the rights and obligations arising from that contract.

It might be anyway also very useful to pay equal attention to those laws that could also be – at least theoretically – applicable to the same contract.

Having such further knowledge could be extremely useful in making the best choice on the law governing the contract.

It could also be important to assess possible interferences by other laws, due to some specific conditions or overriding mandatory rules attached to the contract.

It is even more important in order to understand how the other party could interpret the contract, what it is the implied meaning of a certain legal term, clause or formulation: this because most of the contracts are written in the English language and adopts English legal terms, whose construction and meaning can be different and unfamiliar to anyone not familiar with the common law tradition.

The UNIDROIT Principles of International Commercial Contracts represent a private codification or "restatement" of the general part of international contract law. They have been prepared by a group of independent experts from all the major legal systems around the world and they are the most important example of soft law in contract law.

The UNIDROIT Principles cover international commercial contracts in general, with respect to which they provide a comprehensive set of rules dealing with all the most important topics of general contract law. The drafting style of the UNIDROIT Principles follows the pattern of civilian codes rather than that of common law statutes; the drafters tried to use a language as much concise and straightforward as possible in order to facilitate their understanding also by non-lawyers, and deliberately avoided the use of any terminology peculiar to any given legal system with the aim of creating a sort of legal lingua franca referred to contract law that could be used and generally understood throughout the world.

As to their content, in the drafting process of the UNIDROIT Principles preference was given to solutions generally accepted at international level ("common core" approach), but when it was necessary to make a choice between conflicting rules the preference was not given to the rule that was adopted by most countries, but

rather to that among the rules under consideration which seemed to be particularly well suited for cross-border transactions ("better rule" approach).

The final goal is indeed to understand what the real differences are and how real similarities can be identified. The comparative analysis has already demonstrated how similar (or even identical) rules can lead to different operational results and – vice versa – how different rules can lead to the same operational result.

The research project called "The Principles of BRICS Contract Law – A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries" has been launched at Centre for Comparative Law in Africa at the University of Cape Town in line with these general objectives. The PBCL project tries to find and restate the common core of existing BRICS contract law, considering that the common principles of BRICS contract law (or, better, the PBCL) can become a modern BRICS *lex mercatoria* or *ius commune*, when developed.

The project will proceed with the drafting of the national reports. These reports have two functions. The first is to enable establishing the position in a particular jurisdiction, and the second is to provide the material for a comparative analysis, which in turn could form the basis of draft general principles governing international commercial contracts in the BRICS countries. A questionnaire agreed upon by all national reporters will guide them in the preparation of their reports, and it has been drafted with purpose of providing a more exact indication of the specific issues or research topics to be addressed in the national reports.

With reference to the past experiences, the national reporters agreed to draft the questionnaire using the UNIDROIT Principles of International Commercial Contracts as reference.

When the national reports are completed, a comparative analysis will follow. This analysis will lead to draft soft law rules. The national reporters decided that the comparative analysis based on the national reports would initially be divided between the five reporters and that after the comparatists who are member of the group would then combine these in a final comparative analysis. On reflection, the group agreed that the more practical route would be to proceed in a way that the comparatists draft a comparative analysis first based on all the national reports, and that this analysis is circulated among the national reporters for comment.

The same procedure could be followed for the drafting of the soft law rules. After the comparative analysis has been finalized and the common principles of contract law of the BRICS countries have been identified, the national reporters will meet to discuss and validate them. Having a single guiding mind behind the comparative analysis and draft soft law rules would ensure a uniformity of style from the outset.

At present, the South African report has been completed to serve as a guide for the preparation of the other national reports which are being prepared now and due by the end of the month.

It is unlikely for the PBCL to become the applied law of the BRICS countries. However, the result of this research can be useful for the BRICS countries when amending their

national contract laws. Additionally, the PBCL may also play a role in arbitration and dispute resolution involving contractual parties from the different BRICS countries.

6.5. *Addy Mazz (MERCOSUR, Republic of Uruguay), Professor of Financial Law, Director of the Program for the Specialization in Financial Law of the National University of Montevideo:*

Uruguay is a small state located in South America, between Argentina and Brazil. It is part of MERCOSUR, which is an area of Economic Integration, initially conformed by Argentina, Federative Republic of Brazil, Uruguay, Paraguay and Venezuela. Bolivia is in the process of accession as a member state, with right to voice but no vote. Paraguay was suspended on 28 June 2012 and on 13 July 2013 the suspension was lifted. Venezuela has been suspended on 1 December 2016 for failing to comply with the agreements signed in the areas of trade, politics, democracy and human rights.

