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RENEWABLE ENERGY IN INTERNATIONAL LAW: THE RUSSIAN PERSPECTIVE FOR DEVELOPING A COMMON BRICS APPROACH

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The growing influence of renewable energy in the economy raises concerns about the need for perfecting the relevant international legal regime so as to satisfy all the stakeholders concerned. This article analyzes the relevant legal position of Russia as one of the largest exporters of energy-related products, while focusing on cooperation in this area as the BRICS Energy Prospects. The research reveals a number of findings: Russian Energy Policy has so far cautiously supported the promotion of renewable energy internationally in the context of energy efficiency and energy security; nevertheless, Russia has demonstrated a very restrained approach to the development of legally binding instruments on the matter. The authors conclude that it may be viable to find a reasonable "compromise of compromises" for the evolving international legal regime of renewable energy, and if this were to be accomplished, BRICS could assume a leading international position for the creation of such a regime.

Keywords: renewable energy; international law; energy efficiency; energy security; Energy Strategy; Russia; BRICS; cooperation.

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Introduction

Protecting the Earth's climate system is one of the "grand challenges of planetary governance."[1] Encouraging the use of renewable energy sources (hereinafter, RES) is an essential feature of a "Green Economy," that is, an economy aimed at "supporting life on Earth"[2]

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[1] Oran R. Young, *Grand Challenges of Planetary Governance: Global Order in Turbulent Times* 16–7 (2021).

[2] As noted, the current economic systems are unable "to guarantee sustainability" – Robert Costanza, *Ecological Economics as a Framework for Developing Sustainable National Policies*, in Britt Aniansson & Uno Svedin (eds.), Towards an Ecologically Sustainable Economy 45–7 (1990).

through "clean and non-waste technology that makes sustainable development possible."[3]

Transforming the policies of states that are focused on carbon energy to policies that are focused on RES is certainly not the only instrument of modern sustainable development trends. The structure of international environmental law is constantly becoming increasingly comprehensive and its interaction with the national environmental laws of the different states is becoming more effective in terms of achieving "a decent environment."[4]

RES-related issues, being a part of economic or technological development, are part of the political and legal playing field as well. The legal issues pertaining to the energy security of the BRICS member states have not yet been scrutinized, even though a number of scholars have focused their studies on Russia's national energy laws[5] and Russian domestic and foreign energy policies in general[6] along with issues regarding particular sectors of Russia's energy mix.[7] Some emphasis has also been placed on the political, legal and economic assessment of Russia's energy relations with the European Union (EU),[8] particularly on decarbonization,[9] cooperation and

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[3] B. Danh, *Towards an Ecologically Sustainable Economy and Strategies for the Future*, in Towards an Ecologically Sustainable Economy, *supra* note 2, at 9. Though the legal rules on the "sustainable development" (or on the "maximum sustainable yield") are already reflected in many international instruments relating, for example, in the management of forests or of marine living resources (*see, e.g.*, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, Art. 1 (Nov. 7, 2022), available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-8&chapter=27&clang=_en; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 October 1994, Art. 2 (Nov. 7, 2022), available at https://treaties.un.org/doc/Treaties/1996/12/19961226%2001-46%20PM/Ch_XXVII_10p.pdf; United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, Art. 61(3) (Nov. 7, 2022), available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en), the multiplicity of interpretations of such rules makes the very notion of sustainability still ambiguous. However, it is noted that the concept "was popularized" in the famous 1987 Brundtland Report, "Our Common Future," focusing on the interdependence between ecology, economy, and development. According to the 1987 Report, sustainable development includes integrating environmental, economic and social concerns; intergenerational equity; and international justice. This understanding of the notion has now gained "a relative consensus." *See* William L. Ascher & Natalia Mirovitskaya (eds.), *Guide to Sustainable Development and Environmental Policy* 74 (2001).

[4] Patricia W. Birnie & Alan E. Boyle, *International Law and the Environment* 82–214 (1992).

[5] Aliaksandr Novikau, *What Does Energy Security Mean for Energy-Exporting Countries? A Closer Look at the Russian Energy Security Strategy*, 39(1) J. Energy & Natural Resources L. 105 (2021); Mert Bilgin, *Energy Security and Russia's Gas Strategy: The Symbiotic Relationship Between the State and Firms*, 44(2) Communist & Post-Communist Studies 119 (2011).

[6] Igor Bashmakov, *The Russian Energy Complex: Inertia Strategy or Efficiency Strategy?*, 50(7) Probs. Econ. Transition 66 (2007); Vladimir Milov et al., *Russia's Energy Policy, 1992–2005*, 47(3) Eurasian Geogr. Econ. 285 (2006); Anatoli Diakov, *Status and Prospects for Russia's Fuel Cycle*, 21(3) Sci. & Global Sec. 167 (2013).

[7] Evgeny Lisin et al., *Analysis of Competitiveness: Energy Sector and the Electricity Market in Russia*, 30(1) Economic Research-Ekonomska Istraživanja 1820 (2007).

[8] Tatiana Romanova, *The Russian Perspective on the Energy Dialogue*, 16(2) J. Contemp. Eur. Stud. 219 (2008).

[9] Olga Khrushcheva & Tomas Maltby, *The Future of EU-Russia Energy Relations in the Context of Decarbonisation*, 21(4) Geopolit. 799 (2016).

regulatory competitions in the gas industry[10] and also on Russia's energy relations with the former Soviet countries.[11] Additionally, a separate area of scientific research is devoted entirely to assessing energy relations between the Russian Federation and China.[12] However, no comprehensive research has been conducted on Russia's international legal position concerning RES, taking into account the content of the new "Energy Strategy of Russia for the Period up to 2035," approved by Order of the Government of the Russian Federation of 9 June 2020 No. 1523-r[13] and Russia's respective actions in the international arena.

This paper examines, after this introduction, the basic elements of the notion of "renewable energy" in the context of international law (Section 1). The authors then focus on the key provisions of Russian legal documents on the priorities for the development of international dialogue on energy issues in the sector of renewable energy with the participation of Russia (Section 2). The next section (Section 3) provides an analysis of the International Renewable Energy Agency, a global intergovernmental organization whose mission is focused on developing best practices in the RES domain. Section 4 discusses the political and legal framework for cooperation among states in the renewable energy sector within such influential interstate platforms as the BRICS forum. Section 5 provides an overview of Russia's bilateral efforts regarding renewables with the other BRICS member states. The authors specifically outline that cooperation on this subject is carried out through intergovernmental negotiations and joint ventures between Russian and foreign entities engaged in RES projects on the territory of Russia and the BRICS countries. Section 6 summarizes the main components of Russia's international legal policy in the field of renewable energy and proposes the ways in which common approaches to the advancement of RES could be developed within the framework of BRICS as a promising intergovernmental forum for the sharing of best practices in the area. In the next section, the authors present their conclusion.

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[10] Jaroslaw Ćwiek-Karpowicz, *Russia's Gas Sector: In Need of Liberalization in the Context of the Shale Gas Revolution and Energy Relations with the European Union*, 18(1) J. East-West Bus. 54 (2012).

[11] Inna Chuvychkina, *Russian Energy Strategy in the European Union, the Former Soviet Union Region, and China*, 68(5) Eur.-Asia Stud. 941 (2016).

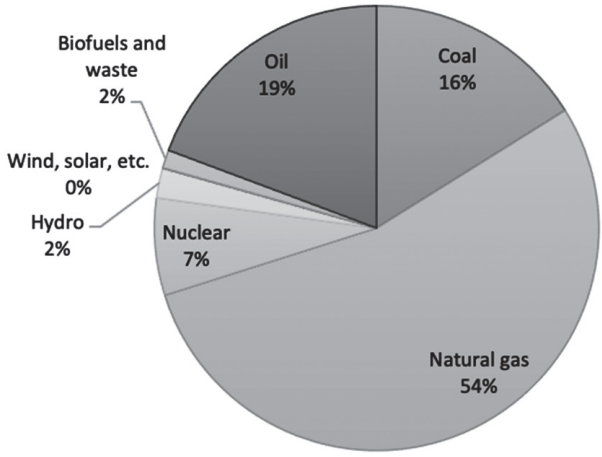
[12] Bo Xu & William M. Reisinger, *Russia's Energy Diplomacy with China: Personalism and Institutionalism in its Policy-Making Process*, 32(1) Pac. Rev. 1 (2019); Boris G. Saneev, *Energy Cooperation Between Russia and Northeast Asian Countries: Prerequisites, Directions and Problems*, 32(1) Global Econ. Rev. 39 (2003).

[13] Энергетическая стратегия Российской Федерации на период до 2035 года, утв. распоряжением Правительства Российской Федерации от 9 июня 2020 г. № 1523-р // Министерство энергетики РФ [Energy Strategy of Russia for the Period up to 2035, approved by Order of the Government of the Russian Federation of 9 June 2020 No. 1523-r, Ministry of Energy of the Russian Federation] (Nov. 7, 2022), available at https://minenergo.gov.ru/node/1026.

1. The Notion of Renewable Energy in the Context of International Law

The relevant efforts undertaken by a number of states to use "clean" energy resources are indicative of a global trend. Russia, being an economy based on traditional energy resources such as natural gas, oil and coal (*see* Figure 1 and Table 1), does not have a long legislative history of regulating the utilization of solar, wind, ocean currents, waves, tides and other undisputable renewable energy resources. Meanwhile, hydropower resources and geothermal energy are not among the newly regulated areas of legal regulation in Russia. That is also applicable to nuclear energy resources and products, which some authors also consider to be among renewable energy resources because they can also be "replenished or regenerated," making them "available for use indefinitely without the threat of exhaustion."[14] However, nuclear energy resources are not generated through natural processes and issues of nuclear safety and security are sensitive concerns in regions in which they are saturated.[15] As for geothermal energy resources, the environmental consequences of installing relevant devices into the earth's crust in order to harness these resources have not yet been comprehensively assessed at this stage of scientific discovery. As a result, nuclear and geothermal energy are still not universally considered environmentally sound, despite being more promising than carbon energy.

Figure 1: **Russia's Energy Mix – Total Energy Supply (TES) by source (2019)**[16]



[14] Celia Campbell-Mohn (ed.), *Environmental Law: From Resources to Recovery* 484–85 (1993).

[15] Mikhail Lysenko et al., *Nuclear Safety and Security in the Arctic: Crafting an Effective Regional Governance System*, 13(2022) Arctic Rev. on L. & Pol. 191 (2022) (Nov. 7, 2022), available at https://arcticreview.no/index.php/arctic/article/view/3820.

[16] World Energy Balances, IEA (Nov. 7, 2022), available at https://www.iea.org/data-and-statistics/data-product/world-energy-statistics-and-balances.

Table 1: **Russia's Energy Mix – Total Energy Supply (TES) by source, in TJ (2019)**[17]

Energy type (2019)	TJ
Coal	5224255
Natural gas	17502256
Nuclear	2294073
Hydro	700983
Wind, solar, etc.	10165
Biofuels and waste	427084
Oil	6256867

In September 2020, the public limited company British Petroleum announced in its Energy Outlook the forthcoming reorientation of the "global energy system" away from carbon energy to renewable energy sources.[18] According to each of the three proposed scenarios for such a transition, oil demand will decrease by 10%–80% over the next 30 years. On the other hand, according to Rapid Scenario Planning, the share of renewable energy in the global energy mix is expected to increase from 5% in 2018 to 45% in 2050. The International Energy Agency (IEA) also stated in its report "Global Energy Review," released in April 2021 that the share of renewables has increased over the past two years. Given that "renewables have proven largely immune to the pandemic," the IEA predicted that the share of renewables in total electricity generation would increase from 27% in 2019 to 30% in 2021.[19]

When the above-mentioned trends are taken into account, it is clear that there is a need for an improvement in the regulation of relations within any state that is involved in the promotion of the use of RES. At the same time, the interaction of the economies of the different states in the energy sector raises the importance of the international legal regulation of RES. The search for mutually acceptable legal mechanisms in this area is aligned with the different and, at times, opposing interests of the states that have unequal natural resources at their disposal.

The geopolitical situation also has a significant impact on this situation. Thus, in June 2021, the international company Fortescue Future Industries (FFI), registered

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17 World Energy Balances, IEA (Nov. 7, 2022), available at https://www.iea.org/data-and-statistics/data-product/world-energy-statistics-and-balances.

18 BP, *Energy Outlook: 2020 Edition* (2020), at 7 (Nov. 7, 2022) available at https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/energy-outlook/bp-energy-outlook-2020.pdf.

19 Global Energy Review 2021, IAEA (Nov. 7, 2022), available at https://www.iea.org/reports/global-energy-review-2021/economic-impacts-of-covid-19.

in Australia, and the Russian Ministry of Energy negotiated the creation of a joint working group to study the possibilities of implementing projects for the production of environmentally friendly hydrogen in Russia.[20] The working group could have included representatives of the Ministry of Industry and Trade of Russia, the Ministry of Transport of Russia and companies from the energy sector. At the same time, the recent events in Ukraine caused the FFI to announce a "loss of interest" in such cooperation for political reasons[21] and, just one month later, sign a Memorandum of Understanding with E.ON (Germany), one of Europe's largest operators of energy networks and energy infrastructure, to achieve the delivery of up to five million tons per year of environmentally friendly renewable hydrogen (GH2) to the European Union by 2030 in order to "reduce its energy dependence on fossil fuels from Russia as quickly as possible."[22] According to the parties to the Memorandum, five million tons per year of renewable hydrogen is equivalent to approximately one third of the heat energy imported by Germany from Russia.

2. The Key Instruments of Russian Legal Policy in the Field of Renewable Energy

The key documents reflecting the priorities of Russia's energy policy, both at the national and international levels, are: (a) the Energy Strategy of Russia for the Period up to 2035, approved by Order of the Government of the Russian Federation of 9 June 2020 No. 1523-r[23] (hereinafter, the Energy Strategy) and (b) the Doctrine of the Energy Security of the Russian Federation, approved by Decree of the President of Russia of 13 May 2019 No. 216[24] (hereinafter, the Doctrine). These documents supplement each other. Thus, the Doctrine focuses mainly on ensuring the security

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20 Минэнерго России и Fortescue Future Industries создадут рабочую группу по чистому водороду // Министерство энергетики РФ. 3 июня 2021 г. [*Ministry of Energy of Russia and Fortescue Future Industries to Create a Clean Hydrogen Joint Working Group*, Ministry of Energy of the Russian Federation, 3 June 2021] (Nov. 7, 2022), available at https://minenergo.gov.ru/node/20824.

21 *Fortescue ends interest in Russian hydrogen sector*, Hydrogen Economist, 1 March 2022 (Nov. 7, 2022), available at https://pemedianetwork.com/hydrogen-economist/articles/strategies-trends/2022/fortescue-ends-interest-in-russian-hydrogen-sector/.

22 *Fortescue Future Industries and E.ON partner on journey to become Europe's largest green renewable hydrogen supplier and distributor*, Fortescue Metals Group Ltd, 29 March 2022 (Nov. 7, 2022), available at https://www.fmgl.com.au/in-the-news/media-releases/2022/03/29/fortescue-future-industries-and-e.on-partner-on-journey-to-become-europe%27s-largest-green-renewable-hydrogen-supplier-and-distributor.

23 Energy Strategy of Russia, *supra* note 13.

24 Доктрина энергетической безопасности Российской Федерации, утв. указом Президента Российской Федерации от 13 мая 2019 г. № 216 // Министерство энергетики РФ [Doctrine of the Energy Security of the Russian Federation, approved by Decree of the President of the Russian Federation of 13 May 2019 No. 216, Ministry of Energy of the Russian Federation] (Nov. 7, 2022), available at https://minenergo.gov.ru/node/14766.

of Russia's fuel and energy complex. In contrast, the Energy Strategy contains a vision of the long-term development of world energy in general and of the Russian fuel and energy complex in particular. Accordingly, the Energy Strategy sets forth the measures necessary to ensure the most advanced and efficient development of Russia's fuel and energy complex, with priority given to the "framework" provisions of the Doctrine regarding energy security.

Both documents focus on the analysis of the main directions and prospects for the development of renewable energy, taking into account the role of Russia as a producer and exporter of predominantly carbon-based energy products.

2.1. Energy Strategy of Russia for the Period up to 2035: The Basis of Russia's Position in the Dialogue on Renewable Energy

The Energy Strategy of Russia for the Period up to 2035, adopted in June 2020, replaced the previous Energy Strategy of Russia for the Period up to 2030, which was approved by Decree of the Government of the Russian Federation of 13 November 2009 No. 1715-r.[25] According to the new Energy Strategy of Russia for the Period up to 2035, the environmental energy transformation is defined as "the transition of the energy sector to a new technological basis as a result of the application of technologies that contribute to organizational and technological changes in the management and operation" of power systems. The transition to "environmentally friendly" and "resource-saving" energy has been named among the priorities of Russian state policy. "The use of renewable energy" is also included in this energy transition. At the same time, the Energy Strategy, in contrast to the abovementioned BP's Energy Outlook, is more cautious in the wording that is used to describe the rate of increase in the share of RES in the global energy mix until 2035:

> Not only can the development and expansion of breakthrough technologies in the world increase competition, but also significantly change the structure of world flows of goods, technologies and services in the energy sector. At the same time, given the persistence of the energy sector, expressed in the high capital and resource intensity of investment projects and their long-term nature, in the future until 2035, fossil fuels will continue to be the foundation of the global energy mix with a gradual increase in the share of energy based on the use of renewable energy sources in global and national energy mix.

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[25] Распоряжение Правительства Российской Федерации от 13 ноября 2009 г. № 1715-р «Об утверждении Энергетической стратегии России на период до 2030 года» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 1715-r of 13 November 2009. On the Energy Strategy of Russia for the Period up to 2030, SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_94054/.

On the one hand, the Energy Strategy indicates that despite the increase in the share of RES, fossil fuels will remain the dominant form of energy in the global energy sector until 2035. On the other hand, the emphasis on the "gradual" (in Russian – постепенный) growth in the share of RES and the "persistence" (in Russian – инерционность) of the global energy sector is seen as somewhat different from the general trend in Europe since studies conducted by EU analysts demonstrate a much more rapid increase in the share of renewable energy.[26] Moreover, the word "gradually" used in the Russian legal document may be interpreted as suggesting that the "green" direction of the energy policy, although important, is not a priority for Russia.

In other sections of the Energy Strategy, it is indicated that the implementation of Russia's policy priorities presumes "increasing the sustainability and reliability of energy supply to macroregions with maximum, cost-effective use," including "renewable energy sources."[27] At the same time, the Energy Strategy lacks concrete measures that could contribute to the sustainability of energy resources and guidelines for legislators regarding the development of such measures.

As an example of the opposite approach to traditional energy resources, the same section of the Energy Strategy mentions "a significant increase in the extraction and deepening of the processing of all types of energy resources in the Arctic zone of the Russian Federation, Eastern Siberia and the Far East, the development of the production of transportable energy-intensive products, high levels of redistribution and appropriate transport and social infrastructure." In spite of the fact that this provision is also quite generalized, the Energy Strategy sets forth several proposals for its implementation. For example, in order to facilitate the growth of the Russian gas industry, it has been proposed to create specialized centers (hubs) in the Arctic zone of the Russian Federation for the transshipment, storage and trade of liquefied natural gas and the implementation of projects for the construction of terminals in Kamchatka and the city of Murmansk. The concrete goals and objectives and measures to achieve them are similarly formulated in other sectors of Russian non-renewable energy; however, this is not at all the case as far as renewables are concerned.