This may of integration aspired, when it was founded on 26 March 1991 to become a Common Market, hence its name of Common Market of the South, but failed to overcome of that, and there is only an imperfect customs *unión*.

On the other hand, diverse economic interests involved, and the economic crises of the members countries, has turned it into an inoperative block.

Despite its potential, Mercosur is considered to be the largest food producer in the world, controls the largest energy reserves, natural minerals, water resources and oil.

Recently, Brazil's serious political crisis about corruption, and Argentina's crisis, have had an impact on the low functioning of this integration bloc, and it is of them not possible to take advantage.

However, there is in process a trade agreement with the European Union. The objective is to eliminate tariffs, restrictions and regulations to reach a free trade agreement that would release 90% of the inter-bloc trade by reducing the different tariff barriers concerning BRICS: Mercosur has signed a preferential trade agreement with India on 17 June 2003.

In particular, Uruguay has important economic relations with some of the BRIC countries China's current Chairman of the BRIC countries, is currently the first buyer of Uruguay, which has motivated the Chinese Ambassador in Uruguay to say that the relationship with Uruguay is in the best historical period.

On the occasion of the visit of Uruguayan President Vazquez in 2016 to China they agreed to establish a strategic association that will update and carry forward the cooperation between the countries.

It would be appropriate for Uruguay to maintain similar economic and cooperation relations with the other BRIC countries.

About the harmonization of the economic interest of developed and developing countries: I think it is very difficult. An example is the soft law produce by the OECD that is good for developed countries but is adopted for developing countries and in the world. Maybe BRICS has the potential to harmonize in a better way the economic interests of developed and developing countries and to contribute for forming a new legal order.

6.6. *Ammon Vincent Mbelle (African Union, Tanzania), Professor of the University of Dares-Salaam, former representative of Tanzania in UN Commission on Trade and Development (UNCTAD):*

Interactions between BRICS group of countries and Developing countries relate, among other issues trade, investments and cross-border transaction. The rise of BRICS, driven by trade, has given BRICS a platform in global governance. This rise should be seen as complementing rather than challenging the international trading system. BRICS group is also significantly active in global FDIs. Developing countries see FDIs from BRICS group as driver of growth.

The Doha Declaration 2016: "Building Responsive, Inclusive and Collective Solutions" affirmed expansion of trade and commercial ties, and investment cooperation with Developing countries, more so support for Africa's implementation of its various programmes.

Globally, growth in Trade, FDIs and cross border transactions, as well as dynamics in the Developing countries, especially Africa, presents an opportunity for increased BRICS-Developing countries interactions. At the same time, however, this growth may also bring about increased risk of emergence of disputes.

Key considerations:

Globalization/internationalization is increasing at a fast rate; internationalization has inherent risks (different regulatory environments, unfamiliar laws). Disputes are part and parcel of doing business. With varying degree of severity, disputes have both negative and positive effects. Nature of disputes in cross border transactions also reflect methods of entry/contracting.

Cross-border disputes assume various forms including: Asset issues (especially freezing), Banking and finance; Choice of Law; Competition law claims; Cross-border capital flows; Cross-border mergers and acquisitions; E-commerce transactions; Enforcement of foreign judgments; Multiple Parties Issues in Cross Border Disputes; Taxation issues; Tort claims; Transport services; etc.

For the record:

BRICS-Developing countries disputes are relatively rare. For example, out of 525 trade disputes recorded between 10/1/1995 and 19/5/2017; intra-BRICS accounted for 0.8 percent and BRICS and Developing countries at 1.3 percent.

Dispute resolution techniques range from methods where parties have full control of the procedure, to methods where a third party is in control of both the process and the outcome.

The architecture of dispute resolution in the world today comprises of a complex web of systems with each mechanism presenting both opportunities and challenges. This has called for the need to improve such mechanisms.

Concluding remarks:

- As the world is fast integrating, internationalization of business is imminent; bringing with it both opportunities and risks associated with operating in

different regulatory environments and being subject to unfamiliar laws. International law has to keep abreast with such developments.

- Efficient cross border dispute management improves credibility and thus predictability and will determine success or challenges to internationalization.

Some commonly suggested methods for improving cross border dispute resolution system:

- Promoting reciprocal or diplomatic arrangement between the countries (recall this as entry point);
- Increasing international coordination among existing sovereigns, through multi-lateral treaties;
- Creation of new international governing bodies;
- Self-regulation;
- Collective litigation and arbitration;
- Rationalization of international investment agreements.

Further thoughts:

- Avoiding host country "oversights": secrecy of contracts; details and implications of contract clauses; dispute resolution clauses in transaction documents (raised red flag: "the devil is in the details"; Swahili adage "don't look at where you fell, but where you tripped");
- Promoting regional collaboration among developing countries/capacity building for negotiations; quality of regulation (paradox: Roman adage "*si vis pacem para bellum*" – if you want peace, prepare for war). If developing countries desire dispute-free cross border trade and investments then they should prepare for dispute resolution;
- Use of host developing country business associations (Chambers) as arbitrator between foreign interests and host country governments;
- Increasing consumer awareness to minimize consumer ignorance: right to complaint and right to be helped.

Ending remarks:

The need for improvement in cross border dispute resolution system should also be appreciated in view of the impacts of trade, FDIs and cross border transactions disputes impacting beyond respondent and complainant only to:

- Macroeconomic: loss of growth, loss of productivity; loss of employment, loss of revenue (taxable); aggregate welfare;
- Sector impacts: trade diversion, depressing forward and backward linkages; Micro impact: decrease in household welfare; loss of consumer surplus; consumer dissatisfaction.

6.7. *Pasquale Pistone (EU), Academic Chairman of the International Bureau of Fiscal Documentation, professor of Vienna University of Economics and Business, Associated Professor of University of Salerno, Professor Honoris Causa at the Ural State Law University:*

In the end of May 2017, a large number of countries, including Russia, signed in Paris the so-called multilateral instrument on international tax law. This instrument adds common rules that bring into international tax law a multilateral dimension, which flanks the coordinated bilateralism. It may be expected that such rules, including a tax dispute settlement mechanism based on arbitration, may soon develop into the minimum standards of international tax law.

Two weeks before the above mentioned event, the European Union has approved the new directive on settlement of cross-border tax disputes. This directive will be formally signed in October under the Estonian Presidency of the European Union. The directive abandons the traditional view of taxpayers as the mere object of cross-border tax disputes. It treats them as holders of rights and gives them legal remedies as affected persons by the consequences of such disputes.

Three weeks before the signing of the multilateral instrument, the Court of Justice of the European Union published a landmark decision on the Berlioz case. The Court stated the right to judicial revision for tax penalties levied in connection with the refusal to supply cross-border information that was not foreseeably relevant for the requesting State. This judgment shows that, also in tax matters, the rule of law requires a legal remedy in respect of any measure that may adversely affect a person.

The three developments are in my view emblematic for at least three reasons.

First, countries that can contribute to the content of global law shift away from a unilateral exercise of their sovereignty in the direction of multilateralism.

National Parliaments of such countries often approve rules that international organizations draft under the impulse of representatives from the executive power that participate in technical working groups.

Second, the European Union interacts with the OECD, but sets its own standards in line with its supranational law. The examples of the settlement of cross-border tax disputes and the right to judicial review constitute good practice for legal transplantation in other parts of the world (e.g. BRICS). The protection of the rule of law is a quintessential feature of any legal system and shows the core values and meaning of a right.

Third, over the past year I simply cannot indicate evidence of any major result achieved by the BRICS that can influence the substance and development of global law. They either join the other countries on an individual basis, or pursue their own national policies on a standalone basis. Or, they just do nothing at all.

This is not a desirable outcome in terms of global governance. Also this year, I want to repeat here that the world needs the BRICS to act as a bridge for global fairness and justice, also in the interest of developing countries.

The concrete contribution of our research group to this development is to provide our technical expertise under the aegis of the BRICS Law Institute of the USLU. Our vision of global law is combined with the commitment to elaborate the substance of technical rules on which BRICS law can be establishment as a common ground among the BRICS countries. Such rules and principles may range from the law of contracts, to tax treaties and the role of incentives for investors, or special economic zones.

Hopefully, we will soon be able to present you our second research work (including Book). This will be one more concrete sign of our commitment as experts to accompany the geopolitical developments with technical scientific studies of the actual problems of global law.

6.8. *William R. Brydie-Watson, Legal Officer of International Institute for Harmonization of Private Law (UNIDROIT):*

UNIDROIT is an independent intergovernmental Organisation with its seat in Rome, Italy. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement.