The only section of the Energy Strategy that provides a detailed description of the objectives and measures related to the use of RES is called "Hydropower and other types of energy based on the use of renewable energy sources." Meanwhile, the majority of the measures provided in this section primarily touch upon hydropower,

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[26] *See, e.g.*, European Commission, *EU Reference Scenario 2020: Energy, Transport and GHG Emissions – Trends to 2050* (July 2021), at 130 (Nov. 7, 2022), available at https://data.europa.eu/doi/10.2833/35750. "In the short to medium term, the transformation of the energy system is substantial. GHG emissions are projected to reduce by 43.8% in 2030 compared to 1990, and the overall renewables share will reach 33.2% in 2030. The overall renewable energy share thus slightly over-achieves the existing 2030 target, driven mainly by developments in the power sector, followed by transport, and heating and cooling."

[27] Energy Strategy of Russia, *supra* note 13.

whose objective is described as "improving the operation efficiency of hydroelectric power plants." Furthermore, another section of the Energy Strategy indicates that the amount of electricity generated through hydroelectric power plants increased by 15.8% during the period from 2008 to 2018; the share of hydroelectric power plants in the structure of generating capacities of the Russian Federation is approximately 20%, and on a global scale, the country has a hydropower potential of approximately 9%. The total capacity of solar power plants in the Unified Energy System of Russia in 2018 reached 0.834 gigawatts (GW), while the total capacity of wind power plants was 0.184 GW (*see* Table 2 below).

Table 2: **Renewable electricity generated in the Russian Federation from 1990–2020, broken down by source (non-combustible) (in GWh)**[28]

	Geothermal	Hydro	Wind	Solar PV
1990	28	165917		
1995	30	176412		
2000	58	165375	2	
2005	410	174604	7	
2010	505	168397	4	
2015	457	169914	148	335
2020	421	214240	1138	1862

The document explicitly mentions the objective to increase the "efficiency of energy supply to remote and isolated territories" and lists several measures that can be taken for the implementation of this objective, including the following:

• improvement of national standards related to renewable energy sources, taking into account best practices from around the world;

• support for Russian exporters of equipment and the providers of services involved in the design, construction, operation and maintenance of generating facilities based on renewable energy sources abroad;

• improvement of the mechanisms for stimulating the development of renewable energy in the medium and-long term;

• stimulation of voluntary demand for electricity generated from renewable energy sources.[29]

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[28] Renewables Information, IEA (Nov. 7, 2022), available at https://www.iea.org/data-and-statistics/data-product/renewables-information.

[29] *Id*.

The Energy Strategy also identifies the main problems associated with using renewable energy sources in Russia, namely, their low efficiency when compared to other technologies for generating electricity. However, the document does not provide for concrete measures that could be taken to increase such efficiency across the country.

Specific provisions of the Energy Strategy are devoted to the development of international cooperation between Russia and other countries in the energy sector in general and in renewable energy in particular. The goals and objectives of Russia's foreign policy regarding RES and the measures needed to achieve them that are stipulated in the Energy Strategy can be divided into two groups, specifically (a) goals and objectives of foreign policy to increase the efficiency of participation in the global energy agenda and (b) goals and objectives of such a policy in the environmental dimension of the country's fuel and energy complex.

The first category of goals and objectives focuses primarily on promoting the economic interests of Russia in global energy interactions. The measures to achieve these goals include "increasing participation in international activities to ensure sustainable development of global energy, including the United Nations-endorsed goal of ensuring universal access to affordable, reliable, sustainable and modern energy for all"; "participation in international negotiations on energy issues"; "strengthening the legal framework for energy cooperation, consolidating the principle of balancing the interests of exporters, importers and transit countries" of energy carriers; promoting a "favourable image of the Russian energy sector"; and expanding "Russian participation in the work of relevant international organizations."[30] Interestingly, none of the above measures presumes a prior promotion of RES by Russia or the country's active participation in negotiations regarding international agreements relating to RES.

According to the Energy Strategy, the indicator of the efficiency of participation in the global energy agenda is expected to move up from its current position of 42nd place in the World Energy Trilemma Index[31] in 2018 to a position between 20th and 30th place by 2035. It should be noted that this index is calculated based on 32 categories, none of which are directly related to RES. Nevertheless, the significance of some of these categories may be influenced by the implementation of the state's renewable energy policy. For example, the policy that aims to increase the share of RES may affect the energy security dimension (energy mix and reducing demand for imports) and the environmental sustainability dimension (by reducing carbon dioxide

[30] Renewables Information, IEA (Nov. 7, 2022), available at https://www.iea.org/data-and-statistics/data-product/renewables-information.

[31] The World Energy Trilemma Index has been prepared annually since 2010 by the World Energy Council. It presents a comparative ranking of 128 countries' energy systems. It provides an assessment of a country's energy system performance, reflecting balance and robustness in the three Trilemma dimensions, namely Energy Security, Energy Equity and Environmental Sustainability of Energy Systems.

emissions). If such a policy contributes to higher electricity prices, this may affect the "Equitable access to energy (physical and financial accessibility)" dimension. External factors such as technological change (e.g. changes in renewable energy technologies) can also have an impact and are not directly measured by the Index.[32]

This direction of Russia's international cooperation entails the country's participation in energy projects (both interstate and "diagonal," i.e. those implying the participation of private entities) on a wide range of issues that are not necessarily directly related to RES. General energy issues (including sustainable development in the energy field) are regularly discussed by Russia within the framework of the International Energy Forum.[33] As for particular areas of energy cooperation, one could invoke Russia's participation in the UNECE (United Nations Economic Commission of Europe) project titled "Sustainable hydrogen production in the UNECE region and its role in the development of a hydrogen ecosystem and export potential" that was approved in October 2021 by the UNECE Executive Committee. The project is financially supported by a voluntary contribution made by Russia to the UNECE.[34] The declared budget of the project is US$241,000. The main task is to study the potential of hydrogen as one of the key elements of the low-carbon energy system of the UNECE region in the future.[35]

Another direction of Russia's international cooperation is described as its participation in the development of international environmental law applicable to the regulation of intergovernmental relations in the energy sector, its harmonization with the national environmental legislation of the country, as well as the fulfillment of Russia's international obligations to reduce greenhouse gas emissions.

To conclude, the Energy Strategy does not specifically mention the "promotion of RES" as one of the components of Russia's participation in international energy dialogues. On the one hand, the topic of RES is covered by some of the areas of

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[32] World Energy Council, *World Energy Trilemma Index 2020*, in partnership with Oliver Wyman (2020), at 60 (Oct. 7, 2021) (Nov. 7, 2022), available at https://www.worldenergy.org/assets/downloads/World_Energy_Trilemma_Index_2020_-_REPORT.pdf.

[33] IEF16 Ministerial, 10–12 April 2018, New Delhi, India, International Energy Forum (IEF) (Nov. 7, 2022), available at https://www.ief.org/events/ief16-ministerial.

[34] *UNECE webinar: How to jumpstart hydrogen production and export potential of CIS countries?*, 8 December 2021, UNECE (Nov. 7, 2022), available at https://unece.org/sustainable-energy/events/unece-webinar-how-jumpstart-hydrogen-production-and-export-potential-cis.

[35] Россия окажет содействие развитию устойчивой водородной энергетики в регионе ЕЭК ООН // Постоянное представительство Российской Федерации при Отделении ООН и других международных организациях в Женеве. 18 октября 2021 г. [*Russia Will Assist the Development of Sustainable Hydrogen Energy in the UNECE Region*, Permanent Mission of the Russian Federation to the United Nations Office in Geneva, 18 October 2021] (Nov. 7, 2022), available at https://geneva.mid.ru/glavnaa/-/asset_publisher/4QbYFW4eSXTx/content/rossia-okazet-sodejstvie-razvitiu-ustojcivoj-vodorodnoj-energetiki-v-regione-eek-oon?inheritRedirect=false&redirect=https%3A%2F%2Fgeneva.mid.ru%3A443%2Fglavnaa%3Fp_p_id%3D101_INSTANCE_4QbYFW4eSXTx%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3D_118_INSTANCE_n3jA6XOjABmS__column-1%26p_p_col_count%3D3.

international cooperation that are mentioned in the Energy Strategy. On the other hand, Russia's silence with regards to the position on international legal regulation of RES can be explained by the country's interest in maintaining its status as one of the largest exporters of traditional carbon-based energy products in the context of the aforementioned "green" trends in the world energy markets, which Russia is forced to address. For example, the Energy Strategy names the "international campaign against the use of coal under the pretext of implementing the environmental agenda" among the Russian coal industry's main problems and risk factors. Thus, the foregoing leads one to the conclusion that the Energy Strategy reflects Russia's aim to maintain, as much as possible, a wait-and-see attitude towards international legal support for renewables while, at the same time, Russia intends to participate in discussions on this issue when and to the extent that its economic interests may be affected.

2.2. The Doctrine of the Energy Security of the Russian Federation: RES Qualifies as a Challenge to Energy Security

The foundations of Russia's state policy in the energy sector, as noted, shall be implemented within the framework of the Doctrine of the Energy Security of Russia, which was approved by Decree of the President of Russia of 13 May 2019. According to the Doctrine, "the energy security system is part of the national security system."[36] This document defines critical concepts related to energy security, systematizes threats, challenges and risks and outlines the tasks, subjects and mechanisms of ensuring energy security. Despite being criticized for specific gaps, the Doctrine, nonetheless, is characterized as a conceptual basis for "further practical steps in the field of legal regulation of energy and national security."[37]

As stated above, the Energy Strategy identifies innovative technologies (including those based on RES) as one of the priorities of the national energy policy. At the same time, it is noteworthy that the concept of "energy transition" is considered one of the "challenges" to Russia's energy security in the 2019 Doctrine. Thus, according to Clause 8 of the document, an increase in the share of renewable energy in the global fuel and energy mix is named among the "external economic challenges" to the country's energy security.[38] Furthermore, according to Clause 9 of the 2019 Doctrine, the "building up of international efforts to implement climate policy and accelerate the transition to a green economy" is a "foreign policy challenge" to Russian energy security. Finally, one of the so-called "cross-border challenges" is stated to be "the development and expansion of breakthrough technologies in the energy sector,

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[36] Doctrine of the Energy Security of the Russian Federation, *supra* note 24, cl. 33.

[37] *Жаворонкова Н.Г., Шпаковский Ю.Г.* Пробелы в новой Доктрине энергетической безопасности России // Юрист. 2020. № 9. С. 43–50 [Natalia G. Zhavoronkova & Yuri G. Shpakovsky, *Gaps in the New Doctrine of Russia's Energy Security*, 9 Lawyer 43 (2020)]; *see also* Novikau 2021.

[38] Doctrine of the Energy Security of the Russian Federation, *supra* note 24.

including technologies for the use of renewable energy." With this in mind, the 2019 Doctrine defines the term "challenge to energy security" as "a combination of conditions and factors that create new incentives for the development of world energy or new directions for its development but can also lead to a threat to energy security."[39]

In contrast to such a complicated assessment of the term "challenge," the term "threat" is defined as "a combination of conditions and factors that create the possibility of damage to the energy sector of the Russian Federation." That is to say, according to Russia, "challenges" are associated with such trends in the global energy market, which provide opportunities for the development of its energy sector, but under certain conditions can become a threat to its energy security. Clause 20 of the Doctrine sets forth, for example, that the current state of the applicable legal framework restrains the introduction of innovative technologies. To prevent the transformation of this challenge into a "threat," Clause 29 of the Doctrine (which is among the goals to ensure Russia's technological independence) indicates the need for the creation and development of innovative technologies in the energy sector, including the use of renewable energy.

2.3. Overview of Renewable Energy Incentives in Russia's National Legislation and Policy

Russia's national legal stance with regards to RES appears to be quite complex and comprises several legal and political acts establishing different directions of state support and regulation. The purpose of this brief outline of this stance is primarily to illustrate better the reasoning behind the conclusion reached in Section 2.1 above, namely, that it is not the highest priority for Russia to actively promote the emergence of a new RES international legal regime.

Historically, Russia's path towards renewable energy started in 1892, when its first hydroelectric power plant was built in the Altai region of Siberia. The plant featured four wooden turbines, each of which had a capacity of 45 kilowatts. In 1931, the most powerful (100 kilowatts in capacity) wind generator was built in the USSR (Union of Soviet Socialist Republics), whereas in 1966, the first power station using geothermal energy was commissioned.[40] However, until the last two decades, the country lacked state programs to support renewable energy.[41]

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[39] Doctrine of the Energy Security of the Russian Federation, *supra* note 24.

[40] *Маренин К.* На Камчатке модернизуют самую старую геотермальную станцию // Российская газета. 28 августа 2014 г. [Kirill Marenin, *The Oldest Geothermal Station in Kamchatka to be Modernized*, Rossiyskaya Gazeta, 28 August 2014] (Nov. 7, 2022), available at https://rg.ru/2014/08/28/regdfo/stanciya.html.

[41] Alexey Lossan, *Russia and China Join Forces to Develop Green Energy*, G20 Magazine (September 2016) (Nov. 7, 2022), available at https://digital.thecatcompanyinc.com/g20magazine/september-2016/green-energy/.

Currently, in Russia, the foundations of RES support and the activity of RES-generating entities in the electric energy market are outlined in Federal Law No. 35-FZ on electric energy of 26 March 2003 (hereinafter, the Law on Electricity).

By-laws of the Russian Government establish targets for the development of renewable energy in the domestic market of Russia as well as the procedure for the competitive selection of generating facilities for obtaining state subsidies. The general principles of state support in this area (furthered by several specific by-laws[42]) are established in the document titled "Main Directions of the State Policy Aimed at Increasing Energy Efficiency of the Electric Power Industry Based on the Use of Renewable Energy Sources for the Period up to 2035" (hereinafter, the Main Directions), approved by Decree of the Government of the Russian Federation on 8 January 2009.[43] The Main Directions also provide that the amount of production and consumption of electric energy using RES will reach 4.5% by 2024 of the country's total production and consumption of electric energy (and at least 6% by 2035). This target is far more modest in comparison, for example, with the objectives of the EU, namely, to achieve a share of at least 32% of energy from renewable sources in the Union's gross final consumption of energy by 2030.[44]

The primary support mechanism for renewable energy in Russia is the auction system.[45] The first part of the RES development program, to be realized in 2014–2024,

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[42] *See, inter alia*, Постановление Правительства Российской Федерации от 3 июня 2008 г. № 426 «О квалификации генерирующего объекта, функционирующего на основе использования возобновляемых источников энергии»; Постановление Правительства Российской Федерации от 17 октября 2009 г. № 823 «О схемах и программах перспективного развития электроэнергетики»; Постановление Правительства Российской Федерации от 17 февраля 2014 г. № 117 «О некоторых вопросах, связанных с сертификацией объемов электрической энергии, производимой на функционирующих на основе использования возобновляемых источников энергии квалифицированных генерирующих объектах» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 426 of 3 June 2008. On the Qualification of a Generating Facility Operating on the Basis of the Use of Renewable Energy Sources; Decree of the Government of the Russian Federation No. 823 of 17 October 2009. On Schemes and Programs for the Long-Term Development of the Electric Power Industry; Decree of the Government of the Russian Federation No. 117 of 17 February 2014. On Some Issues Related to the Certification of Volumes of Electrical Energy Produced at Qualified Generating Facilities Operating on the Basis of the Use of Renewable Energy Sources, SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru.

[43] Распоряжение Правительства Российской Федерации от 8 января 2009 г. № 1-р «Об основных направлениях государственной политики в сфере повышения энергетической эффективности электроэнергетики на основе использования возобновляемых источников энергии на период до 2035 года» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 1-r of 8 January 2009. On the Main Directions of the State Policy Aimed at Increasing Energy Efficiency of the Electric Power Industry Based on the Use of Renewable Energy Sources for the Period up to 2035, SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_83805/.

[44] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), EUR-Lex (Nov. 7, 2022), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L2001.

[45] Tatiana Lanshina, *Research of Current Economic Policy Instruments in the Field of Renewable Energy in Russia and in the World*, SSRN (2020) (Nov. 7, 2022), available at https://ssrn.com/abstract=3695065.

according to the Main Directions, has as its foundation a capacity-based approach to renewable electricity support. In the majority of other countries, support for RES electricity is usually linked to the electricity output (production) of renewable energy generating facilities (expressed in MWh) (e.g. through feed-in tariffs, premiums, green certificates or tendering schemes).[46] In contrast, the Russian capacity scheme, in its first stage, has been linked to a capacity supply agreement (i.e. the availability of power plants to produce electricity), expressed in MW or MW per month. Under this mechanism, annual auctions have been held to implement projects for the construction of solar, wind and small hydropower plants. The investor offering the lowest capital expenditures is typically declared the winner (thus, the competitive system came to be called CAPEX, i.e. capital expenditure-based).[47] These agreements have allowed investors to secure a return on their investment in RES projects through guaranteed capacity payments (12% annually) payable over a term of 15 years owing to increased payments made by wholesale consumers.[48] However, the said system of competitive selection of investors has not proven optimal for the RES market. Indeed, it did not promote increasing the efficiency of the equipment or searching for new sources of financing and potential markets. Moreover, investors were not interested in localization of the equipment in Russia. The cross-subsidization did not stimulate RES investors to search for alternative means to reduce the cost of the energy that was produced.[49] Despite the fact that the auction prices have fallen twice from 2014 to 2019,[50] it was decided to introduce an LCOE-based[51] auction system for state support of RES for the period of 2024–2035.[52] Under the new rules, the amount of payment for

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46 IRENA, *REmap 2030: Renewable Energy Prospects for the Russian Federation*, Working Paper (2017) (Nov. 7, 2022), available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2017/Apr/IRENA_REmap_Russia_paper_2017.pdf.

47 Lanshina, *supra* note 45, at 46.

48 Объем господдержки развития ВИЭ-генерации в России до 2035 года составит 350 млрд рублей // ТАСС. 22 марта 2021 г. [*The Volume of State Support for the Development of Renewable Energy Generation in Russia until 2035 Will Amount to 350 Billion Rubles*, TASS, 22 March 2021] (Nov. 7, 2022), available at https://tass.ru/ekonomika/10967461.

49 *Тукалин Г.* Сверхприбыль инвесторов ВИЭ может оказаться убедительнее доводов энергопотребителей // Новая газета. 8 апреля 2019 г. [Gleb Tukalin, *Super Profits of Renewable Energy Investors May Be More Convincing than the Arguments of Energy Consumers*, Novaya Gazeta, 8 April 2019] (Nov. 7, 2022), available at https://www.ng.ru/economics/2019-04-08/5_7551_energy.html.

50 Дешево-зелено: Цена «зеленой» электроэнергии в РФ сблизилась со стоимостью традиционной // Коммерсантъ. 5 октября 2021 г. [*Cheap Green: The Price of "Green" Electricity in the Russian Federation Approached the Cost of Traditional One*, Kommersant, 5 October 2021] (Nov. 7, 2022), available at https://www.kommersant.ru/doc/5009075.

51 Levelised Cost of Electricity (LCOE): The constant unit cost of electricity per kWh of a payment stream that has the same present value as the total cost of building and operating a power plant over its useful life, including a return on equity.