UNIDROIT has 63 member States across the five continents. All five BRICS countries are longstanding members of the Institute. Of the BRICS group, Brazil was the first to join in 1940, and Russia the most recent to join in 1990.

UNIDROIT is one of the three "sister organisations" of private international and international commercial law, alongside the United Nations Commission for International Trade Law (UNCITRAL) and the Hague Conference on Private International Law. These three organisations are primarily legislative bodies: they work collectively to develop international instruments that regulate commercial relationships between private parties in different countries. By providing a harmonised, transparent and predictable international framework for international commercial relations, the three sister organisations contribute to economic growth in developing countries and towards promoting the rule of law internationally.

UNIDROIT has developed 27 instruments across a variety of international private law and commercial law fields. These instruments cover legal topics such as capital markets, security interests and leasing, international sale, international commercial contracts, franchising, and succession. While UNIDROIT tends to produce instruments that harmonise substantive areas of international private law, the Institute does also work on transnational civil procedure in a regional context.

From a historical perspective, UNIDROIT has produced many more "hard law" instruments, namely treaties, rather than soft law instruments. This is a reflection of the trends in international legal cooperation over the lifetime of the Institute; during much of its 91 years of operation there was a preference from member States for the development of binding treaties rather than soft law instruments.

However, over the past few decades, UNIDROIT has joined the international trend in producing a number of soft law instruments. Most notably, the UNIDROIT Principles of International Commercial Contracts, or UNIDROIT Principles, first developed by UNIDROIT in 1994, are an excellent example of the value of soft law instruments. These Principles, now in their fourth edition, are internationally regarded as a fair and balanced restatement of general international commercial contract law. They

provide a valuable tool for parties in different countries which want to conclude a commercial contract.

It is important to make three general conclusions here as to the value of UNIDROIT soft law instruments for BRICS countries and other developing countries alike:

(1) *By their very nature, soft law instruments are adaptable.* As such, they allow countries with divergent legal traditions, norms and values to harmonise certain aspects of their international commercial legal regimes to improve cross-border economic relations, whilst simultaneously respecting national values in other areas that are not ripe for harmonisation.

(2) *Soft law instruments are efficient and economical to produce.* Formal treaty negotiation for commercial law treaties often takes over seven years to complete, and can even drag on for decades where there is no consensus between participating states. This long and costly process often makes it almost impossible for developing countries to substantively participate in such negotiations. Soft law instruments can be negotiated in a much more quick, cost effective and flexible manner, which allows for better participation for developing countries.

(3) *Soft law instruments are particularly valuable for private parties in developing countries.* For example, many states allow parties to elect the UNIDROIT Principles of International as the governing law for international commercial contracts, even if the Principles have not been implemented under domestic law. This directly allows private parties to improve their cross-border commercial relationships through the utilisation of an international commercial soft law instrument.

I would like to thank the BRICS Law Institute for inviting UNIDROIT to participate in this forum, and for facilitating and supporting UNIDROIT's participation. The BRICS Law Institute is undertaking valuable and important work in a number of fields and UNIDROIT looks forward to deepening its relationship with the BRICS Law Institute in the future.

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BOOK REVIEW NOTES

THE BRICS: A MAJOR PARTICIPANT IN THE MULTIPOLAR WORLD ORDER*

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In recent decades the global community has been witnessing a dramatic change in world politics and the balance of power. New global challenges demand a multipolar world order, and new participants are attaining more political power. A vivid example of multilateralism is the BRICS group, established in 2009 and evolving since then as an effective structure for economic cooperation and collective decision-making. The BRICS were launched as a new platform to meet global challenges, and the group is gaining importance and attention both regionally and globally. On the other hand, as an international actor, it remains largely unexplored by scholars.

The book "*BRICS and Global Governance*" is presented by two celebrated editors – *John J. Kirton* (Munk School of Global Affairs, Trinity College, Department of Political Science, University of Toronto) and *Marina Larionova* (Center for International Institutions Research (CIIR), Russian Presidential Academy of National Economy and Public Administration (RANEPA)). Its content is an excellent overview and deep critical analysis on BRICS development, strengths and weaknesses. The objective of the book is to describe the BRICS role in global governance, and this goal is approached by the multi-disciplinary study of the BRICS group's birth and evolution, mechanisms of cooperation, agenda priorities, tools for collective and individual compliance with

* Reviewed book: *BRICS and Global Governance* (J. Kirton & M. Larionova (eds.), London: Routledge, 2018).

the agreed commitments, and the patterns of the BRICS engagement with other international institutions. The five parts and fourteen chapters of the book combine to form a BRICS anthology of research papers contributed by eminent researchers from four continents that discusses the key features of the BRICS: mission, values, agenda, evolving institutional identity, compliance performance and models of engagement with international organizations and perspectives. The common thread running through the entire book is the idea that despite specific historical, political, economic and cultural backgrounds, the members of the BRICS group share common values and goals, and have the potential for future cooperation and success.

In the introductory Part I *Marina Larionova* discusses the challenges the world witnessed and the responses the global community suggested in recent decades. Geopolitical, economic, environmental, societal and technological challenges have intertwined and driven shifts in international cooperation. The mission of the BRICS group is to respond to the global challenges and to realize the ambition of supporting a multipolar, equitable and democratic world order. The principles of the new world order announced by the BRICS are international law, equality, mutual respect, cooperation, coordinated action and collective decision-making of all states. The group has committed itself to improving the global governance system, ensuring the representation of developing countries in international institutions and building up a new model of socio-economic development.

Targeting their goals, the BRICS have acquired both opponents and advocates, and they have undoubtedly achieved recognition in the global arena. In spite of any criticism, the BRICS are firmly established as an international actor and prominent player for at least three reasons: first, the sheer size of the members' combined population and their share of the global gross domestic product; second, the fact that all the members are regional powers; and, third, the BRICS operate across at least five regions. In chapter 1, "*The Rise of New Institution*," *Marina Larionova* examines the key features of the BRICS as an international actor.

The author believes that the BRICS have established a balanced agenda, where economic, social and political dimensions reinforce each other. An increasing share of social issues on the agenda indicates the commitment to deliver public goods for the members' own citizens and those of other countries.

The cornerstone of the BRICS mission is developing mutually enriching and beneficial cooperation and shaping the forum's agenda on a wide range of issues. This is accompanied by rapid institutionalization, which is likely to continue. Along with their basic themes – health, development, education, science and innovation, environmental protection, renewable energy, and clean and efficient energy technologies – in 2015 the BRICS launched a dialogue on new policy areas: industrial cooperation, migration and employment. New mechanisms for internal coordination were also set up, such as the working group on socially important economic sectors, the working group on energy saving and energy efficiency, the Basic Agricultural

Information Exchange System (BAIES) and the working group on cooperation on information and communications technologies.

The author concludes that as an actor in the system of global governance the BRICS have the autonomous capacity to define and pursue their mission, interests, values and agenda; the group has the capability to pool resources to implement collective commitments; and its collective actions are significant enough to affect the global agenda and activities.

Part II of the book tracks the evolution of the BRICS agenda and its contribution to global governance across various policy areas. The agenda of the group was formed in response to global challenges and has gradually changed to reflect the external and internal dynamics.

This part begins with a chapter by *John J. Kirton* on "*Explaining the Solid, Strengthening Success of the BRICS Summit*." He reviews the ongoing debate among several competing schools of thought, sharing their views on this "plurilateral summit institution," its evolution and performance in the global arena.

The author appeals to ten schools having opposite views on the significance and weight the BRICS carry on the international stage. Adherents of the first school point to its weak political and economic ambitions, for example, the rejection of reforms in the United Nations Organization and "the long struggle to produce only a modestly resourced BRICS development bank by 2014." The reason for these failures, according to the first school, is the lack of common characteristics and interests among the BRICS members, differences in political and legal systems and territorial disputes, among others. The second school depicts the decline of the BRICS as a consequence of economic failures in Russia, Brazil and South Africa, which can be aggravated by political tensions.

Other schools express more optimistic views on the BRICS development. For example, the fifth school sees the BRICS becoming increasingly influential, though, to date, they have not become a unified geopolitical bloc or globally influential alliance. The seventh school describes the BRICS as a broader developing country coalition seeking to shift the balance of global political influence from the West towards the developing world as a whole. The BRICS have fulfilled their mission to establish a new international institutional balance to correspond to the emerging geopolitical forces of the developing countries. The ninth school sees the BRICS as a successful competitor to the G8 and the G20, whereas the tenth school emphasizes the ability of the BRICS to become a successful cooperator with the G8 and the G20.