52 *Cheap Green*, *supra* note 50.

electricity or the rate of return on invested capital will directly depend on the volume of electricity generation. The capacity price becomes variable and is determined by monthly indicators. It will be recalculated and adjusted periodically depending on the efficiency of each power plant. The auctions based on the new system that were organized in September 2021, have already proven to be efficient. Thus, the winning entities offered 65,000 rubles (RUB) per kilowatt (kW) of installed power in the wind energy sector, which was already twice as low as the initial minimum cost.[53] It could be assumed that the newly implemented state system of funding the projects in question will lead to a smoother development of RES generation facilities. Nevertheless, while the focus has been on developing measures and limiting such state support only to eligible generation facilities, the potential of other mechanisms remains unexplored and thus underestimated. This is especially true when it comes to the tax incentives available for the use of renewable energy sources by production plants. There are only three such mechanisms established in the Russian Tax Code. The first one is a so-called "investment tax credit" (ITC).[54] The essence of the Russian ITC is to provide the qualifying taxpayer who uses energy-efficient technologies (including those based on using RES)[55] with a deferral to pay corporate income tax as well as certain regional and local taxes. Therefore, fundamentally, it is a loan of a tax amount, whereas, for example, in the United States (as well as in some other countries), the term "credit" (reduction in the amount of the final tax sum) is the opposite of the term "deduction" (reduction of the tax base).[56] The loan amount may cover up to 100% of the cost of investments in energy-efficient facilities (including RES). Meanwhile, it implies the accrual of specified interest and is granted under an agreement with a tax authority. To further complicate matters, granting ITC is not an obligation of a tax authority, which presents a significant administrative impediment to potential investors.[57] Finally, private citizens in Russia cannot use

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53 Процесс, который инициировала Европа, к счастью, необратим // Коммерсантъ. 22 декабря 2020 г. [*The Process Initiated by Europe Is, Fortunately, Irreversible*, Kommersant, 22 December 2020] (Nov. 7, 2022), available at https://www.kommersant.ru/doc/4617319.

54 Налоговый кодекс Российской Федерации (часть первая) от 31 июля 1998 г. № 146-ФЗ // СПС «КонсультантПлюс» [Tax Code of the Russian Federation (Part One) of 31 July 1998 No. 146-FZ, SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_19671/.

55 Постановление Правительства Российской Федерации от 17 июня 2015 г. № 600 «Об утверждении перечня объектов и технологий, которые относятся к объектам и технологиям высокой энергетической эффективности» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 600 of 17 June 2015. On Approval of the List of Objects and Technologies that Relate to Objects and Technologies of High Energy Efficiency, SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_181403/.

56 Energy Incentives for Individuals: Residential Property Updated Questions and Answers, IRS (Nov. 7, 2022), available at https://www.irs.gov/newsroom/energy-incentives-for-individuals-residential-property-updated-questions-and-answers.

57 Tax Code of the Russian Federation, *supra* note 54.

this mechanism. In fact, this deprives the Russian Government of a prospective way to raise the popularity of installing RES technologies in everyday life, such as generating electricity at home.

Other tax incentives for installing RES technologies include accelerated depreciation of energy-efficient property (including RES), which is not used frequently due to the higher depreciation rates that are applicable when using other kinds of equipment. Finally, the Tax Code of Russia provides for corporate property tax relief on the properties of entities owning facilities with a high energy efficiency class (including those using RES).[58] However, in Russia, there is no law providing for energy efficiency classes for commercial buildings. Therefore, the said benefit has been a *nudum jus* since its introduction in the Tax Code in 2011, this fact having been negatively assessed by the Russian Constitutional Court (which only rarely criticizes Russian laws it finds compatible with the Russian Constitution).[59]

In light of the foregoing, the efforts of the Russian Government and regions to increase the popularity of electric vehicles (EVs) appear to be somewhat controversial. Thus, in Moscow, the capital of Russia, it is permitted to park EVs free of charge at the paid parking lots.[60] Furthermore, legal entities may include the cost of charging EVs in their corporate tax expenses (thereby reducing the tax base and, consequently, the tax amount).[61] In August 2021, the Russian Government approved a policy, referred to as a "Concept" for the development of production and use of electric transport in the Russian Federation until 2030.[62] It is planned to prepare a base for

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58 Налоговый кодекс Российской Федерации (часть вторая) от 5 августа 2000 г. № 117-ФЗ // СПС «КонсультантПлюс» [Tax Code of the Russian Federation (Part Two) of 5 August of 2000 No. 117-FZ, SPS "ConsultantPlus"], Art. 381, cl. 21 (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_28165/.

59 Определение Конституционного Суда Российской Федерации от 2 июля 2019 г. № 1831-О «Об отказе в принятии к рассмотрению жалобы общества с ограниченной ответственностью «Северный Автовокзал» на нарушение конституционных прав и свобод пунктом 21 статьи 381 Налогового кодекса Российской Федерации» // СПС «Гарант» [Decree of the Constitutional Court of the Russian Federation No. 1831-O of 2 July 2019. On the Refusal to Accept for Consideration the Complaint of the Limited Liability Company "Northern Bus Station" for Violation of Constitutional Rights and Freedoms by Clause 21 of Article 381 of the Tax Code of the Russian Federation, SPS "Garant"] (Nov. 7, 2022), available at https://base.garant.ru/72298836/.

60 Постановление Правительства Москвы от 17 мая 2013 г. № 289-ПП «Об организации платных городских парковок в городе Москве» // СПС «КонсультантПлюс» [Decree of the Government of Moscow No. 289-PP of 17 May 2013. On the Organization of Paid Urban Parking in the City of Moscow, SPS "ConsultantPlus"] (Nov. 7, 2022), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=MLAW;n=181677;dst=100038#7qtDDjTglmqIwfhs.

61 Письмо Минфина России от 31 мая 2021 г. № 03-03-06/3/42061 // Время бухгалтера [Letter of the Ministry of Finance No. 03-03-06/3/42061 of 31 May 2021, Accountant Time] (Nov. 7, 2022), available at https://www.v2b.ru/documents/pismo-minfina-rossii-ot-31-05-2021-03-03-06-3-42061/.

62 Распоряжение Правительства Российской Федерации от 23 августа 2021 г. № 2290-р «Об утверждении Концепции по развитию производства и использования электрического автомобильного транспорта в Российской Федерации на период до 2030 года» (вместе с «Планом мероприятий

the mass production of EVs and, by 2024, to produce at least 25,000 EVs. By 2030, the country should be producing at least 10% of EVs from the total volume of all vehicles produced at the next stage. The government plans to develop the EV market with the help of demand support programs: preferential leasing and lending will be introduced for EV owners, as well as transport tax benefits. Additionally, Russians will receive a 25% discount when buying Russian-produced EVs.

Indeed, EVs can be an effective means to reduce a country's carbon footprint. However, it is noted that

> optimizing the power structure, upgrading battery technology, and improving the recycling efficiency are of great significance for the large-scale promotion of EVs, closed-loop production of batteries, and sustainable development of the resources, environment, and economics.[63]

Without these factors, talking about reducing carbon footprints is, in principle, meaningless. Therefore, along with the development of the EV industry, the state needs to make efforts to ensure that their production, as well as the electricity they consume, is "green." At the same time, neither the Concept itself nor the current regional legislation of the city of Moscow mentions this vital relationship.

It can be concluded that the Russian legislation promoting the use of RES by legal entities and individuals is in the process of formation. However, the political and legal ramifications of doing this have not yet been explored fully. The described state of domestic policy and legislation regarding RES logically explains that the active promotion of renewables as a new international legal regime does not fully meet the interests of Russia at the moment, as reflected in its Energy Strategy.

3. Russia and the International Renewable Energy Agency: Cooperation in 2015–2021

The International Renewable Energy Agency (IRENA) is a leading global intergovernmental agency that serves as the primary platform for assisting countries in their transitions to the use of all forms of renewable energy. According to the

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(«дорожной картой») по развитию производства и использования электрического автомобильного транспорта в Российской Федерации на период до 2030 года») // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 2290-r of 23 August 2021. On Approval of the Concept for the Development of Production and Use of Electric Motor Transport in the Russian Federation for the Period up to 2030 (together with the "Action Plan ('Road Map') for the Development of Production and Use of Electric Road Transport in the Russian Federation for the Period up to 2030"), SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_393496/.

63 Xiaoning Xia & Pengwei Li, *A Review of the Life Cycle Assessment of Electric Vehicles: Considering the Influence of Batteries*, 814 Sci. the Total Env't 152870 (2022).

Statute of the International Renewable Energy Agency (hereinafter, the Statute), its purpose is to promote widespread and increased adoption and the sustainable use of all forms of renewable energy (Art. II of the Statute).[64] The organization's main function is to analyze, monitor and systematize current renewable energy practices of states, and such activities are carried out "without obligations on Members' policies" (Art. IV of the Statute).

The Russian Federation became a member of IRENA on 22 July 2015, which gave it access to IRENA's scientific developments in "best practices" in renewable energy.[65] In 2016, Russia was selected to be one of the 21 members of the IRENA Council (an executive body that meets at least twice a year and manages the agency's current activities, and prepares the annual IRENA Assembly) for 2017–2018.

One of the significant outcomes of the Russian Federation within IRENA was the preparation of the Global Report on RES 2030 (REmap 2030) and the roadmap "RE 2030 – Renewable Energy Prospects for the Russian Federation" in 2017. The REmap 2030, based on the then draft of the Energy Strategy of Russia for the period up to 2035,[66] outlines the priority directions for the development of renewable energy and assesses the required volume of investments (approximately US$15 billion per year between 2010 and 2030):

> Based on consultation with the Russian government and relevant stakeholders, this report identifies four main drivers which Russia could consider to accelerate the uptake of renewables in its energy mix, to be exact, economic activity and job creation; science and technology development; energy supply to isolated areas; and improving the quality of the environment. Under REmap – the case that considers the accelerated deployment of renewable energy in the Russian energy mix – the share of total renewable energy increases to 11.3% of TFEC by 2030.[67]

Currently, there is no information available regarding any relevant joint projects between Russia and IRENA. Given that similar projects have already been launched,

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64 IRENA, *Statute of the International Renewable Energy Agency (IRENA)*, IRENA/FC/Statute, 26 January 2009 (Nov. 7, 2022), available at https://www.irena.org/-/media/Files/IRENA/Agency/About-IRENA/Statute/IRENA_FC_Statute_signed_in_Bonn_26_01_2009_incl_declaration_on_further_authentic_versions.ashx?la=en&hash=FAB3B5AE51B8082B04A7BBB5BDE978065EF67D96&hash=FAB3B5AE51B8082B04A7BBB5BDE978065EF67D96. As of 2022, 168 states are IRENA members.

65 Liliana N. Proskuryakova & Georgy V. Ermolenko, *The Future of Russia's Renewable Energy Sector: Trends, Scenarios and Policies*, 143 Renew. Energy 1670 (2019).

66 Minenergo (Ministry of Energy of the Russian Federation), *Draft Energy Strategy of the Russian Federation for the Period up to 2035* (2017).

67 IRENA, *supra* note 46.

such as, for example, with the Republic of Belarus,[68] and the states of Central America (Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama[69]), this might indicate that Russia is not yet ready to discuss the prospects for national legislative regulation of RES at the global level.

4. BRICS as a Platform for Negotiations on Reasonable Prospects for the Development of Renewable Energy

BRICS, an interstate association (comprised of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and, since December 2010, the Republic of South Africa), held its first full-scale summit on 16 June 2009, in Yekaterinburg, Russia. The final Joint Statement recorded the aim of the alliance countries to promote "an incremental, proactive, pragmatic, open and transparent dialogue and cooperation," which serves not only the "common interests of emerging market economies and developing countries but also to build a harmonious world of lasting peace and common prosperity."[70] Its Action Plan names "ensuring Russian contribution to the development of the BRICS Energy Research Platform" as one of the priority areas of cooperation.[71] It is the only international forum highlighted in the Action Plan as a separate item.

Within the BRICS association, Russia's energy policy is currently realized in two directions, namely:

1. Promotion of research cooperation in the energy field through joint research with the BRICS member states under the direction of the BRICS Energy Research Platform (hereinafter, the Platform),[72] which was created at the initiative of Russia on 11 November 2019;[73] and

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68 IRENA, *Renewables Readiness Assessment: The Republic of Belarus* (July 2021) (Nov. 7, 2022), available at https://www.irena.org/publications/2021/Jul/Renewables-Readiness-Assessment-Belarus.

69 IRENA, *Clean Energy Corridor of Central America (CECCA) Strategy* (2015) (Nov. 7, 2022), available at https://www.irena.org/-/media/Files/IRENA/Clean-Energy-Corridors/CECCA-Strategy-Document-Final--22-9-2015.pdf.

70 Joint Statement of the BRIC Countries' Leaders, Yekaterinburg, Russia, 16 June 2009 (Nov. 7, 2022), available at https://brics-ysf.org/sites/default/files/2nd_Summit.pdf.

71 Распоряжение Правительства Российской Федерации от 1 июня 2021 г. № 1447-р «Об утверждении Плана мероприятий по реализации Энергетической стратегии Российской Федерации на период до 2035 года» // СПС «КонсультантПлюс» [Order of the Government of the Russian Federation No. 1447-r of 6 January 2021. On Approval of the Action Plan for the Implementation of the Energy Strategy of the Russian Federation for the Period up to 2035, SPS "ConsultantPlus"] (Nov. 7, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_386439/.

72 *Terms of Reference of the BRICS Energy Research Cooperation Platform*, Brasilia, Brazil, 14 November 2019, China Daily, 15 November 2019 (Nov. 7, 2022), available at https://www.chinadaily.com.cn/a/201911/15/WS5dce10cfa310cf3e3557796e.html.

73 Communique for BRICS Energy Ministers Meeting to Be Held at Brasilia, Brazil on 11 November 2019 (Nov. 7, 2022), available at http://www.brics.utoronto.ca/docs/191111-energy.pdf.

2. Realization of projects in the field of renewable energy.

The first direction outlines the assurance of sustainable energy development through cooperation in energy research, technology, policy and innovation as well as dialogue on energy issues in order to ensure universal access to affordable, reliable, sustainable and modern energy for all, in addition to strengthening the energy security of the BRICS countries and providing a stronger voice for BRICS in the global energy agenda. At the same time, renewable energy is indicated among the priority topics that are the object of research within the Platform's framework. In 2020, joint studies were published (the BRICS Energy Report 2020[74] and the BRICS Energy Technology Report 2020[75]), which separately investigated the issue of renewable energy being supported in member states.

As for the second direction of the energy policy of the Russian Federation, which is being implemented in cooperation with the BRICS member states, several renewable energy projects in Russia are being carried out with the support of the BRICS New Development Bank (hereinafter, the BRICS NDB). Thus, in Karelia, the Nord-Hydro project is being carried out to construct two small hydroelectric generation plants, "Beloporozhskaya HPP-1" and "Beloporozhskaya HPP-2."[76] The total cost of the project is estimated at approximately US$161.9 million. The amount of financing provided by the NDB to two international banks (the Eurasian Development Bank and the International Investment Bank) for refinancing the project is US$100 million. The project's equity investors are the Russian Direct Investment Fund and the Chinese partner, China State Energy Engineering Corp. Ltd. (Sinomec).[77] The second project, implemented with the participation of BRICS NDB funding, aims to facilitate investment in the production of RES from 2019 to 2023, as a result of which carbon dioxide emissions are expected to be reduced by about 200,000 tons annually. For the project, the BRICS NDB allocated a credit line to the Eurasian Development Bank of US$300 million (with a total project cost of US$415 million).[78]

The legal basis for BRICS energy cooperation is supported by both intergovernmental and private law arrangements.

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[74] BRICS Energy Research Cooperation Platform, *BRICS Energy Report* (2020) (Nov. 7, 2022), available at https://eng.brics-russia2020.ru/images/114/89/1148985.pdf.

[75] BRICS Energy Research Cooperation Platform, *BRICS Energy Technology Report* (2020), at 1–6 (Nov. 7, 2022), available at https://eng.brics-russia2020.ru/images/114/89/1148990.pdf.

[76] Two Loans to EDB and IIB for Nord-Hydro, New Development Bank (Nov. 7, 2022), available at https://www.ndb.int/project/edbiibrussia/.

[77] Новые МГЭС в Карелии принесут около 12 млрд рублей налоговых отчислений // ТАСС. 27 марта 2019 г. [*New SHPPs in Karelia Will Bring About 12 Billion Rubles in Tax Deductions*, TASS, 27 March 2019] (Nov. 7, 2022), available at https://tass.ru/ekonomika/6264496.

[78] Development of Renewable Energy Sector in Russia Project, New Development Bank (Nov. 7, 2022), available at https://www.ndb.int/project/russia-development-renewable-energy-sector-russia-project/.

5. Bilateral Cooperation Between Russia and the Other BRICS Countries on RES Issues

Apart from the described international initiatives within the framework of selected intergovernmental institutions, Russia's activities on RES issues on a bilateral basis are also worth noting.

5.1. Russia and China

Since 2014, there has been a trend of continually strengthening ties between Russian and Chinese corporations in terms of the development of renewable energy; the parties conclude cooperation agreements and develop and implement investment projects on a mutually beneficial basis.

The procurements, which are organized in accordance with the Main Directions and were analyzed in Section 2.3, primarily attracted investors from China. For instance, Solar Systems, a subsidiary of the Chinese company Amur Sirius, announced that it intends to invest up to US$1 billion in Russian solar energy projects. The Chinese investors plan to build three power plants, each producing 175 MW. Moreover, Russia's largest corporations are eager to build commercial ties in terms of RES with major Chinese companies. Thus, in 2014, RusHydro, Russia's largest hydroelectric power plant operator, and Power Construction Corporation of China Limited (Ltd.) (PowerChina) signed an agreement providing for the creation of a joint venture (JV) with the distribution of shares between RusHydro and PowerChina in a ratio of 51% to 49% that is aimed at joint construction of pumped storage power plants (PSPP) in Russia.[79] Furthermore, in 2016, the Russian company Rusnano JSC came to an agreement on creating a wind energy investment fund with the Chinese company Zhongrong Trust International Co. Ltd. (Zhongrong), one of the largest financial institutions in the Asia-Pacific region with a proven track record in financing large-scale innovative projects. Initially, the planned budget for the project was US$500 million. The two companies planned to carry out investments in Russia (at a rate of not less than 70%), China and other countries.[80]

On the international law level, a Russia-China bilateral intergovernmental commission on RES carries out its activities as one of the four bilateral commissions on energy matters. According to the Joint Communiqué of the 26th Regular Meeting between the Heads of Government of the People's Republic of China and the Russian Federation signed on 30 November 2021, the countries agreed to support the

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[79] *Rushydro signed an agreement with Power China on the joint construction of pumped storage plants*, Rushydro (Nov. 7, 2022), available at https://eng.rushydro.ru/press/news/95543.html&cd=2&hl=en&ct=clnk&gl=gr&client=safari.

[80] *Russian Rusnano, Chinese Zhongrong set up $500 mln investment fund*, TASS, 19 January 2016 (Nov. 7, 2022), available at https://tass.com/economy/850525?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com.

interaction of economic entities of both countries in the area of RES,[81] the importance of which was discussed a day before at the annual Russian-Chinese Energy Business Forum.[82]

5.2. Russia and Brazil

The potential for cooperation between Russia and Brazil regarding renewable energy has not been widely covered due to the collaboration still being in its early stages of development. Thus, some researchers have suggested that "clean" hydrogen projects might "establish an important axis for integration and energy cooperation" among BRICS countries, including the respective interaction between Russia and Brazil.[83] Indeed, such ideas appear to be grounded in the long-standing history of strategic partnership between the two countries, as evidenced by the respective Partnership Agreement between the Russian Federation and the Federative Republic of Brazil of 2000, which is aimed at expanding trade and economic cooperation in a variety of areas, including energy and environment[84] and the respective Action Plan 2010.[85]

In 2012, the two countries signed an agreement titled "Action Plan for the Strategic Partnership between the Russian Federation and the Federative Republic of Brazil: Next Steps."[86] This document determined specific areas of interaction as well as the protocols to be followed by the representatives of the two countries

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81 *Li Keqiang and Russian Prime Minister Mikhail Mishustin Co-chair the 26th Regular Meeting with Han Zheng's Presence*, Ministry of Foreign Affairs of the People's Republic of China, 30 November 2021 (Nov. 7, 2022), available at https://www.fmprc.gov.cn/eng/zxxx_662805/202112/t20211201_10460667.html.