All these schools acknowledge the growing international economic and political power and role of the BRICS members, their desire for an enhanced place in global governance and their leadership in regional institutions. This analysis shows that the BRICS summit is a solid, increasingly comprehensive, cooperative success.

In his chapter "*BRICS Engagement with International Institutions for Better Governance*," *Andrey Shelepov* of the Russian Presidential Academy of National Economy and Public

Administration (RANEPA) explores the models, intensity and distribution of the BRICS cooperation with international organizations in order to assess the role of the BRICS in the system of global governance. The chapter contains the results of a qualitative and quantitative analysis which identifies references to international organizations and assesses those references. *Andrey Shelepov* describes two models of the BRICS interaction with international institutions: catalytic influence and parallel treatment. The BRICS countries have established efficient mechanisms for working with the UN, G20 and WTO in the form of discussions on the sidelines of their relevant meetings or on a whole range of economic and financial issues in the case of the IMF and the World Bank. The researcher concludes that the dynamics of the BRICS engagement with other international institutions is positive. By strengthening intra-institutional cooperation and interacting with international organizations, the BRICS address their priorities, enhance their role in global governance and improve the sustainability, legitimacy and efficiency of the global governance architecture as a whole. However, the goal of the BRICS should be to enhance their connections with other international organizations which will promote the BRICS priorities and decisions and, on the whole, intensify the effectiveness of global governance mechanisms.

In the chapter "*Political Dynamics within the BRICS in the Context of Multilayered Global Governance*" *Maria Raquel Freire* explores how the BRICS political dynamics influence existing and future governance mechanisms. This chapter argues that the BRICS have been advancing an alternative model for international governance. The BRICS members possess very diverse characteristics; however, the group agenda is built on common principles and suggests an "equal and just new global order." The author believes that the group members have become relevant actors in the international system and that their approach to a joint agenda is structured on consensus-based decision-making and coherent policies, and that is the reason for their influencing global governance. On the other hand, the BRICS countries' diversities and contradictions on some political, economic, cultural and social issues make it difficult to harmonize a joint decision-making process. Nevertheless, *Freire* concludes that the BRICS have proved their authority and relevance as a group and have certainly become an active participant in the global governance process. In the chapter, in general, the author clarifies the ways in which the BRICS, despite the members' asymmetrical characters and *sui generis* nature, have been promoting a new international agenda.

Part III of the book is devoted to the BRICS contribution to global governance. Here, authors review the BRICS contributions to the global finance and economic architecture, traditional and non-traditional security issues, to science, technology and innovation.

This part opens with the chapter on "*The New Development Bank in the Global Financial and Economic Architecture*" by *Alexandra Morozkina* of the National Research University Higher School of Economics. She addresses the question of whether the

New Development Bank (NDB) will promote the role of the BRICS countries in the global financial architecture and foster their development. *Morozkina* compares the key multilateral development banks (the World Bank, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development) and the BRICS countries' national development banks with the newly established institution. She concludes that, given the NDB's purpose to mobilize resources for infrastructure and sustainable development projects in the member countries, it could add to the functions of the existing institutions and become a significant development bank for those countries.

Natalia Khmelevskaya of the Moscow State Institute of International Relations of the Ministry of Foreign Affairs of Russia, in the chapter "*BRICS Financial and Payment Arrangements: A Locus of Intragroup Trade Development*," studies monetary cooperation among the BRICS countries. Drawing on in-depth statistics and analysis of trade flows, export structure similarities and exchange rate indicators of bilateral trade among the BRICS members, *Khmelevskaya* argues that their common vulnerability to external shocks, asymmetry in the trade network regarding value and structures, and their aspirations to internationalizing their currencies all push them towards common financial and payment arrangements.

"*The BRICS Security Agenda: Russia's Approach and Outcomes of the BRICS Ufa Summit*" is the focus of *Victoria Panova*, of the Far Eastern Federal University and Russia's National Committee on BRICS Research. She contends that the priorities of the BRICS countries lie not only within the domain of the international economic and financial architecture, but also within their aspiration to political and economic governance. In this realm, security issues have become a key item for BRICS attention. The BRICS consider the UN to be the central and only legitimate body for global governance. The five countries assert that only the United Nations Security Council (UNSC) is mandated with maintaining peace and security. As rightly noted by *Vyacheslav Nikonov* (2013),

> All five countries are interested in increasing to the maximum extent the role of the United Nations, in improving its mechanisms and in responding to global challenges and threats through multilateral diplomacy.

Further on in her chapter, *Panova* describes the distinctiveness of Russia's approach and the outcomes of its foreign policy. Russia's objective is to further institutionalize the BRICS cooperation agenda, because "a stronger BRICS grouping would help to safeguard the interests of all developing countries." The author concentrates on the most crucial issues of the BRICS security agenda, such as terrorism, internet governance and cybersecurity as well as nuclear disarmament.

Describing the BRICS prospects, *Panova* concludes that there is an additional responsibility vested in the BRICS because their cooperation and achievements in

global political and economic governance reform are considered an alternative to the domination of the advanced economies and a new model of equal and mutually beneficial cooperation by the majority of developing countries. Therefore, the five countries should seek viable solutions to security challenges.

Niall Duggan of University College Cork, Ireland, explores "*The BRICS and Nontraditional Security*." His chapter reviews how the BRICS have influenced the agenda of global governance bodies and highlights their role as a collective actor in dealing with nontraditional security threats. Two areas of nontraditional security – water security and food security – are examined. The author particularly focuses on the interconnections between food, energy and water, and the impact of climate change on all three sectors. All of the BRICS countries have acknowledged that food and water security is critical to their further development. The chapter makes it clear that the BRICS countries agree that in order to deal with water and food security the issues must be seen as interdependent, and they must be tackled at a global level by bodies dedicated to these areas of nontraditional security.

Despite the BRICS members' vulnerability to water and food insecurity, they have not yet fully developed collective grounds for action. The issue is not fully reflected in the political and legal sources of the countries; to a certain extent water security within the BRICS has been strongly linked to food security and agriculture.

Although the BRICS water security agenda is underdeveloped compared to its food security agenda, both promote a greater role for the current global governance bodies, particularly those that are part of the UN's centralized system. This discourse calls for the water and food security agendas to be returned in full to bodies whose sole purpose is to deal with these areas.

This work plan focuses on five priorities, with new initiatives to be included:

– the prevention and mitigation of natural disasters, to be led by Brazil;

– water resources and pollution treatment, to be led by Russia;

– geospatial technology and its applications, to be led by India;

– new and renewable energy, and energy efficiency, to be led by China;

– astronomy, to be led by South Africa.

In the chapter "*Prospects for Cooperation in Science, Technology and Innovation among BRICS Members*" *Michael Kahn*, a policy analyst and evaluator of science, technology and innovation (STI), from Stellenbosch University, Centre for Research on Evaluation, Science and Technology, studies intra-BRICS cooperation in science, technology and innovation, and informs readers that these issues have been strengthened through the Cape Town Declaration of 10 February 2014, whereby the BRICS ministers responsible for science, technology and innovation committed to a program of STI cooperation (BRICS Science, Technology and Innovation 2014). International scientific collaboration has become a part of the new globalization of knowledge, and the Cape Town Declaration has two objectives: first, to "harness this momentum to the benefit of the BRICS"; and, second, to propose country

specializations in the STI. The "line-up" for the countries is stated as follows: Brazil – climate change and disaster mitigation; Russia – water resources and pollution treatment for Russia; India – geospatial technology and applications; China – new and renewable energy and energy efficiency; and South Africa – astronomy.

To explain the viability of BRICS cooperation in science, technology and innovation *Kahn* answers a number of questions: the current state of STI cooperation among the BRICS members, their fields of interest and the domestic strategies for STI. He also assesses country-to-country interactions and analyzes bilateral STI agreements and the Cape Town Declaration as well as rising geopolitical tensions (in the Black Sea, the South China Sea) and their possible limiting effects on the scope of STI cooperation. The author concludes that effective scientific cooperation is a challenge for the BRICS countries which, unlike the United States and the European Union, have not experienced one hundred years of university and research cooperation. *Kahn* suggests mega science projects as an important channel for scientific development.

Part IV of the book explores the BRICS members' interests and priorities that shape the cooperation agenda. The objective of this part is to assess the BRICS capability to become an instrument for peaceful and effective governance in the contemporary global community. This goal can be described as the search for a new balance between developed and developing countries mostly in the areas of economics and finance. And this goal can be further contemplated as the movement to a new system of sharing the responsibility for international security and for jointly charting the course for the future of the "global village."