82 *III Russia-China Energy Business Forum brings together more than 300 representatives of major companies*, Rosneft, 29 November 2021 (Nov. 7, 2022), available at https://www.rosneft.com/press/today/item/208597/.

83 Luciano Losekann & Amanda Tavares, *Potential for Cooperation in the Dissemination of Renewable Energy and Natural Gas Among BRICS Countries*, 74 Pol'y Res. Brief, International Policy Centre for Inclusive Growth 1 (2021) (Nov. 7, 2022), available at https://ipcig.org/sites/default/files/pub/en/PRB74_Potential_for_cooperation.pdf.

84 Договор о партнерских отношениях между Российской Федерацией и Федеративной Республикой Бразилией от 22 июня 2002 г. // Электронный фонд актуальных правовых и нормативно-технических документов [Partnership Agreement Between the Russian Federation and the Federative Republic of Brazil of 22 June 2000, Electronic Fund of Current Legal and Regulatory Documents], Arts. 8 & 9 (Nov. 7, 2022), available at https://docs.cntd.ru/document/901812576.

85 Plano De Ação Da Parceria Estratégica Entre A República Federativa Do Brasil E A Federação Da Rússia [Action Plan of the Strategic Partnership Between the Federative Republic of Brazil and the Russian Federation], DefesaNet, 14 May 2010 (Nov. 7, 2022), available at https://www.defesanet.com.br/br_ru/noticia/9613/Brasil---Russia----Plano-de--Acao-da--Parceria-Estrategica/.

86 Atos assinados por ocasião da visita da Presidenta da República à Federação da Rússia – Moscou, 13 a 14 de dezembro de 2012 [Act Signed on the Occasion of the Visit of the President of the Republic to the Russian Federation – Moscow, 13–14 December 2012], Portal Gov.br, 14 December 2012 (Nov. 7, 2022), available at https://www.gov.br/mre/pt-br/canais_atendimento/imprensa/notas-a-imprensa/atos-assinados-por-ocasiao-da-visita-da-presidenta-da-republica-a-federacao-da-russia-moscou-13-a-14-de-dezembro-de-2012.

when interacting within these areas. In particular, in Article VI of the document, it was highlighted that the countries shall "identify specific opportunities for cooperation in the area of renewable energy sources (including the production of second-generation biofuels)."[87] The recent Joint Statement issued by the President of the Federative Republic of Brazil, Jair Bolsonaro and the President of the Russian Federation, Vladimir Putin as of 16 February 2022[88] expressed the corresponding idea emphasized the notion that this particular area of bilateral integration should be addressed. Similar approaches were demonstrated at the ministerial level between the two countries in October 2021.[89]

Despite the challenging geopolitical situation surrounding Ukraine, bilateral interaction between the two countries in the area of energy appears to remain quite prominent, especially when taking into account the relatively reserved stance of Brazil on the current Ukrainian crisis. Instead of assessing which of the Ukrainian Presidents – Yanukovich or Zelenskiy – legitimately represents Ukraine today, Brazil appears to be focusing reasonably on promoting its own interests rather than introducing sanctions against Russia and Belorussia, which could pose significant risks for the Brazilian economy.[90]

5.3. Russia and India

The future of Russia-India interaction regarding renewables has been a popular subject of research in recent years. It is widely argued[91] that such a partnership between Russia and India, a country with strong RES potential,[92] could take on

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87 Act Signed on the Occasion of the Visit, *supra* note 86.

88 Joint Statement by President of the Russian Federation Vladimir Putin and President of the Federative Republic of Brazil Jair Bolsonaro, President of Russia, 16 February 2022 (Nov. 7, 2022), available at http://en.kremlin.ru/supplement/5774.

89 Максим Решетников обсудил с министром энергетики Бразилии развитие торгового и инвестиционного сотрудничества // ТАСС. 14 октября 2021 г. [*Maxim Reshetnikov Discussed with the Minister of Energy of Brazil the Development of Trade and Investment Cooperation*, TASS, 14 October 2021] (Nov. 7, 2022), available at https://www.economy.gov.ru/material/news/maksim_reshetnikov_obsudil_s_ministrom_energetiki_brazilii_razvitie_torgovogo_i_investicionnogo_sotrudnichestva.html.

90 Bolsonaro sobre guerra na Ucrânia: "Meu partido é o Brasil" [*Bolsonaro on War in Ukraine: "My Party Is Brazil"*], Correio Braziliense, 12 April 2022 (Nov. 7, 2022), available at https://www.correiobraziliense.com.br/politica/2022/04/5000048-bolsonaro-sobre-guerra-na-ucrania-meu-partido-e-o-brasil.html.

91 *See, e.g.*, Vasily Shikin & Amit Bhandari, *Russia – India Energy Cooperation: Trade, Joint Projects, and New Areas*, Policy Brief No. 13, Russian International Affairs Council (October 2017), at 8 (Nov. 7, 2022), available at https://www.gatewayhouse.in/wp-content/uploads/2017/10/GH-RIAC_Russia---India-Energy-Paper_Web_2017.pdf; Dr. Junuguru Srinivas, *India and Russia Energy Cooperation*, The Diplomatist, 14 December 2019 (Nov. 7, 2022), available at https://diplomatist.com/2019/12/14/india-and-russia-energy-cooperation/.

92 In efforts to transition to green energy, India has recently achieved a significant milestone by completing the countrywide installation of 100 gigawatts of total installed renewable energy capacity,

a "complementary" nature, given the countries' already existing ties in the energy domain (mainly nuclear energy and oil investments).[93]

Indeed, the economic incentive of such a favorable exchange might lie in India providing Russia with know-how on wind power.[94] In contrast, having increased the share of RES in its domestic energy mix, Russia could export more gas to India. Such diversification of energy cooperation could benefit both parties, and certain practical steps, although merely on a private-player level, have already taken place in this direction. Thus, as of 2021, the Russian State Corporation, "Rosatom," has been exploring opportunities to participate in India's wind energy markets using its Joint Stock Company, "RIR" (formerly the Public Joint Stock Company, "OTEK"). In addition, its subsidiary in Hungary, Ganz EEM, lists India among the countries where their small hydropower plants are supplied.[95]

On the other hand, the official bilateral cooperation between the countries in the RES domain largely remains *terra incognita*. Among such sporadic initiatives, one could name the Memorandum of Understanding signed on 24 December 2016, between the Solar Energy Corporation of India and the Russian Energy Agency to set up large-scale solar photovoltaic (PV) projects in India between the years 2016 and 2022.

Under the terms of the Agreement, initially, a 500-MW pilot solar PV project should have been developed.[96] The parties also agreed to formulate a roadmap for the further development of the projects and procure an intergovernmental agreement between Russia and India to be concluded six months after signing the memorandum. Nevertheless, no other steps to implement the memorandum have

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excluding large hydro. It now aims to hit its 175 GW renewable energy target by December 2022. If achieved, that would be close to half of India's current total installed power capacity. *See* Dmitriy Frolovskiy, *Energy Cooperation as the Backbone of India-Russia Ties*, The Hindu, 28 October 2021 (Nov. 7, 2022), available at https://www.thehindu.com/opinion/op-ed/energy-cooperation-as-the-backbone-of-india-russia-ties/article37200740.ece.

93 Russian companies have been involved in the construction of six nuclear reactors in the Kudankulam nuclear power project in Tamil Nadu. Of these, Unit 1 and Unit 2 have been operating at total capacity. Unit 3 is still under construction. Previously, Russian President Vladimir Putin claimed that Russia is ready to build a dozen reactors in India over the next 20 years. A few years ago, Rosneft invested US$12.9 billion in India's second-largest private oil refiner, Essar Oil, renamed Nayara Energy, marking it as one of the most significant foreign investments in years.

94 For example, India is the world's fourth-largest wind energy generation capacity on its manufacturing base. *See Year-End Review 2022 – Ministry of New and Renewable Energy*, Government of India, 18 December 2016 (Dec. 20, 2022), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1885147.

95 Ganz Engineering & Energetics – General Information, Power Technology (Nov. 7, 2022), available at https://www.power-technology.com/contractors/operations/ganz/.

96 Memorandum of Understanding Between Solar Energy Corporation of India and Russian Energy Agency Regarding Construction of Solar Power Plants in the Republic of India, 24 December 2016 (Nov. 7, 2022), available at https://mnre.gov.in/img/documents/uploads/a64dab7ac89347cdae2098e22cc0e754.PDF.

been taken so far. The signature of the memorandum thus unveiled the potential area of energy cooperation between the two countries; however, the initiative appeared premature for it to be formalized at the treaty level.

5.4. Russia and South Africa

Issues of renewable energy and energy efficiency have officially been on the agenda in bilateral interactions between Russia and South Africa since the conclusion of the Agreement between the Government of the Russian Federation and the Government of the Republic of South Africa on cooperation in the field of energy dated 26 March 2013.[97] As stated in the preamble, the mutual interest here consisted in establishing an inextricable link between the economic development and energy security of both states with "the availability, accessibility and efficient use of fuel and energy resources, taking into account the requirements of security and environmental protection."[98] Article 2(d) of the 2013 Agreement imposed a positive obligation on the states to "develop cooperation in accordance with their national legislation" in the "area of renewable energy." The treaty also outlined several ways of ensuring such interaction, namely, encouraging the exchange of information in the areas of clean technologies and energy, energy efficiency and renewable energy among state universities, technology centers, design bureaus, industrial enterprises and other government organizations (Art. 3 of the 2013 Agreement). The priority here was given to the existing national legislation of the parties, which, according to the 2013 Agreement, should be observed during its implementation. This is an important consideration since, even though the 2013 Agreement imposed obligations on the states to cooperate, it did not call for any changes to be made in each of these countries' national laws in order to facilitate such cooperation. Meanwhile, at that stage of the development of such a sensitive domain of international dialogue as RES, which has always posed a "challenge" to Russia's energy security, the wording used in the 2013 Agreement demonstrates both countries' "cautious" approach to the international law dimension of RES.

Indeed, the need for such an approach was clearly demonstrated in the negotiations between the states regarding nuclear power, which led to public protests that were ultimately declared unconstitutional by the South African Western Cape

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[97] Соглашение между Правительством Российской Федерации и Правительством Южно-Африканской Республики о сотрудничестве в сфере энергетики от 26 марта 2013 г. // Официальное опубликование правовых актов [Agreement Between the Government of the Russian Federation and the Government of the Republic of South Africa on Cooperation in the Field of Energy of 26 March 2013, Official Publication of Legal Acts] (Nov. 7, 2022), available at http://publication.pravo.gov.ru/Document/View/0001201805140038.

[98] Anastasia E. Vinokurova, *International Legal Framework for Energy Cooperation Between the Russian Federation and the Republic of South Africa*, 6(2) Econ. L. Soc'y 47 (2021) (Nov. 7, 2022), available at https://epo.rea.ru/jour/article/view/400?locale=en_US.

High Court in April 2017.[99] Though touching upon another area of cooperation, this decision clearly illustrated the need to prioritize national policies over international considerations when dealing with energy issues.

Nevertheless, despite this fact, the actual cooperation between the two countries under the existing legal mechanisms appears promising, especially considering South Africa's current political course, which has renewable energy as its focus.[100] Thus, there is evidence that the projects receiving joint financing from the Russian Foundation for Basic Research and the National Science Foundation of South Africa include those that are focused on renewable energy.[101]

Private entities also appear to be quite actively involved. For example, in January 2018, Rosatom and the South African government signed an agreement to construct small hydropower plants in Mpumalanga to power rural regions of the country. Each mini hydropower plant is expected to power 250 to 400 houses.[102]

Considering all of the above, the RES interaction between Russia and South Africa may continue within the BRICS framework. It is possible to find mutually acceptable solutions without the strict need to rush into any binding instruments. The stalled nuclear deal taught the key lesson that energy cooperation should develop in strict accordance with both countries' priorities rather than in reconciliation of them.

6. Summary of Potential BRICS Common Legal Policies Regarding Renewable Energy

In the context of the above, it is possible to highlight the following political and legal incentives for Russia's participation in the development of international law in the field of renewable energy within the BRICS platform:

1. Russia, as well as the other BRICS countries, sees the promotion and encouragement of RES as an essential part of the inevitable energy transition. Accordingly, their documents on energy policy express a generally positive attitude towards the expansion of international cooperation regarding RES and the development of applicable international legal rules. The result of this position will most certainly be

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99 *Earthlife Africa Johannesburg and Another v. Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017) (Nov. 7, 2022), available at http://www.saflii.org/za/cases/ZAWCHC/2017/50.pdf.

100 Department of Energy, *State of Renewable Energy in South Africa* (September 2015) (Nov. 7, 2022), available at https://www.energy.gov.za/files/media/Pub/State-of-Renewable-Energy-in-South-Africa.pdf.

101 SCO and BRICS: Russia – South Africa: Prospects for Cooperation, World Trade Center Moscow, 19 May 2021 (Nov. 7, 2022), available at https://en.wtcmoscow.ru/news/sco-and-brics-russia-south-africa-prospects-for-cooperation/.

102 *ROSATOM signs contract for small scale hydro facility in the Republic of South Africa*, ROSATOM, 29 January 2018 (Nov. 7, 2022), available at https://rusatom-energy.com/media/rosatom-news/rosatom-signs-contract-for-small-scale-hydro-facility-in-the-republic-of-south-africa/.

the active participation of member countries in negotiations, international research and drafting international documents on relevant topics within the framework of regional international organizations and forums, particularly BRICS.

2. At the same time, Russia considers the promotion of RES to be one of the challenges to its energy security. Based on Russia's position, the relevant international laws should strictly follow the existing legal framework rather than stem from the rules introduced within particular regional intergovernmental organizations. Moreover, this development should be based on the mutual advantage of the interested states and the observance of the principle of non-interference in domestic affairs. The development of technologies using RES as well as an increase in the share of RES in the global energy mix is assessed by Russia as an undoubtedly positive trend, and the use of "green" technologies is viewed as one of the ways to create a sustainable world economy. However, in some cases, excessive emphasis on the introduction of RES is regarded as a way to manipulate the international political agenda and or to promote the interests of western companies that are already successful in "green" technologies. That will most likely be regarded by Russia as "unfair economic competition" that is supported by governmental instruments. Therefore, despite the stated aim mentioned in the Russian Energy Strategy to reorient and modernize the economy, any initiatives concerning RES will be subject to an in-depth analysis by Russia for compliance with its international rights and obligations. This is also true for the other BRICS countries, especially South Africa, which also calls for emphasizing the prevalence of national laws and policies above international energy negotiations.

3. The BRICS countries additionally see the promotion and encouragement of RES as an independent element of "sustainable energy." However, this political and legal track is not a high-priority task of Russia's international legal cooperation. The primary efforts of Russia in the international arena are aimed at fulfilling its obligations and exercising its rights under the existing international treaties. In the same context, Russia participates in international discussions and international organizations and conducts joint research. At present, Russia does not expedite discussions on the promotion of RES into a universal international agreement or the development of recommendations for harmonizing national legislation on the matter. This could be explained by the fact that Russia's national laws on RES development are only just being formed, along with the mechanisms for efficient state support of the respective projects. Therefore, this process needs careful analysis considering that Russia has had no experience in developing the respective legislation and implementing such policies throughout its history. Several authors have criticized the outlined "cautious approach" in international environmental law-making. In particular, Professor S. Bruce notes that despite the abundance of "soft law" norms, which in general have shaped the basis for the principle of sustainable development in the field of RES, the absence of universally binding rules on this issue is both "striking and unsustainable."[103]

[103] Stuart Bruce, *International Law and Renewable Energy: Facilitating Sustainable Energy for All?*, 14(1) Melbourne J. Int'l L. 11 (2013) (Nov. 7, 2022), available at https://ssrn.com/abstract=2327090.

According to S. Bruce, the primary option for developing the regime of RES should be the setting of an aim by states to conclude a relevant international convention, which may be preceded by a comprehensive declaration reflecting the priorities for the development of RES.[104] Nevertheless, when moving towards such a universal harmonization of the legal regime of renewable energy sources, it is advisable to consider the principle of international law of non-interference in the internal affairs of states as well as the sovereignty of states over natural resources. There is much work that remains to be done in the days ahead in order to strike a balance between imposing international obligations on states to bring their national legislation in line with the new environmental standards being developed and the mentioned international legal principles.[105] It should be noted that a similar stance is also true for the other BRICS countries, which do not rush into creating common, binding regional or bilateral approaches for cooperation in the RES domain or place the RES interaction at the center of the negotiations. Rather, the BRICS countries appear to be watching how the private players are cooperating in this sector within the boundaries of the laws and regulations currently in place. Nonetheless, the results of such cooperation could further be used to develop common approaches to the regulation of this domain as well as to highlight the best practices.

In this context, the priorities of Russia's international legal policy concerning renewable energy, including the emphasis on the evolutionary development of broadly accepted approaches to the regulation of international cooperation in the field of RES based on international law, may be seen as adequate. In fact, there is hardly any alternative to developing an international legal regime for RES that is based on a balance of the economic, environmental and other interests of all the states concerned. On the other hand, it is easy to forecast that such an international legal regime will develop accompanied by increasing environmental restrictions for traditional energy products.

Conclusion

The growing influence of renewable energy in the global energy mix inevitably raises the question of developing a special international legal regime for RES, considering the different economic interests and common needs of all the interested parties. This topic has a clearly evident political connotation. Therefore, international efforts aimed at shaping its legal content are primarily limited to developing "soft law" provisions. The latter is aimed in general at encouraging international cooperation in scientific research, technological development and improving the respective domestic legislation. So far, there is no universal harmonized cooperation model

[104] Bruce 2013, at 30–35.

[105] Imam Mulyana, *The Development of International Law in the Field of Renewable Energy*, 2(1) Hasanuddin L. Rev. 57 (2016).

in this area of energy and no universal international legal regime of RES that might be considered to be responsive to the common interests of all the members of the international community. Consequently, particular international projects (sci-technical, economic and legal ones, the latter of which involves the systematization of "best practices" in the regulation of RES) are dealt with individually.

In this regard, the analysis of the international legal position of Russia (as one of the BRICS countries) on the issues of RES, as well as the assessment of its contribution to the formation of the international legal regime for renewable energy, has more than merely historical and statistical significance. The same can be said about analyzing Russia's principal national political and legal documents on renewable energy issues.

Of even greater practical interest are the future relevant energy policy actions of major energy exporters and importers. The materials reviewed for this paper indicate that, while cautiously expressing the need to strengthen international cooperation in the field of "green" energy, Russia indicates at the same time that such cooperation can be better developed on a "step-by-step" basis and strictly within the framework of the applicable international economic laws (not just environmental laws), including the principle of sustainable development. Moreover, the legally binding treaties currently in effect and that mention RES as an area of cooperation with the participation of Russia, particularly the 2013 Agreement with South Africa, also mention the need to observe the existing national legislation when developing any international ties in this domain.

According to this legal position, the promotion of RES should not negatively affect the basic economic interests of all the states concerned, including those with huge scientific, financial and technological potential as well as those with very limited potential. Such a legal strategy might seem acceptable to the other member states of the BRICS alliance. The basic components of a legal regime of RES, which might be developing within BRICS, must benefit all the interested participants of the current international energy dialogue, representing a so-called "compromise of compromises" with the main aim of not interfering with the BRICS countries' domestic affairs and national energy priorities.

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INFLUENCING COMPANIES' GREEN GOVERNANCE THROUGH THE SYSTEM OF LEGAL LIABILITY FOR ENVIRONMENTAL INFRACTIONS IN CHINA AND BRAZIL: LIGHTING THE WAY TOWARD BRICS COOPERATION

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As a platform of cooperation among its member states, questions of whether or how the BRICS alliance can influence and shape the global governance system and improve their internal governance systems have often been raised. In the process of exploring the role that the law can play in this context, comparative studies on the laws of the BRICS member states, particularly in the defined areas of cooperation, are an important perspective to be addressed in order to be able to contribute to the improvement of their internal governance systems. However, much work remains to be done on this perspective. This article partially fills this gap by conducting a comparative study related to one of the BRICS areas of cooperation – sustainable development – between two of its members: China and Brazil. Specifically, it compares how both states, as stakeholders, use the legal regime of liability for environmental infractions to influence the green governance of companies. The article, therefore, uses comparative legal methodology, using as its objects of research relevant legal provisions on legal liability for environmental infractions gathered from the legal systems of China and Brazil. The adoption of strict civil liability, liability for environmental damages per se and the extension of criminal liability to legal persons are among the similarities found. As for the differences, it finds that, as a principle, Chinese law shields directors and senior officers from liability toward third parties, while Brazilian law fully extends such liability to these entities; additionally, in the Chinese legal system, the burden of disproving causality between the harm and the activity that caused it falls upon the actor, while the Brazilian legal system adopts a double-standard approach for collective suits and individual suits; and finally, the Chinese law imposes a legal obligation to adopt what, in effect, is close to a corporate environmental management system, while the Brazilian legal system lacks a similar mandate.

Keywords: BRICS; legal liability; green governance; environmental infractions; harm; civil liability; criminal liability; climate change; China; Brazil.

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Introduction

The conception and establishment of the BRICS[1] alliance have been linked to the legitimacy crisis of the global governance system, particularly the global financial system, in the context of the 2008 international crisis, coupled with relative economic stability at that time among emerging countries.[2] The BRICS countries describe themselves as a "dialogue and cooperation" platform between its members aimed

[1] BRICS is an acronym derived from the initials of Brazil, Russia, India, China, and South Africa, which are its members. It was established originally as BRIC in Yekaterinburg (Russia) in 2009, with Brazil, Russia, India, and China as its members; *see* the relevant documents of the summit at Events, President of Russia (June 6, 2921), available at http://en.kremlin.ru/events/president/news/4478. South Africa later joined the platform in 2010 (BRICS (Brazil, Russia, India, China and South Africa), South African Government (June 6, 2021), available at https://www.gov.za/about-government/brics-brazil-russia-india-china-south-africa-1).

[2] Oliver Stuenkel, *The Financial Crisis, Contested Legitimacy, and the Genesis of Intra-BRICS Cooperation*, 19(4) Global Governance 611, 612 (2013).

at enabling them to not only pursue their common interests but also to influence and shape the global governance system.[3] This statement of aims by the BRICS countries raises the logical questions of how and whether they can be successful in achieving these goals.[4]

Assuming an optimistic view on the potential of intra-BRICS cooperation, i.e. cooperation among its members aimed at improving their local governance systems, as well as on the role of law in such cooperation, this article compares China's and Brazil's systems of legal liability for environmental infractions and attempts to assess their potential in influencing companies' green governance.[5] It seeks to identify differences and similarities that can help to understand both countries' approaches, guide intra-BRICS legal cooperation and hopefully, inspire a debate that may generate creative solutions in future legal reforms.

Thus, the article embraces an approach that has only recently begun to be emphasized in discussions on the BRICS countries, notably the role of the law in BRICS cooperation, specifically intra-BRICS cooperation, thereby complementing the economic and political perspectives through which the debate was initially generally conducted.[6] By addressing an important topic related to sustainable development, the article contributes to the advancement of legal research in a relatively new area of comparative legal research among the areas of intra-BRICS cooperation.[7] While other authors have conducted comparative legal research

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[3] The "dialogue and platform" nature of the BRICS, as well as its major strategic objectives, have been expressed from the beginning. For example, the Joint Statement issued at the end of the first (then) BRIC Summit in 2009, revealed that the Members had agreed on "steps to promote dialogue and cooperation" among them, which should be "conducive not only to serving the common interests of emerging market economies and developing countries but also to building a harmonious world of lasting peace and common prosperity." The document also expressed the specific position of the members on global issues, including the need to reform international financial institutions and the United Nations, the need to preserve the multilateral trading system, and the implementation of the concept of sustainable development. Their objective of enhancing intra-BRIC(S) cooperation, including "in socially vital areas" was also expressed. *See* Joint Statement of the BRIC Countries' Leaders, President of Russia, 16 January 2009 (June 6, 2021), available at http://en.kremlin.ru/supplement/209; *see also* Press Statement following BRIC Group Summit, President of Russia, 16 January 2009 (June 6, 2021), available at http://en.kremlin.ru/supplement/209.

[4] For a more detailed overview of raising and/or discussing these questions, *see, e.g.*, Rostam J. Neuwirth, *The Enantiosis of BRICS – BRICS La[w]yers and the Difference that They Can Make*, in Rostam J. Neuwirth et al. (eds.), The BRICS-Lawyers' Guide to Global Cooperation 9, 10 and 17–24 (2017); Christian Brütsch & Mihaela Papa, *Deconstructing the BRICS: Bargaining Coalition, Imagined Community, or Geopolitical Fad?*, 6(3) Chinese J. Int'l Pol. 299, 300 (2013); David B. Wilkins & Mihaela Papa, *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance*, 54 B.C.L. Rev. 1149, 1152 (2013).

[5] *See* Section 3 of the definition of "green governance."

[6] *See, e.g.*, Wilkins & Papa 2013, at 1150–1; Lucia Scaffardi, *BRICS, a Multi-Centre "Legal Network"?*, 05(02) Beijing L. Rev. 140, 140 (2014); Mikhail Antonov, *Systematization of Law: The BRICS Context and Beyond*, 2(1) BRICS L.J. 7, 7–8 and 13 (2015); and The BRICS-Lawyers' Guide to Global Cooperation, *supra* note 4, at 2.

[7] For sustainable development as one of the areas of cooperation of the BRICS, *see* Joint Statement for the Fourth BRICS Ministers of Environment Meeting, Zimbali, Durban, South Africa, 18 May 2018,

related to the BRICS countries in other areas,[8] the area of sustainable development, specifically the area of green governance remains largely unexplored, let alone its linkage with environmental legal liability systems.[9] This article bridges this gap by exploring in detail how legal liability can potentially drive green governance in companies. Furthermore, it explores a very specific aspect of public policy – the specific legal regimes on liability for environmental infractions and their potential to influence green governance in companies – rather than simply comparing branches of law or entire legal systems. This allows the reader to have a closer look at the differences and similarities in the approaches of the compared jurisdictions' and on their impact at the micro level, providing a level of specific detail to which a more general comparison cannot aspire.

The choice of a topic related to sustainable development, and more specifically, green governance, is timely. Indeed, the importance of sustainable development and cooperation on environmental matters for the BRICS countries, as well as their commitment to major global consensus such as the 2030 Agenda for Sustainable Development and Sustainable Development Goals and the Paris Agreement on Climate Change 2015, has been frequently reiterated.[10] Additionally, environmental

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Department of Forestry, Fisheries and the Environment (DFFE) (June 6, 2021), available at https://www.dffe.gov.za/mediarelease/jointstatement_fourthbricsministersofenvironmentmeeting. *See also* Neuwirth 2017, at 13–4.

[8] The BRICS-Lawyers' Guide to Global Cooperation, *supra* note 4, contributed with several studies: Denis de Castro Halis & Guilherme Vargas Castilhos, *The BRICS Investment Framework – Catching Up with Trade* 78; Salvatore Mancuso, *Contract Law in the BRICS Countries – A Comparative Approach* 247 (suggesting a methodological approach for developing common principles of Contract Law within the BRICS); Jia Yao, *Consumer Protection Law in the BRICS Countries and their Future Cooperation* 270. Other works include, for example: Adrian Emch et al. (eds.), *Competition Law in the BRICS Countries* (2012); Rafael Pinho de Morais, *Antitrust and Compulsory Licensing in BRICS and Developing Countries*, in Frédéric Jenny & Yannis Katsoulacos (eds.), Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects 149 (2016); Adriana B. Deorsola et al., *Intellectual Property and Trademark Legal Framework in BRICS Countries: A Comparative Study*, 49 World Pat. Inf. 1 (2017); Alexander B. Zelentsov et al., *Comparative Analysis of Regulatory Instruments and the Trend Towards the Harmonization of Proprietary Regulation in the Civil Law of Member States of BRICS*, 8(5) J. Advanced Res. L. & Econ. 1641 (2017).

[9] Nevertheless, there is an article that partially intersects with this one: Aleksey Anisimov & Julia Kayushnikova, *Trends and Prospects for Legislative Regulation of Legal Responsibility for Environmental Offenses in BRICS Countries: Comparative Law*, 6(1) BRICS L.J. 82 (2019). Notwithstanding the significant contribution of the mentioned work, the present article differs for its concentrated focus on two jurisdictions, thus providing a more specific level of detail and comparative analysis and, fundamentally, for its exploration of the potential influence of the legal regimes of liability for environmental infractions on companies' green governance.

[10] *See, e.g.*, 8th BRICS Summit: Goa Declaration, Goa, India, 16 October 2016, BRICS 2016 (June 6, 2021), available at http://brics2016.gov.in/content/document.php; Goa Statement on Environment, Second Meeting of BRICS Environment Ministers, Goa, India, 15–16 September 2016, BRICS 2016 (June 6, 2021), available at http://brics2016.gov.in/content/document.php; Joint Statement for the Fourth BRICS Ministers of Environment Meeting, *supra* note 7; *Cabinet approves MoU among BRICS Nations on Environmental Cooperation*, Government of India, 24 October 2018 (June 6, 2021), available at https://www.pmindia.gov.in/en/news_updates/cabinet-approves-mou-among-brics-nations-on-environmental-cooperation/.

degradation and pollution represent one of the major global and BRICS problems.[11] For instance, despite major reforms of its environmental laws and policies over the past years.[12] China continues to suffer from high levels of pollution.[13] On the other

[11] As for the BRICS, for example, according to 2019 data, based on the concentration of PM2.5, India was the fifth most polluted country in the world and China ranked 12th (World's Most Polluted Countries 2019 (PM2.5)), IQAir (June 6, 2021), available at https://www.iqair.com/world-most-polluted-countries. Brazil, a country that hosts more than half of the Amazon – the biggest rainforest in the world – has been in a constant battle against deforestation, the index of which appears to be generally increasing again since 2013, after having registered a notable downward trend in the previous decade despite fluctuations (*see* Coordenação Geral de Observação da Terra, "PRODES – Amazônia: Monitoramento do Desmatamento da Floresta Amazônica Brasileira por Satélite," INPE (June 6, 2021), available at http://www.obt.inpe.br/OBT/assuntos/programas/amazonia/prodes). Brazil has also repeatedly recorded serious environmental incidents in its extractive sector, such as the collapse of the Brumadinho (2019) and Mariana (2015) dams, which caused at least 259 and 18 deaths, respectively, as well as severe environmental damages (*see, e.g.*, *Brumadinho: mais duas vítimas do rompimento da barragem da Vale são identificadas*, G1, 20 December 2019 (June 6, 2021), available at https://g1.globo.com/mg/minas-gerais/noticia/2019/12/28/brumadinho-mais-duas-vitimas-do-rompimento-da-barragem-da-vale-sao-identificadas.ghtml; *Corpo é achado dentro de caminhão em área do desastre em Mariana*, G1, 9 March 2016 (June 6, 2021), available at http://g1.globo.com/minas-gerais/desastre-ambiental-em-mariana/noticia/2016/03/corpo-e-achado-dentro-de-caminhao-em-area-do-desastre-em-mariana.html). Russia shares the typical environmental challenges faced by transition economies, namely "unbalanced use and erosion of natural resources (…) and industrial pollution" (Andrey Poltarykhin et al., *Problems of the Ecological System in Russia and Directions for Their Solution Based on Economic and Social Development Programs*, 10(3) J. Envtl. Mgmt. & Tour. 508, 509 (2019)). In South Africa, urbanization and population growth, for example, are increasing stress on already thin natural resources such as water and sanitation infrastructure (Ivan Turok & Jacqueline Borel-Saladin, *Is Urbanisation in South Africa on a Sustainable Trajectory?*, 31(5) Dev. S. Afr. 675, 679 and 682 (2014)).

[12] Just over the last decade, China revised, for example, the Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by the Standing Committee of the National People's Congress, 26 December 1989, effective 26 December 1989, revised 24 April 2014, effective 1 January 2015); the Zhonghua Renmin Gonghe Guo Daqi Wuran Fangzhi Fa (中华人民共和国大气污染防治法) [Air Pollution Control and Prevention Law] (promulgated by the Standing Committee of the National People's Congress, 9 May 1987, effective 6 January 1988, last revised 29 August 2015, effective 1 January 2016); the Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa (中华人民共和国环境影响评价法) [Environmental Impact Assessment Law] (promulgated by the Standing Committee of the National People's Congress, 28 October 2002, effective 1 September 2003, last revised 29 December 2018, effective 29 December 2018); the Zhonghua Renmin Gonghe Guo Shui Wuran Fangzhi Fa (中华人民共和国水污染防治法) [Water Pollution Prevention and Control Law] (promulgated by the Standing Committee of the National People's Congress, 11 May 1984, effective 1 November 1984, last revised 27 June 2017, effective 1 January 2018); and approved its first Zhonghua Renmin Gonghe Guo Turang Wuran Fangzhi Fa (中华人民共和国土壤污染防治法) [Soil Pollution Prevention and Control Law] (promulgated by the Standing Committee of the National People's Congress, 31 August 2018, effective 1 January 2019, revised 13 September 2020, effective 13 September 2020). The current wave of reform aims mainly at fixing the flaws of previous laws, which were notably ineffective (*see, e.g.*, Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 Vt. J. Envtl. L. 195, 202–4 (2007); Zhilin Mu et al., *Environmental Legislation in China: Achievements, Challenges and Trends*, 6(12) Sustainability 8967, 8971–3 (2014)).

[13] *See, e.g.*, Lauri Myllyvirta, *Air Pollution in China 2019*, Centre for Research on Energy and Clean Air (January 2020) (June 6, 2021), available at https://energyandcleanair.org/publications/china-winter-targets-2019-2020/ (noting significant improvements in the reduction of PM 2.5 and S02 from 2015–2019 but also a deterioration in the levels of ozone pollution and weak performance in the reduction of NO2).

hand, Brazil faces a severe deforestation problem and pollution brought on by its agricultural, mining and oil industries. For example, 10,129 square kilometers were deforested in the Amazon in 2019, a 34 percent increase from the deforested area in the previous year,[14] while multiple environmental incidents have tainted the reputation of its extractive industry.[15] Nevertheless, Brazilian Environmental Law has been described as "stringent and advanced"[16] and "one of the most modern in the world,"[17] while on the other hand, Chinese Environmental Law is also relatively comprehensive in terms of coverage, containing a vast number of laws and regulations,[18] but in a crucial stage of development, as the ongoing intensive reforms suggest. The research is also significant in light of China's commitments to peak carbon dioxide emissions by 2030 and achieve carbon neutrality by 2060, in line with global efforts to fight global warming and climate change. The degree to which companies adhere to higher green governance standards will be a determining factor in whether these targets are met or not and thus, it is crucial to explore the potential of the law in driving change.[19]

The selection of only two BRICS jurisdictions for this article's comparative work, although having the drawback of being incomplete in terms of scope, enabled a deeper and more manageable analysis to be conducted within the space available.

The remainder of the article is organized as follows: Section 1 discusses the importance of comparative law for intra-BRICS cooperation; Section 2 presents some preliminary notes explaining the concept of green governance as used in this article; Section 3 discusses the importance of legal liability as a tool to influence green governance; Section 4 analyzes how the Chinese and Brazilian legal systems use the legal framework of liability for environmental infractions to influence companies' adoption of green governance, focusing on (4.1) the scope and nature of such liability and (4.2) the obligation to adopt a corporate environmental management system; and a final section presents the conclusions and recommendations.

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14 INPE, *supra* note 11.

15 G1, *supra* note 11.

16 OECD, *Environmental Performance Reviews: Brazil 2015* (2015), at 6 (Sept. 6, 2022), available at https://www.oecd.org/env/oecd-environmental-performance-reviews-brazil-2015-9789264240094-en.htm.

17 Anisimov & Kayushnikova 2019, at 87.

18 Wang 2007, at 202–3.

19 *Chinese roadmap by 2060 for a carbon neutral future*, CGTN, 15 March 2021 (Sept. 6, 2022), available at https://news.cgtn.com/news/2021-03-15/Chinese-roadmap-by-2060-for-a-carbon-neutral-future-YDX1ED0W8U/index.html.

1. The Importance of Comparative Law for Intra-BRICS Cooperation

Several authors have discussed and sought to identify the "functions of comparative law," or rather, the objectives of comparative law.[20] While it is possible to find differences in the lists and systematization of those functions, the majority of scholars concur that comparative law can be useful for analyzing national legislative processes, promoting the harmonization of the laws of different countries and gaining a better understanding of one's own legal system.[21] The present work is undoubtedly of an academic nature, yet as is often the case with comparative legal research of an academic nature, its contributions can be beneficial for more practical processes of a legislative or even judicative nature.

The BRICS legal systems are diverse in their history and nature, including legal systems with predominant features of the civil law family (China, Brazil and Russia), the common law family (India) and a mixed jurisdiction (South Africa).[22] Of course, even jurisdictions classified as belonging to the same legal tradition may present significant differences, reflecting different political, economic and social contexts.[23]

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[20] *See, e.g.*, Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 13–31 (Tony Weir trans., 3rd ed. 1998); Mary A. Glendon et al., *Comparative Legal Traditions: Text Materials and Cases on Western Law* 13–23 (2007); Albin Eser, *The Importance of Comparative Legal Research for the Development of Criminal Sciences*, in Roger Blanpain (ed.), Law in Motion: Recent Developments in Civil Procedure, Constitutional, Contract, Criminal, Environmental, Family & Succession, Intellectual Property, Labour, Medical, Social Security, Transport Law 492, 498–510 (1997).

[21] *Supra* note 20, all cited authorities.

[22] Mancuso, *supra* note 8, at 250.