The opening chapter prepared by *Georgy Toloraya*, Russian diplomat, Executive Director of the Russian National Committee on BRICS research, "*The BRICS for Better Global Governance*," discusses the BRICS influence in global economics and geopolitics. Assessing the group's leadership potential, *Toloraya* explains the reasons for the criticism of the BRICS and proves that in spite of many differences – in political systems, economic models and living standards – the group's members are united by strategic interests:

> the desire to reform the basics of world politics and economics, independence in politics, primacy of international law, support for the role of the United Nations as the guarantor of international security, maximum use of the possibilities of complementarity of national economies and cooperation in society's modernization.

Toloraya debates the BRICS role and future strategy from the Russian perspective, mentioning that Russia was one of the initiators of the creation of the bloc. The position of the BRICS group is strengthened through their agenda's focus on five pillars, namely:

– the promotion of cooperation for economic growth and development;
– the maintenance of peace and security;
– social justice, sustainable development and quality of life;
– political and economic governance;
– the achievement of progress by sharing knowledge and innovation.

At present, the BRICS are substantively broadening the sphere of cooperation, as well as deepening it, shifting from declarations and programs to real action. It is clear that at the next stage, the BRICS can formulate their own global governance agenda to pursue certain aims. The new perspectives are to design permanent mechanisms for foreign policy consultations; to work out BRICS declarations on peace and cooperation with the possible future adoption of a basic treaty on peace, friendship and cooperation founded on UN principles; to promote the BRICS within the UN structure and to create a permanent BRICS secretariat and other coordinating bodies. The future objectives of the BRICS are targeting financial institutions of the group and their interaction with international financial organizations, and an internet domain which can serve for the promotion of the BRICS role in the global governance.

Further in Part IV, the BRICS agenda is considered from the point of view of the group members. In doing so, *Haibin Niu* describes the BRICS agenda in the Asian-Pacific region and Asia's weight within the BRICS. *Vladimir Shubin* contemplates South Africa's role in the BRICS, describing the country's goals and policy within the group. *Tatiana Deych* characterizes the BRICS regional policy in Africa. The focus on this region is relevant, taking into account that in recent years Africa has become the base for implementing the group's efforts to change the existing world order.

In the "*Conclusion*," *Marina Larionova* looks into the future of the BRICS. The five countries united to form the BRICS group with the aim of creating a platform for dialogue and cooperation. Appearing as a new actor in the global arena, the BRICS primarily have striven to promote peace, security and development in a multipolar, interdependent and increasingly complex, globalizing world, on the basis of universally recognized norms of international law and multilateral decision-making.

The BRICS group development has both supporters and opponents, but it is the common view that the position of the group remains as before and is unlikely to change in the near future. Meanwhile, a certain level of achievement has been reached – various mechanisms for collaboration with international institutions have been developed, the international agenda has been formed and support for the countries on all the members' continents is being provided.

The BRICS mission is to build a multipolar, equitable and democratic world order, based on international law, and to ensure a fair representation of developing countries in the international institutions. The discourse of the BRICS main documents presents the concept of the new world order that is the

democracy at the international level, i.e. where states in the international system, like citizens at the national level, are equal before the law and have equal say in co-management of the international system.

The BRICS have taken many important steps towards achieving their mission; the group has shown its own ability to cooperate, forge and project collective decisions in various public areas.

Economic, financial and trade issues will likely remain the top three priorities. For example, cooperation on social issues, including health, education and science and innovation, may expand, as all members are aware that investment in human capital is crucial for raising actual and potential output. *Marina Larionova* argues that the BRICS members will increase their coordination on political issues and consolidation of efforts to resolve security problems, as well as broaden cooperation on energy efficiency and related issues. The BRICS development cooperation can be significantly reinforced through the New Development Bank and investments in the infrastructure of emerging markets and developing countries.

There are a number of risks with regard to the BRICS performance, such as tensions among the members, political differences on certain decisions at the UN and divergent stances on approaches to certain issues. However, there is much more in common within the group, including their common goals of innovation-driven growth, and inclusive and sustainable development. The shared values and goals of the five members define the BRICS future cooperation as a concert of equals despite having different economic and political weights.

The BRICS would benefit from a change in the institutionalization pattern. An important step for the group's performance should be efficient mechanisms for implementing decisions taken at summits. Enhanced effectiveness and legitimacy, in turn, would maximize the attainment of the group's priorities and consolidate their capability to fulfill their mission and the functions vested in the BRICS by their leaders.

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