[23] For example, despite being a unitary state, China's administrative governance system is highly decentralized. On environmental governance, this approach, together with an inadequate system of incentives, has led to problems of "local protectionism" and "selective implementation" by local governments (*see, e.g.*, Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5(1) Chinese J. Int'l L. 185, 209 (2006); Ran Ran, *Perverse Incentive Structure and Policy Implementation Gap in China's Local Environmental Politics*, 15(1) J. Envtl. Pol'y & Plan. 17, 24 (2013)). One solution that is being experimented with in order to fight local protectionism is an increased centralization of environmental governance (*see, e.g.*, Genia Kostka & Jonas Nahm, *Central-Local Relations: Recentralization and Environmental Governance in China*, 231 China Q. 567 (2017)). A different trend is ongoing in Brazil, with significant efforts being made to increase the role of municipalities and states in environmental governance, thus moving towards a more decentralized governance system (*see, e.g.*, Taciana N. Leme, *Governança Ambiental no Nível Municipal*, in Adriana M.M. de Moura (ed.), Governança Ambiental no Brasil: Instituições, Atores e Políticas Públicas (2016)). However, one cannot simply conclude, for example, that decentralization of environmental governance will also lead to local protectionism in Brazil without further consideration of the context in which the relevant rules operate. Indeed, despite its federal form, in which its states, municipalities and the Federal District enjoy considerable autonomy, there is hardly any mention of local protectionism as a problem in environmental governance in Brazil. An explanation for this may lie in the adoption of the "concurrent competence" model for the distribution of legislative powers between the Union, states, and the Federal District, under which all these subjects can legislate on environmental matters, but always respecting the "minimum standard" established by federal legislation (*see* Constituição Federal [C.F] [Constitution], Art. 24, VI, VIII and secs. 1–4). Additionally, the administrative enforcement power of environmental laws is equally shared between the Union, the states, the Federal District, and Municipalities,

However, despite their diversity, the BRICS countries also share important points in common. For instance, they generally belong to the same group in the classification of countries according to the stage of their economic development, namely the group of the so-called emerging economies;[24] although this general classification may be, to a certain degree, misleading as it may conceal important specific differences between the countries.

All of these considerations leave one thing clear: in order to find a coherent approach and strategy for their cooperation, including intra-BRICS cooperation, much must be learned from the realities of each of its members. This will make it possible to identify areas of common ground and differences, as well as potentially, inspiring models for creative solutions to address common problems, such as environmental pollution and degradation. In looking at the general functions of comparative law and cross-analyzing them with the general objectives of the BRICS platform, one can easily identify the potential of the former to serve as an important methodological tool to pursue the latter. Starting with the function of comparative law as a tool to enable a deeper understanding of one's own legal system, one commentator explained the mechanism as follows:

> [C]omparative law creates the conditions for a confrontation of different discourses and for the cognitive disruption that can generate creativity. It forces us to articulate a different legal and normative framework, and thus opens a space for the recognition of ways in which our own framework is deficient or flawed. In doing so, it makes us aware of the other possible understandings that better account for who we are and who we aspire to be.[25]

An implicit benefit of this function of comparative law is, of course, gaining an understanding of the other legal systems under study. For the BRICS countries and their objective of enhancing cooperation among its members, this function would be of significant value for at least two reasons. First, it would enable the members to gain a better understanding of each other's legal systems as well as relevant political,

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under a system of "cooperative federalism" (*see* Constitution, Art. 23, VI and VII and Lei Complementar N.º 140/2011, de 8 Dezembro de 2011, Diário Oficial da União [D.O.U.] de 9.12.2011, rectified 12.12. 2011). Nevertheless, comparative law can help to understand what went wrong in China and identify possible positive elements, considering its specific context, as well as help to build a more effective and resilient decentralization system in Brazil, while considering its specific context.

[24] However, considering South Africa's significantly smaller economic standing, it is often said that the country was added to the group as a doorway to the African continent. *See, e.g.*, Herbert Kawadza, *A Step Towards the Harmonization of the Regulation of Financial Misconduct in BRICS: A Comparison of the Chinese and South African Regimes for the Prohibition of Insider Dealing*, 62(3) J. Afr. L. 351, 354–55 (2018).

[25] Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81(2) Cal. L. Rev. 531, 535 (1993). (Footnotes omitted.) *See also* Glendon et al. 2007, at 14–5.

social and economic contexts, thereby creating the conditions for an informed discussion and the development of a coherent framework for their cooperation agenda. A second benefit of comparative law for the BRICS intra-cooperation would be the exploration of different approaches and solutions for similar problems that might exist within the member states' legal systems, serving as a generator of critical thinking and creative ideas, and thus, potentially contributing to the improvement of their respective legal systems.

In this sense, the function of comparative law as a tool to enable a deeper understanding of one's own legal system is linked to the other two functions, namely aiding national legislative processes and promoting the harmonization of laws. Indeed, the first function can be exercised not only for academic-theoretical purposes but also for practical purposes such as creating new legislation or approximating the laws of different countries. In legislative processes, comparative law can serve an invaluable preparatory function, enabling legislators to have a richer pool of possible solutions from which they can draw inspiration for their future legal regulations and frameworks.[26] For example, China has relied strongly on comparative law to aid its legal reform efforts across different areas of law over the last seventy years.[27] Comparative legal research on the BRICS legal systems can enhance intra-BRICS legal cooperation by increasing dialogue and debate on their approaches to common problems and, possibly, inspiring each other to come up with creative solutions that can advance their legal systems. Moreover, in the case of China and, to some degree, Brazil, which have relied primarily on European and American legal systems for inspiration in their legal reform processes, intra-BRICS comparative law can widen their pool of possible solutions and expose their reformers to alternative models other than those they are accustomed to. This would also reinforce the idea of the BRICS alliance as a viable platform of "dialogue and cooperation" and boost the role of law and legal cooperation in the pursuit of the BRICS objectives.

Regarding comparative law's function of aiding in the harmonization of laws, thus far it has been of virtually no use for the BRICS countries, as it is not among the group's objectives. Nevertheless, in the legal literature, the potential benefits of such harmonization in specific areas have been invoked[28] and models of how such harmonization can be pursued have been proposed.[29] In any case, if harmonization

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[26] *See* Eser 1997, at 503.

[27] On the influence of foreign legal systems (and, to some degree, international law) on the construction of modern Chinese law, *see, e.g.*, Jianfu Chen, *Chinese Law: Context and Transformation* 23–76 (2008); Albert H.Y. Chen, *Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law*, in Michael Otto et al. (eds.), Law-Making in the People's Republic of China 55 (Jan. 2000).

[28] *See, e.g.*, Kawadza 2018.

[29] *See* Agnessa O. Inshakova et al., *Determinants and Prospects for the Legal Harmonization of the Intra-BRICS Trade Turnover in the Digital Form*, in Elena G. Popkova & Bruno S. Sergi (eds.), Digital Economy: Complexity and Variety vs. Rationality 209 (2020).

of laws one day becomes a goal of the BRICS countries, comparative law can always be relied upon to pave the way for such a process to be carried out successfully.

2. The Concept of Green Governance

The term "green governance" has been used in different contexts, often with little or no explanation of its meaning.[30] It has been used, for example, in relation to the environmental policies and processes of governments,[31] international and global environmental policies,[32] commons-based and collective arrangements for the management of environmental goods,[33] and the environmental management and corporate governance of companies.[34] By looking closely at the works in which the term "green governance" is used, it can be determined that its meaning may vary depending on the context in which it is used. Notwithstanding, a common theme is that of "environmental sustainability." Indeed, the term "green," when used in relation to environmental matters, mostly embodies the concept of "environmental sustainability." For example, when a product is referred to as a "green product," it implies that its design, its production process or its effects are environmentally friendly. Another common theme is the concept of an institutional arrangement designed to achieve a goal, in this case, environmental sustainability, by reconciling conflicts of interest and objectives among various stakeholders and relying on cooperation and coordination among those stakeholders to do so. That is the concept embodied in the word "governance."

Li et al. proposed a general definition of green governance based on the core elements of the terms "governance" and "green" as follows:

> Green governance coordinates the conflict between human and nature through the design of a set of institutional arrangements or mechanisms, thereby ensuring the scientific decision-making of global green governance actions and ultimately maintaining the continuous and stable operation of the economic–social environmental system.[35]

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30 *See as an exception* Weian Li et al., *Green Governance: New Perspective from Open Innovation*, 10(11) Sustainability 3845, 3848–9 (2018).

31 Philip Cooke, *Green Governance and Green Clusters: Regional & National Policies for the Climate Change Challenge of Central & Eastern Europe* 1(1) J. Open Innovation: Tech., Mkt. & Complexity 1 (2015).

32 Frank Biermann, *Strengthening Green Global Governance in a Disparate World Society – Would a World Environment Organisation Benefit the South?*, 2(4) Int'l Envtl. Agreements: Pol., L. & Econ. 297 (2002); and Kate Ervine, *The Greying of Green Governance: Power Politics and the Global Environment Facility*, 18(4) Capitalism Nature Socialism 125 (2007).

33 Burns H. Weston & David Bollier, *Green Governance – Ecological Survival, Human Rights, and the Law of the Commons* (2013).

34 Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 Iowa L. Rev. 987 (2009).

35 Li et al. 2018, at 3848.

Aside from the elements of coordination and interrelation among multiple stakeholders, the cited authors also indicate the "balance of interests and scientific decision making" as well as the "continuity"[36] of the interactions among stakeholders. The idea of a balance between economic, social and environmental aspects is often associated with the concept of "sustainable development." However, such a balance is difficult to optimize, often giving rise to concepts with consequences at the implementation level that emphasize dualities instead of the entire trinity of the concept.[37] Notwithstanding, we submit that both in the concept of "sustainable development" and in its related concept of "green governance," the balance between their economic, social and ecological aspects has a programmatic value, the pursuit of which must be constant because of their largely unstable connection.

In the context of companies, "green governance" can then be understood as an institutional arrangement by which companies internalize the environmental costs of their activities and embrace the goal of environmental sustainability. This may involve a variety of systems and processes, from product design to production processes, relationships and interactions with company stakeholders, and even the mandate of management in relation to environmental matters. Crucially, it also involves compliance with relevant state laws and regulations, such as those that set environmental standards and protect third-party property rights. While, in practice, mandatory regulation aimed at aligning the behavior of companies with environmental interests as well as third-party and public interests (command-and-control regulation) sets the floor or minimum standards for what is considered acceptable, states often complement such regulation with market-based instruments to incentivize companies to adopt green[er] governance. The potential of command-and-control regulation and market-based instruments as a tool to influence companies' green governance deserves special attention considering the global pressures posed on states to achieve tangible results in the fight against climate change and global warming. For this reason, states make specific and, at times, ambitious commitments, such as China's pledge to peak its carbon dioxide emissions by 2030 and achieve carbon neutrality by the year 2060, the achievement of which will significantly depend on the success of the adoption of higher green governance standards by companies.

For the adoption and development of its green governance strategy, a company's approach to corporate governance is an important factor. Indeed, a company that embraces environmental sustainability can express its commitment by incorporating this concept into its corporate governance systems. For example, its shareholders may incorporate in their articles of association a mandate or guideline stating that

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[36] Li et al. 2018, at 3848.

[37] Joyeeta Gupta & Courtney Vegelin, *Sustainable Development Goals and Inclusive Development*, 16(3) Int'l Envtl. Agreements: Pol. L. & Econ. 433, 435 (2016).

environmental sustainability should be considered or pursued as a goal when managing the company.[38]

3. The Importance of Legal Liability as a Tool to Influence Green Governance

A state's intervention to guarantee the sustainable use of environmental goods has been justified for reasons of market failure to balance the desire of economic agents to maximize their (short-term) gains with the collective interest of environmental sustainability.[39] This is because, in an unregulated scenario, most environmental goods would fit in the category of free-access public goods, i.e. they would be available for everyone to use, free of cost.[40] Thus, in such a scenario, there would be no incentive for private agents to use environmental goods sustainably as they would bear no cost for their (mis)use.[41] The result would be a race among the different economic agents to maximize their use of the environmental resources, aiming for short-term gains to the detriment of the collective long-term interest, as society in general and future generations would ultimately bear the costs of the use of environmental resources in such a fashion.[42] This resulting state of affairs was famously described by Hardin as "the tragedy of the commons."[43]

A state's intervention is thus deemed necessary to guarantee that economic agents, companies in particular, use environmental resources sustainably and internalize the environmental costs associated with their economic activity. States have many ways to influence companies in this regard. The range of options available and that are typically used by states includes prescriptive regulation, the allocation of property rights, financial penalties, the elimination of payments and subsidies and persuasion.[44] Additionally, the following broader categories have also been employed to classify states' environmental regulations and policies: command-and-control regulation and market-based instruments.[45]

Command-and-control regulations establish mandatory standards on performance and technology, frequently specifying the processes, methods, equipment,

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38 Sneirson 2009, at 1019.

39 David Hunter et al., *International Environmental Law and Policy* 104–7 (2011).

40 *Id.* at 104.

41 *Id.* at 105–7.

42 *Id.* at 104–5.

43 Garrett Hardin, *The Tragedy of the Commons*, 162(3859) Science 1243, 1244 (1968).

44 Hunter et al. 2011, at 107–14.

45 *See, e.g.*, Robert W. Hahn & Robert N. Stavins, *Economic Incentives for Environmental Protection: Integrating Theory and Practice*, 82(2) Am. Econ. Rev. 464, 464 (1992); and Juan-Pablo Montero et al., *A Market-Based Environmental Policy Experiment in Chile*, 45(1) J.L. & Econ. 267, 268 (2002).

etc., to be used by economic agents during their activities and they rely on their enforcement authorities to ensure compliance.[46] Differently, market-based instruments "encourage behavior through market signals rather than through explicit directives regarding pollution control levels or methods."[47] They are also referred to as "economic incentive policies"[48] or "incentive-based strategies"[49] due to the fact that they create financial incentives for economic agents that reduce pollution.[50] Those incentives consist of financial costs incurred by polluting behavior and, in reverse, financial benefits for those economic agents that reduce their pollution levels in a more cost-efficient manner. In practice, the majority of states have relied heavily on command-and-control regulation; however, having realized its shortcomings (including economic inefficiency) and seeking a more effective governance system, they tend to combine command-and-control regulation with market-based instruments.[51]

Legal liability for environmental infractions is, by definition, linked to command-and-control regulation and can be of an administrative, civil or criminal nature. It constitutes an important part of mandatory legal rules, ensuring their enforceability.[52] Without a sanction, a mandatory legal rule is simply not enforceable and is likely ineffective. A second function of environmental legal liability rules is to ensure that those that have suffered harm (including the collectivity[53] and the ecology itself) can

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[46] Robert N. Stavins, *Experience with Market-Based Environmental Policy Instruments*, in Karl-Göram Mäler & Jeffrey R. Vincent (eds.), 1 Handbook of Environmental Economics 355 (2003); Alan Moran, *Tools of Environmental Policy: Market Instruments versus Command-and-Control*, in Robyn Eckersley (ed.), Markets, the State and the Environment 73 (1995); Barry C. Field, *Environmental Economics: An Introduction* (1994).

[47] Stavins 2003, at 358.

[48] Jolene Lin Shuwen, *Assessing the Dragon's Choice: The Use of Market-Based Instruments in Chinese Environmental*, 16(4) Geo. Int'l Envtl. L. Rev. 617, 624 (2004).

[49] Field 1994.

[50] Shuwen 2004.

[51] Different from what is sometimes implied, command-and-control regulation and market-based instruments are not necessarily mutually exclusive, and often a combination of both may prove to be a more adequate approach. *See* Darren Sinclair, *Self-Regulation Versus Command and Control? Beyond False Dichotomies*, 19(4) Law & Pol'y 529 (1997).

[52] *See, e.g.*, Viktor Ladychenko et al., *Environmental Liability in Ukraine and the EU*, 8(2) Eur. J. Sustainable Dev. 261, 262 (2019) (indicating as functions of legal liability the following: promotion of compliance with the law, full compensation for environmental damage, prevention of new violations and punishment of guilty persons).

[53] One legal institution through which the environmental rights and interests of the collectivity can be redressed is that of environmental public interest litigation. Nevertheless, environmental public interest litigation can also serve an important preventive function as it can generally be activated even before the environmental damage has occurred. *See, e.g.*, on the Chinese context, Juan Chu, *Vindicating Public Environmental Interest: Defining the Role of Environmental Public Interest Litigation in China*, 45(3) Ecology L.Q. 485 (2018); Daniel Carpenter-Gold, *Castles Made of Sand: Public-Interest*

be compensated. Thus, in general, the legal regime on liability for environmental infractions is a powerful tool to implement one of the most important principles of environmental law, the "polluter pays" principle, which embodies the basic idea that those who pollute should bear responsibility for their actions and should not be allowed to shift liability to others.[54]

Additionally, this regime frequently incorporates punitive measures against infringers. If those penalties are severe enough, they may serve a general prevention function, deterring the various actors, including companies, from violating environmental protection rules. If a violation occurs, the quantity and quality of enforcement executed by the relevant entities may also play a major role in reinforcing such general prevention measures, in addition to deterring the infringer from committing the infraction again (special prevention).

Whether or not command-and-control regulation is beneficial in driving green governance on its different aspects, including green innovation in product design and production processes, especially in comparison to market-based instruments, is subject to debate. However, as already discussed above, the green governance of companies involves several aspects, and different regulatory tools and approaches may be more suitable for achieving different goals.[55] For example, one study focused on the Chinese context found that market-based instruments have a positive impact on driving companies' "environmental innovation" on eco-organization innovation, eco-process innovation and eco-product innovation, while command-and-control regulation was found to only be a driver of eco-organization innovation. The study concluded that the best policy approach is a combination of both command-and-control regulation and market-based instruments.[56] At the very least, legal liability regimes ensure that a certain minimum of protection set by the state as non-negotiable is complied with by all market actors. That is why, despite the virtues of market-based instruments, essential command-and-control regulations, including legal liability rules, have not been eliminated from legal systems.

However, the potential of the systems legal liability for environmental infractions and, for that matter, command-and-control regulation and market-based instruments in

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Litigation and China's New Environmental Law, 39(1) Harv. Envtl. L. Rev. 241 (2015); Richard Z. Qing & Benoit Mayer, *Public Interest Environmental Litigation in China*, 1 Chinese J. Envtl. L. 202 (2017). On the Brazilian context, *see, e.g.*, Lesley K. McAllister, *Public Prosecutors and Environmental Protection in Brazil*, in Aldemaro Romero & Sarah E. West (eds.), Environmental Issues in Latin America and the Caribbean 207 (2005).

54 David M. Driesen et al., *Environmental Law: A Conceptual and Pragmatic Approach* 445 (2011).

55 *See, e.g.*, Allen Blackman et al., *Efficacy of Command-and-Control and Market-Based Environmental Regulation in Developing Countries*, 10(1) Ann. Rev. Resource Econ. 381, 399 (2018) (finding that different studies have found benefits for both command-and-control regulation and market-based instruments in developing countries).

56 Zhongju Liao, *Environmental Policy Instruments, Environmental Innovation and the Reputation of Enterprises*, 171 J. Cleaner Prod. 1111, 1115–6 (2018).

general, should not be overstated without further investigation into the specific details of each legal system. Indeed, in their traditional form, legal liability systems and other environmental rules are external controls on the behavior of market actors. Whether such rules can trigger changes in the internal organization of companies, so that they adopt their own internal controls and thus genuinely internalize environmental interests, deserves special consideration. Ong identified two major trends among several legal systems across the world that "generate pressure for the *internal* reform of traditional corporate governance law"[57] but also create "a discernible impact on corporate governance"[58] itself. These trends are as follows: first, the expansion of the scope and nature of the companies' environmental legal liability beyond the traditional fault-based approach to include strict liability, as well as beyond the company itself to include directors, company officers and even shareholders; and second, the introduction of a legal obligation to adopt a corporate environmental management system.[59] It is based on these aspects that the legal liability systems for environmental infractions in China and Brazil are analyzed and their potential to influence companies' green governance is assessed. So far, in China and Brazil, as in the vast majority of other legal systems, the incorporation of environmental interests directly into corporate law, including through the explicit inclusion of the need to protect such interests within the scope of directors' duties, has not taken place yet.

4. The Scope and Nature of Legal Liability for Environmental Infractions and the Obligation to Adopt a Corporate Environmental Management System

4.1. The Scope and Nature of Legal Liability for Environmental Infractions

4.1.1. Administrative Liability

In general, Chinese environmental law does not extend administrative liability for environmental infractions to directors or other members of the company. However, in some instances, directors and arguably even supervisors, as well as employees directly responsible for an infraction, may be punished with administrative detention that may last up to fifteen days. This is in accordance with the Environmental Protection Law, Article 63, which determines liability for "the person directly in charge and other personnel directly responsible" in instances where the company refuses to make corrections on specified violations even after receiving an order to do so. Moreover, the same legal provision specifies an instance (item (3)) where this kind of liability is imposed even before a directive to make corrections is issued.

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57 David M. Ong, *The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives*, 12(4) Eur. J. Int'l L. 685, 692 (2001).

58 *Id.* at 707.

59 *Id.* at 691–716.

This occurs when an entity attempts to evade regulation by discharging pollutants through concealed drains, seepage wells or pits, perfusion, tampering with or forging monitoring data, abnormally operating facilities that are used for prevention and control of pollution, etc.

In Brazil, administrative liability extends to both the company and the physical persons directly or indirectly responsible for the infraction. The foundation of this norm is Article 225, section 3 of the Brazilian Constitution; however, it was more specifically materialized by Law No. 9.605 of 12 February 1998[60] Article 3, which specifies that the administrative, civil or criminal liability of the juridical person does not exclude that of the physical person. This means that directors and other senior officers who, by action or omission of their company duties, directly or indirectly commit an environmental offense, may be subject to administrative liability. This is further supported by the definition of "polluter" in Law No. 6.938 of 8 August 1981[61] Article 3(IV), which covers both physical and legal persons who "directly or indirectly" are responsible for an activity that causes environmental degradation.

4.1.2. Civil Liability

With regard to civil liability, Article 64 of the Environmental Protection Law (China) refers to the Tort Liability Law (China)[62] for rules on civil liability. However, as the Tort Liability Law (China) has been repealed by the newly approved Article 1260 of the Civil Code of the People's Republic of China (C.C.), it is within the latter that the inquiry should take place. The C.C. establishes that an employer who is a legal entity shall assume tort liability for harms caused by an employee in the execution of his work duty, although retaining the right to seek reimbursement in situations where the employee caused the harm intentionally or by gross negligence (Art. 1191). Thus, only the company is liable to third parties for environmental damages. According to Article 149 of the Company Law of the People's Republic of China,[63] directors, supervisors and senior officers who violate laws, administrative regulations or company statutes are liable for compensation to the company for damages caused to it. This provision appears to be in line with the provisions of the C.C.; thus, in

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60 Lei No. 9.605, de 12 de Fevereiro de 1998, Diário Oficial da União [D.O.U.] de 13.2.1998, rectified 17.2.1998 (hereinafter, Law on Environmental Crimes).

61 Lei No. 6.938, de 31 de Agosto de 1981, Diário Oficial da União [D.O.U.] de 2.9.1981 (hereinafter, Environmental Policy Law).

62 Zhonghua Renmin Gongheguo Qinquan Zeren Fa (中華人民共和國侵權責任法) [Tort Liability Law] (promulgated by the Standing Committee of the National People's Congress, 26 December 2009, effective 1 July 2010). This law was repealed by the Zhonghua Renmin Gongheguo Minfa Dian (中华人民共和国民法典) [Civil Code] (promulgated by the Standing Committee of the National People's Congress, 28 May 2020, effective 1 January 2021), (hereinafter, C.C.).

63 Zhonghua Renmin Gongheguo Gongsi Fa (中华人民共和国公司法) [Company Law] (promulgated by the Standing Committee of the National People's Congress, 29 December 1993, effective 1 July 1994, last revised 26 October 2018, effective 26 October 2018).

a specific case, it is likely that compensation to the company will only be granted where there was intent or gross negligence proven. The Company Law also appears to establish direct liability of directors and senior officers of the company (but not of supervisors) to the shareholders for acts that infringe the interests of the latter (Art. 152). The law does not provide a clear rule as to whether the civil liability of directors and senior officers toward the company is cumulative with their civil liability toward shareholders. Notwithstanding, it is submitted that there should only be direct responsibility for directors and senior officers toward shareholders in cases where the damages suffered by the latter cannot be covered by the responsibility assumed by the former toward the company or where the damages were suffered "directly" by the shareholders concerned. Otherwise, there would be a situation in which shareholders or the company would be unjustly enriched in any event, despite not being directly liable toward third parties, company directors, supervisors or senior officers.

The approach adopted by the Brazilian legal system is different, as both the company and physical persons who are "authors, co-authors or accomplices" can be found liable toward third parties.[64] As the legal provisions providing for this solution are the same as those for administrative liability, reference is made, with the necessary adaptations, to the considerations made above regarding administrative liability. It is important to note, however, a fundamental difference between the approaches taken by the Chinese and Brazilian legal systems regarding the civil liability of directors and senior officers. While in China, directors and senior officers only bear civil liability toward the company or shareholders for acts that cause damages to them, in Brazil, besides such liability toward the company or shareholders,[65] directors and senior officers may also be liable toward third parties for acts that produce environmental damages.[66]

In both China and Brazil, civil liability for environmental pollution covers situations of actual harm as well as situations in which there is a danger of harm. In the Chinese legal system, this can be deduced from the forms of assumption of legal liability established in Article 179(3) of the C.C., which include the "elimination of danger" (also Art. 1167). In the Brazilian legal system, this can be extracted, *inter alia*, from the broad definition of pollution, which includes, *inter alia*, "degradation of the environmental quality resulting from activities that directly or indirectly undermine the health, security and the well-being of the population."[67] Cementing this position is the fact that all kinds of pollution are subject to civil liability, as the law does not contain exceptions.[68]

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64 Law on Environmental Crimes, Art. 2.

65 *See* Lei No. 6.404, de 15 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Supl.), Arts. 158 and 159.

66 Law on Environmental Crimes, Art. 3.

67 Environmental Policy Law, Art. 3, III, a).

68 Constitution, Art. 225, sec. 3; Environmental Policy Law, Art. 14, sec. 1.

Regarding the so-called "environmental damage *per se*," that is, damages to the environment that do not violate directly individual or collective rights and interests that are protected by law, the C.C. 2020 introduced an express provision (previously lacking in the legal system) protecting "the ecology and the environment" against damage, as well as rules on specific aspects that compensation and remediation shall cover (Arts. 1234 and 1235). In the Brazilian legal system, environmental damage *per se* is also addressed, as any kind of pollution is subject to civil liability, including activities that "adversely affect biota; affect the aesthetic or sanitary conditions of the environment; or emit matter or energy in violation of established environmental standards."[69]

In general, the civil liability systems in both China and Brazil are, as a rule, based on fault. However, for cases involving environmental pollution, a system of strict liability applies in both jurisdictions.[70] It is important to mention that in Brazil, this rule enjoys constitutional status,[71] and thus, no infra-constitutional law, be it federal, state or municipal, can overturn it. This clearly shows that the rule enjoys an especially high status in the legal system. In the Chinese legal system, the burden of proof of not being civilly liable, of mitigated liability or of the absence of causation between the action and the harm lies with the actor.[72] The Brazilian legal system adopts a double-standard approach containing different rules for collective suits and for individual suits. For collective lawsuits, the burden of proof of causality between the action and the damage can be more readily switched in favor of the claimant, as long as the requirements of verisimilitude of the claim or hypo-sufficiency of the claimant are met.[73] For individual suits, the general rules of the Brazilian Civil Procedural Code (C.P.C.)[74] Article 373 apply. Under these rules, the claimant would be required to prove the causal link between the damage and the activity of the defendant.[75] Nevertheless, the 2015 C.P.C., unlike its 1973 predecessor[76] contains a rule on a "dynamic allocation" of the burden of proof

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69 Environmental Policy Law, Art. 3, III, c), d) and e).

70 C.C., Art. 1229 (*see also* Art. 1233) (China); Constitution, Art. 225, sec. 3 (Braz.); and Environmental Policy Law, Art. 14, sec. 1 (Braz.).

71 Constitution, Art. 225, sec. 3.

72 C.C., Art. 1230.

73 Lei No. 7.347, de 24 Julho de 1985, Diário Oficial da União [D.O.U.] de 25.7.1985 (on public civil suits), Art. 21, which extends the rules contained in Title III of the Código de Defesa do Consumidor (C.D.C.) [Consumer Protection Code] to the "defense of collective and individual diffuse rights and interests, as appropriate."

74 Lei No. 13.105, de 16 de Março de 2015, Diário Oficial da união [D.O.U.] de 17.3.2015 [Civil Procedural Code].

75 The first part of Article 373 reads: "The burden of proof lies with: I – the claimant, for facts constitutive of their right; II – the defendant, in relation to the existence of a fact that is impeditive, modifying, or extinctive of the rights of the claimant."

76 *See* Lei No. 5.869, de 11 de Janeiro de 1973, Diário Oficial da União [D.O.U] de 17.1.1973, republished 27 July 2006.

(Art. 373, sec. 1), enabling the judge, in certain circumstances, to allocate the burden of proof differently from what the general rule states. Aside from the cases where the law so determines, the circumstances in which the judge can allocate the burden of proof differently are those where the party with the burden of proof faces an impossibility or great difficulty in producing such proof and those where the other party can more easily prove the opposite. Therefore, this rule would enable a case-by-case assessment and possibly shift the burden of proof of causality in individual environmental suits to the defendant. Nevertheless, some courts have accepted applications for shifting the burden of proof in certain cases if the requirements contained in Article 6 of the Consumer Protection Code (namely, verisimilitude of the claims or hypo-sufficiency of the claimant) are met and based on the Environmental Law principles of precaution, prevention and "polluter-pays," thus analogically applying the same rules that govern the burden of proof in collective suits.[77] This interpretative approach is far from consensual, however, and other courts and authors have argued against it, claiming that unless there is a consumer relationship, the rules of the Consumer Protection Code cannot be extended to individual environmental suits and that shifting the burden of proof to the defendant would amount to assuming a rule of presumption of guilt on the part of the defendant as well as imposing unjust costs on the defendant where no causality is found.[78]

4.1.3. Criminal Liability

In both the Chinese and Brazilian legal systems, in cases where a crime has been committed, liability can be borne by both the company and physical persons.[79] In China, the physical persons who can be subject to criminal liability in cases of environmental crimes involving a company are the people in charge of the company as well as the people directly responsible for committing the crime. In Brazil, besides the people directly responsible (which could include authors, co-authors and accomplices), directors and other senior officers listed, as well as legal representatives and auditors can be criminally liable if they failed to act when they could have to avert the crime from being committed.[80] Interestingly, the Supremo Tribunal Federal (S.T.F.), which is Brazil's top court on constitutional issues, as well as the Superior Tribunal de Justiça (S.T.J.), regarded as Brazil's top court on non-constitutional issues, have changed the previously prevailing interpretation on criminal liability of physical and

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77 Larissa Schmidt et al., *Inversão do ônus da prova no direito ambiental brasileiro*, 20 Revista Justiça do Direito 70, especially at 75–81 (2006).

78 *Id.* at 74.

79 Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law] (promulgated by the Standing Committee of the National People's Congress, 1 July 1979, effective 1 January 1980, last revised 26 December 2020, effective 1 March 2021), Arts. 30 and 31 (China); Constitution, Art. 225, sec. 3 (Braz.); Law on Environmental Crimes, Arts. 2 and 3 (Braz.).

80 Law on Environmental Crimes, Art. 2.

juridical persons by Brazilian courts.[81] Previously, the interpretation was that it was necessary that a physical person be found responsible for an environmental crime in order for a juridical person to face criminal liability, based on the so-called "double imputation theory."[82] Under this approach, it would be impossible to charge a criminal offense exclusively against a juridical person without also charging a physical person responsible for the relevant facts. For instance, the S.T.F. was presented with a case in which the physical persons responsible for a four million-liter oil spill could not be identified (the accused were acquitted). Despite this, the S.T.F. determined that this was not an obstacle to holding the juridical person (Petrobras) criminally liable for the events.[83] This viewpoint was subsequently followed by the Brazilian Superior Court of Justice.[84] As per the information available to the authors, this legal issue has not yet been raised in Chinese courts. For Brazil, this new interpretation reduces the risk of impunity where, despite it being clear that a company is responsible for an environmental crime, it is not possible to identify for the purposes of criminal liability the physical persons responsible.

4.2. The Obligation to Adopt a Corporate Environmental Management System

The Environmental Protection Law of China expressly mandates that companies put in place an "environmental protection accountability system so as to identify the responsibilities of their persons-in-charge and relevant staff."[85] Nothing more is established in this respect, thus leaving ample room for discretion to the companies to make their own decisions regarding issues such as the procedure of establishment, its operation and the composition of such a system. However, the implication of the legal mandate is that each company must define and allocate environmental protection responsibilities among its personnel, such as directors, supervisors and other employees. Besides ensuring that compliance with environmental regulations runs smoothly, this system enables the state to impose liability on the responsible parties

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81 Although there is no rule of precedent and, as a general rule, the decisions of upper courts are not binding on lower courts in the Brazilian legal system, decisions made by the S.T.F. and the S.T.J. have a persuasive effect on other courts.

82 Reis Friede, *The Protection of the Environment in the Brazilian Supreme Federal Court: Analysis of Real Cases*, 10(3) Semioses 78, 85 (2016) (mentioning the position adopted, e.g., by S.T.J. in the case S.T.J., Recurso Especial No. 610.114/RN (2005), rel. Min. Gilson Dipp (17.11.2005), Superior Tribunal de Justiça Jurisprudência [S.T.J.J.] (June 6, 2021), available at https://stj.jusbrasil.com.br/jurisprudencia/7179272/recurso-especial-resp-610114-rn-2003-0210087-0/inteiro-teor-12919587).

83 S.T.F., 1ª Turma (2013), Recurso Especial 548181/PR, rel. Min. Rosa Weber (6.8.2013), Supremo Tribunal Federal Jurisprudência [S.T.F.J.] (June 6, 2021), available at https://stf.jusbrasil.com.br/jurisprudencia/25342675/recurso-extraordinario-re-548181-pr-stf.

84 S.T.J. (2016), Recurso Especial 1497787/SP 2014/0299600-2, rel. Min. Nefi Cordeiro (14.9. 2016), Superior Tribunal de Justiça Jurisprudência [S.T.J.J.] (June 6, 2021), available at https://stj.jusbrasil.com.br/jurisprudencia/468080522/recurso-especial-resp-1497787-sp-2014-0299600-2.

85 Environmental Protection Law, Art. 42.

in cases of environmental infractions. Despite using different terminology, which appears to be narrower in its meaning than that of a typical mandate for a corporate environmental management system, in practice, the implication of adopting an environmental protection accountability system will be almost the same.

On the other hand, in Brazil, there is no legal obligation for companies to establish their own corporate environmental management systems. Nevertheless, in practice, many companies establish some sort of environmental management system that enables them to at least comply with the state's environmental regulations. Moreover, a significant number of companies (not only in Brazil but also in China and around the world) adhere to voluntary international standards such as those in the ISO 14001 series.[86]

4.3. Discussion

The findings brought to light by the analysis of the Chinese and Brazilian systems of administrative, civil and criminal liability for environmental infractions reveal a persuasive side of those systems toward companies, and particularly toward directors and managers, as well as other senior officers, to incorporate environmental concerns into the governance of companies. Indeed, if a company wants to avoid liability for environmental infractions, it will put in place a governance and management system that will allow it to fulfill its environmental obligations. In fact, Chinese law already mandates that companies put in place an environmental protection accountability system, which, in practice, entails the adoption of a corporate environmental management system. Notwithstanding, when legal consequences affect not only the company as a legal person but also its directors and other senior officers, the impact of environmental regulations on companies' green governance is likely to be greater, at least up to the level required by such regulations. As one study has found and as logic suggests, command-and-control regulation, including legal liability systems, can drive eco-organization innovation,[87] which is the internalization of environmental concerns in a company's corporate governance. While Brazil lacks a legal mandate for companies to establish environmental management systems, the pressure from existing environmental legislation[88] and other relevant stakeholders, as well as an increased general environmental awareness, has resulted in the majority of companies adopting, nonetheless, some form of environmental management system.

As for the systems of legal liability for environmental infractions, it became clear that while the Chinese system favors, as a rule, exempting directors and senior

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[86] *See, e.g.*, Iuri Gavronski et al., *ISO 14001 Certified Plants in Brazil – Taxonomy and Practices*, 39 J. Cleaner Prod. 32 (2013); Guoyou Qi et al., *Diffusion of ISO 14001 Environmental Management Systems in China: Rethinking on Stakeholders' Roles*, 19(11) J. Cleaner Prod. 1250 (2011).

[87] Liao 2018, at 1115.

[88] For example, the scope of acts subject to criminal liability is particularly broad compared to most jurisdictions, including China (*see* Law on Environmental Crimes, Arts. 29–61).

officers from administrative liability and civil liability toward the state and third parties, respectively, the Brazilian system favors a different approach, i.e. extending administrative and civil liability to directors and senior officers. In both legal systems, criminal liability can be borne by both physical and juridical persons. As a side note, it is worth mentioning that, differently from what happens in corporate law, where the discussion revolves around extending or not extending civil liability to physical persons (*maxime*, directors) who work for the company, in criminal law, the discussion revolves around extending or not extending criminal liability to juridical persons, as the traditional belief that juridical persons were not capable of criminal behavior (and thus were not subject to criminal liability) and that only physical persons could bear such liability is increasingly being questioned.

The different approaches adopted by China and Brazil appear to reflect two different philosophies on the liability of directors and corporate governance. On one hand, there is the approach which contends that liability should not be extended to directors since doing so may cause them to act in a defensive manner and prevent them from taking risks, which could be detrimental for the survival and development of the company. Moreover, it may "unduly shift the risk of doing business to directors and officers."[89] On the other hand, there is the approach which considers that establishing a system of liability for directors is beneficial because it constrains their behavior, inducing them to be diligent and avoid making decisions that may put at risk the survival and development of the company.[90] Although at first glance it may appear that the Chinese legal system embraces the first approach, a more comprehensive view reveals that, in fact, it adopts a mixed approach. It generally exempts company directors from administrative liability (with exceptions) and civil liability toward third parties, while subjecting them to liability toward the company and its shareholders. On the other hand, the Brazilian legal system clearly favors the approach of imposing liability on directors (both toward third parties and toward the company and its shareholders).

Despite being uncommon, the nature of administrative liability imposed on directors and those directly responsible for committing the relevant infractions is particularly severe, namely administrative detention, which consists of a deprivation of liberty. In the majority of jurisdictions, including Brazil, this type of sanction is only applicable in criminal proceedings. In China, however, it has been an important governance tool outside of criminal law since the foundation of the People's Republic of China in 1949, although it has evolved in its functions, range of applicability and procedure to adapt to different historical contexts.[91] It serves several functions,

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89 Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59(6) Am. U. L. Rev. 1661, 1663 (2010).

90 On the American context, *see* David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule*, 6(2) Berkeley Bus. L.J. 216 (2009).

91 On the use and reform of administrative detention over time in China, *see, e.g.*, Sarah Biddulph et al., *Detention and its Reforms in the PRC*, 2(1) China L. & Soc'y Rev. 1 (2017).

including "to effect social transformation"[92] and to "signal social, economic, and political values."[93] As environmental protection and the construction of an "ecological civilization" are now top priorities of the State, on the same level as social stability and economic growth,[94] administrative detention is used as a tool to assist in the pursuit of those objectives. Notwithstanding, the use of administrative detention has long been controversial, and as China progressively adapts its legal system to the principles of the rule of law, it has increasingly been subject to debate and legal controls to avoid abuse of power by public security bodies.[95] It is curious to note that some of the offenses subject to administrative detention in China, such as those related to evading regulation by discharging pollutants through concealed mechanisms, and even some that are punishable with lower sanctions only applicable to the company, such as construction without an environmental impact assessment, would be prosecuted criminally in Brazil. Thus, one cannot simply conclude that one system is harsher than the other with regard to punishing environmental infractions without looking into the details, case by case. Moreover, both systems (of administrative detention and of criminal prosecution) have their advantages and disadvantages. While the use of administrative detention has the advantage of being swift and easier to administer, it has the disadvantage of only imposing minor sanctions compared to criminal law sanctions, as well as the criticism of not guaranteeing due process and being difficult to reconcile with the principles of the rule of law.

Regarding the burden of proof of the existence or non-existence of causality, the issue appears to have been settled in China with the adoption of a general rule of shifting the burden of proof to the defendant, irrespective of the type of claims involved. The Chinese legislator opted for a straightforward rule, under which the burden of proof is automatically shifted where environmental claims are involved. This, *inter alia*, ensures a higher level of certainty and uniformity in the application of the law. Differently, the Brazilian system is more complex in this aspect, as it adopts different rules for collective suits involving ecological damage and for individual suits involving primarily private interests. While the shift of the burden of proof can be more easily materialized in collective suits, it is not an automatic shift, as the judge must verify the verisimilitude of the claim or the hypo-sufficiency of the claimant to

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92 Biddulph et al. 2017, at 2.

93 *Id.*

94 *See, e.g.*, Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37(2) Harv. Envtl. L. Rev. 365, 399 (2013); Hu Jintao, *Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All Respects*, Report to the Seventeenth National Congress of the Communist Party of China, 15 October 2007, China.org.cn (June 6, 2021), available at http://www.china.org.cn/english/congress/229611.htm; Decision on Some Major Issues Concerning Comprehensively Deepening the Reform (adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China, 12 November 2013); Constitution of the People's Republic of China, Preamble; Chinese Environmental Protection Law, Art. 1.

95 *See, e.g.*, Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* 331–50 (2007).

authorize such a shift. On the other hand, it is relatively more difficult to materialize the shift in individual suits, as there is no special rule allowing for such a shift and only in exceptional circumstances is such a shift allowed. In any event, the complexity of the Brazilian approach, while arguably, enabling the judge to make a more equitable decision when considering the circumstances of each individual case, leaves room for disparities and a lack of uniformity in the application of the law.

As a final point, it is worth noting that as with any legal rules, enforcement mechanisms for legal liability rules are indispensable in ensuring their effectiveness. This is a particularly serious challenge affecting many emerging countries, including China and Brazil. This article does not explore enforcement-related aspects of legal liability in either of the two countries. This is an area that deserves a special, separate study due to its many complexities, which cannot be fully addressed here.

It can be noted, however, that some of the commonly mentioned enforcement challenges of environmental regulation in China include local protectionism and selective implementation of laws and regulations, underfunded and understaffed institutions, the insufficiency or inadequacy of procedural tools to enforce substantive norms and the lack of independence of courts.[96] In recent years, a massive effort has been undertaken to address these issues, including through institutional reforms that include the centralization of some aspects of environmental governance to curb the problem of local protectionism,[97] the introduction of environmental courts, the establishment of environmental public interest litigation (both civil and administrative) and the expansion of the list of subjects who have the standing to file public interest litigation suits (now including non-governmental organizations).[98]

While it is common to hear about lax enforcement of environmental laws in Brazil, in most instances such comments typically mention corruption, institutional weakness and a lack of political will as the main issues.[99] Other major issues that negatively impact enforcement in China, such as local protectionism, are hardly heard of in Brazil, possibly because of the adoption of the "concurrent competence" model for the distribution of legislative powers between the Union, states and the Federal District.[100] Procedural

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96 *See supra* note 23 and the bibliography therein.

97 *See, e.g.*, Kostka & Nahm 2017; Benjamin van Rooij et al., *Centralizing Trends and Pollution Law Enforcement in China*, 231 China Q. 583 (2017); Ma Yun, *Vertical Environmental Management: A Panacea to the Environmental Enforcement Gap in China?*, 1(1) Chinese J. Envtl. L. 37 (2017).

98 *See, e.g.*, Alex L. Wang & Jie Gao, *Environmental Courts and the Development of Public Interest Litigation in China*, 3(37) J. Ct. Innovation 37 (2010); Carpenter-Gold 2015; Qing & Mayer 2017; Chu 2018; Zhang Minchun & Zhang Bao, *Specialized Environmental Courts in China: Status Quo, Challenges and Responses*, 30(4) J. Energy & Nat. Resources L. 361 (2012); Rachel E. Stern, *The Political Logic of China's New Environmental Courts*, 72 China J. 53 (2014).

99 *See, e.g.*, Luca Tacconi et al., *Law Enforcement and Deforestation: Lessons for Indonesia from Brazil*, 108 Forest Pol'y & Econ. 1, 3–5 (2019).

100 *See supra* note 23.

tools for the enforcement of substantive norms are also fairly advanced and have been in place for a long time, while the courts have also been known to produce innovative, pro-environment decisions, particularly the S.T.J.[101]

Clearly, both countries face significant challenges, although distinct, at the enforcement level, and this may severely constrain the ability of their legal liability regimes for environmental infractions to achieve their maximum potential in influencing companies' green governance.

Conclusion

This article conducted a comparative study of the systems of legal liability for environmental infractions in China and Brazil with the aim of identifying common aspects and differences, which may light the way to a more effective and well-informed intra-BRICS legal cooperation on environmental matters and enrich their sustainable development cooperation agenda. As some of the functions of comparative law suggest, it is hoped that this study contributes to a better understanding of both countries' approaches, triggers a critical reflection on both countries' legal solutions in light of their own circumstances and inspires a debate for creative solutions in future legal reforms. Such reflection, debate, cooperation and potential legal reforms should be aligned with global objectives and country commitments in the fight against climate change and global warming, including the goal of achieving carbon neutrality.

The study found several similarities between the studied legal systems, including the adoption of strict civil liability, the establishment of liability for environmental damages *per se* (which arguably makes the environment a standalone stakeholder in companies' operations), the extension of legal liability to directors and senior officers, although in slightly different terms and the extension of criminal liability beyond physical persons to also cover legal persons.

Nevertheless, differences were also found. The first relates to how liability is extended beyond the company to affect directors and other senior officers. China adopts an approach that shields directors and senior officers from administrative (with exceptions) and civil liability toward the state and third parties, respectively, while Brazil fully extends such liability to directors and senior officers. The second relates to the rules on the burden of proof of causality between a market actor's activity and the damage caused. In China, the burden to prove the absence of such causality (or the existence of mitigating circumstances) lies with the actor. Differently, in Brazil, there is a double-standard rule: in collective suits, the burden of proof can be shifted if the requirements of verisimilitude of the claim or hypo-sufficiency

[101] *See, e.g.*, Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justica (High Court of Brazil)*, 29(2) Pace Envtl. L. Rev. 470 (2012).

of the claimant are met; in individual suits, the burden of proof in principle lies with the claimant, although under the "dynamic allocation" rule, the judge may exceptionally shift such a burden. The third difference relates to an aspect that is not strictly concerned with legal liability regimes yet has been identified as another major trend across the world in legal tools that are used to pressure companies to internalize environmental concerns into their governance, namely the legal obligation of adopting a corporate environmental management system. On this issue, while the Chinese legal system has a mandate that is, in effect, close to a mandate to implement a corporate environmental management system, the Brazilian legal system has no such mandate. Nevertheless, in practice, many companies voluntarily adopt such a system as they become more environmentally conscious and because it enables them to comply with other environmental regulations as well as address the demands of other stakeholders.

Despite the fact that the systems of legal liability for environmental infractions have the potential to be effective, their full potential can only be materialized with effective enforcement rules and institutions. In this area, it was noted that both China and Brazil still face significant challenges; however, a more comprehensive assessment of how their current enforcement systems may impact companies' green governance deserves a special, separate study.

Finally, the different legal solutions adopted by China and Brazil are, in part, a reflection of their rich histories and were shaped by their respective economic, social, political and institutional contexts. An example is the use of administrative detention in China, which may be an indication of a continued preference for administrative enforcement due to its flexibility and swiftness, while, for example, the extended list of environmental crimes and the long-standing, relatively strong system of collective suits in Brazil may be an indication of reliance or confidence in its judicial system. Consequently, while this diversity of contexts and backgrounds (not only between the two countries studied but among all the BRICS members) may enrich the pool of potential solutions and approaches in future legal reforms and the academic debates on intra-BRICS legal cooperation, it will always be important to take into consideration the relevant contexts of the legal solutions.

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OPENING PANDORA'S BOX: STRICT LIABILITY UNDER UNQUALIFIED EXTENDED WAR CLAUSES IN INTERNATIONAL INVESTMENT LAW

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There has been a growing interest in the extent to which international investment law imposes an obligation on the state to compensate for losses arising from an armed conflict. This contribution explores the prevalence of war clauses that hold the state liable to pay compensation for war losses without the investor needing to prove fault. The contribution considers a recent case against Syria in which an investor was permitted to rely on such a war clause in another treaty through the most favoured nation (MFN) clause. The contribution finds that MFN clauses substantially increase the number of investors who can rely on unqualified extended war clauses. It considers unqualified extended war clauses and the extent to which other investors can rely on them through an MFN clause in Cameroon, Syria and Yemen. It then considers the role that the BRICS countries can play in bringing about the necessary reforms to unqualified extended war clauses. It argues that these reforms are urgently needed as these states emerging from armed conflict can scarcely afford to meet their people's most essential developmental needs, let alone virtually unlimited liability to foreign investors.

Keywords: armed conflict; international investment law; unqualified extended war clauses; Syria; Cameroon; Yemen; Guris case.

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Table of Contents

Introduction

There has been a growing body of literature on international investment law and its obligations on states amidst an armed conflict. This increased scholarly interest has arisen at least partly due to the substantial surge in claims brought by investors over losses suffered during an armed conflict.[1] Liubashenko provided an overview of the scholarly contributions on standards such as full-protection and security and the interaction between international humanitarian law and international investment law.[2] Liubashenko's contribution importantly argues that international humanitarian law (IHL) must generally prevail over international investment law (IIL) during an armed conflict.[3] He postulates that where the targeting of belligerents

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[1] *See, inter alia*, *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3; *Gamesa Eólica, S.L.U. v. Syrian Arab Republic*, PCA Case No. 2012-11; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 and *Cengiz İnsaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ.

[2] Viacheslav Liubashenko, *Treatment of Foreign Investments During Armed Conflicts: The Regimes*, 24(1) J. Confl. Secur. L. 145, 146 (2018).

[3] *Id*. at 167.

property is lawful under IHL, the more general property protection under IIL may be excluded.[4]

At the time of Liubashenko's writing there had been minimal case law on the operation of investment law in the context of an armed conflict.[5] Since then there have been at least three additional decisions that Liubashenko had not considered.[6] The most recent is *Guris Construction and Engineering Inc. v. Arab Republic of Syria* (hereinafter, the *Guris* case), which has not yet attracted much academic attention.[7] The inclusion of so-called war clauses has also increasingly been interpreted by arbitral tribunals. However, as Ryk-Lakhman recently noted, extended war clauses have been considered far less extensively in the literature.[8] Extended war clauses contain more onerous obligations for states than standard war clauses. Standard war clauses commonly appear in bilateral investment treaties (BITs). They merely provide for equality in treatment where compensation is paid for any losses arising in the course of an armed conflict.[9] In contrast, extended war clauses make the payment of compensation to investors for losses resulting from hostilities mandatory if certain conditions are met.[10]

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4 Liubashenko 2018, at 167.

5 Liubashenko notes that "[n]o more than few cases directly and indirectly concern damages as the result of an armed conflict: *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No ARB/87/3; *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, ICSID Case No ARB/07/12; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No ARB/93/1." It is possible that Liubashenko missed the case of *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 (hereinafter, the *Ampal-American Israel* case) due to the fact that arbitral awards in IIL do not always become available immediately.

6 These cases are *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (hereinafter, the *Guris* case); *Strabag SE v. State of Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020; *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018 (hereinafter, the *Cengiz* case) and the *Ampal-American Israel* case.

7 The author could not find any peer-reviewed articles discussing this case as of the time of writing. This likely results in part from the fact that although the award was rendered in August 2020, it had not been seen before a subscription based arbitration news service had sight of the award and provided a summary thereof in a news post in November 2020 (*see* Lisa Bohmer, *Analysis: In Previously Unseen Turkey-Syria Bit Award, Majority Imports a More Favourable War-Losses Clause; in Dissent Ziade Warns of "Exorbitant" Implications of Majority Reading*, Investment Arbitration Reporter, 13 November 2020 (July 7, 2021), available at https://www.iareporter.com/articles/analysis-in-previously-unseen-turkey-syria-bit-award-majority-imports-a-more-favourable-war-losses-clause-in-dissent-ziade-warns-of-exorbitant-implications-of-majority-reading/). The full award was first published on the Investor State Law Guide database on 17 June 2021. At the time of writing the award had also not been reported on the widely used dispute settlement navigation database of the United Nations Conference on Trade and Development. Indeed its very existence is not even noted on that database.

8 Ira Ryk-Lakham, *The Genealogy of Extended War Clauses: Requisition and Destruction of Property in Armed Conflicts*, in Tobias Ackermann & Sebastian Wuschka (eds.), Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts 54–83 (2021).

9 *Id*. at 54.

10 *Id*.

The contributions by Ryk-Lakhman and Zrilic have been the most comprehensive studies on extended war clauses to date.[11] An earlier contribution by Schreuer also included a section analysing extended war clauses but did not focus on it extensively, considering that "extended war clauses subject the investor's right to restitution or compensation to a number of stringent requirements."[12] This is indeed true with respect to the extended war clauses considered by Ryk-Lakham, Zrilic and Schreuer.[13] The extended war clauses considered by them are, with slight variations in their wording, some of the most commonly occurring extended war clauses.[14] These extended war clauses only create liability where the conduct is attributable to the state and exclude the state's liability where the destruction of property arose due to military necessity.[15] However, none of these studies focused on the much rarer extended war clauses where the obligation to pay compensation is absolute and not subject to any qualifications other than harm occurring within the context of a listed event.[16] This contribution will refer to these clauses as unqualified extended war clauses to distinguish them from the more standard extended war clauses.

Unqualified extended war clauses are extremely rare and seem largely, though not exclusively, confined to treaties wherein Italy is one of the parties to the treaty. The Italian unqualified extended war clause had been included in the 2003 iteration of the Italian model BIT.[17] An Italian unqualified extended war clause was at the heart of the

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11 Ryk-Lakham 2021, at 54; Jure Zrilic, *The Protection of Foreign Investment in Times of Armed Conflict* 109–120 (2019).

12 Christoph Schreuer, *The Protection of Investments in Armed Conflicts*, 3 Transnat'l Disp. Mgmt. 1, 11–13 (2012).

13 Schreuer 2012, at 11 for example, refers to Article 4(2) of the United Kingdom-Sri Lanka BIT which provides that: "Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from (a) requisitioning of their property by its forces or authorities, or (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable." Ryk-Lakham, in turn, extensively considers the extended war clause contained in Article 9(2) of the Morocco-Nigeria BIT. This provision is virtually identical to the extended war clause considered by Schreuer. The Morocco-Nigeria BIT only differs in that it uses the word "Party" instead of "Contracting Party" and uses "investors" instead of "nationals and companies."

14 Zrilic 2019, at 112 notes the relative rarity of extended war clauses in comparison to standard non-discrimination war clauses. However, they still appear in virtually identical form in around a third of all investment treaties.

15 *Id*. at 115.

16 The only contribution the author has found that makes any mention of an unqualified extended war clause is the contribution by Kit De Vriese, *COVID-19 and 'War' Clauses in Investment Treaties: A Breach Through the Wall of State Sovereignty?*, Ejiltalk.org, 10 June 2020 (July 8, 2021), available at https://www.ejiltalk.org/covid-19-and-war-clauses-in-investment-treaties-a-breach-through-the-wall-of-state-sovereignty/. That contribution remarks in passing that Article IV of the Italy model BIT creates liability "irrespective of whether those losses have been caused by governmental forces or other subjects." It does not contain any further discussion or analysis on the consequences of this clause for states.

17 *Id*.

dispute in the *Guris* case. This case could potentially have far-reaching consequences as the tribunal in that case held that the investor needn't prove fault on the part of the state.[18] It effectively provided for strict liability where the mere occurrence of damage resulting from an armed conflict is sufficient to establish liability.

This strict liability arose based on the draconian unqualified extended war clause in the Italy-Arab Republic of Syria BIT (Italy-Syria BIT). The tribunal's decision to "import" that clause into another treaty, based on a most-favoured-nation (MFN) clause,[19] serves as an important warning that the rarity of the clause does not make it of lesser significance. This decision has opened the proverbial Pandora's Box. It effectively exposes Syria to strict liability to all foreign investors protected by a BIT containing a sufficiently broad MFN clause.

The *Guris* case highlights the broad implications that unqualified extended war clauses can have for states engaged in an armed conflict. The ongoing efforts to reform international investment law (IIL) to address the overly extensive rights granted to foreign investors should not, therefore, overlook unqualified extended war clauses. BRICS countries have been leaders in the call for fundamental reform of IIL.[20] BRICS may well exert significant influence on ongoing reform efforts where its member countries collaborate.[21] It is, therefore, necessary to consider the role that BRICS as a group may play in the reform of unqualified extended war clauses.

This contribution firstly provides a detailed case discussion on the *Guris* case and the key findings by the tribunal. It then proceeds to critique the award and considers the practical implications of the decision for Syria, including an analysis of other BITs to which Syria is a party with MFN clauses. The article then analyses similar unqualified extended war clauses in other BITs to which two states (Cameroon and Yemen) engaged in ongoing armed conflicts are a party. Lastly, the article considers the role of BRICS in the reform of IIL and the potential elimination of unqualified extended war clauses.

1. The *Guris* Case

1.1. The Factual Background

Güriş İnşaat ve Mühendislik Anonim Şirketi is a Turkish construction company active in the fields of construction, cement production and renewable energy.[22] Güriş, together with Mr İdris Yamantürk and his two sons, were the majority shareholders in

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18 Para. 281 of the *Guris* case.

19 *Id*. Para. 284.

20 Congyan Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL Unbound 217 (2018).

21 *Id*. at 218.

22 Para. 108 of the *Guris* case.

two cement companies incorporated in Syria.[23] The claimants obtained investment authorisation in 2005 and incorporated the two companies on 1 February 2006 and 5 June 2007.[24] The complainant averred that the stability and security of Syria deteriorated in early 2011.[25] The protests against the government began in March 2011, spreading throughout the country and escalated into violent armed conflicts between the government and numerous opposition groups by 2012.[26]

The claimant went on to say that in 2012, due to the escalation of the armed conflict, Syrian government forces began to withdraw from most of the northern Syrian territory, including the area where the claimant's cement facilities were located.[27] The claimants indicated that various robberies and armed attacks damaged the cement plants after the withdrawal of the Syrian military.[28] The claimant had been unable to enter the plants since 2014.[29] Therefore, the claimants could not verify the losses but treated the plants as having been lost entirely.[30] The claimants sought compensation from Syria for these alleged losses under the Agreement between the Republic of Turkey and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (hereinafter, the Turkey-Syria BIT).[31] Syria confirmed that it had withdrawn from the region but denies any liability.[32]

1.2. Tribunal's Findings on the Alleged Suspension of the BIT

Syria argued that the BIT between itself and Turkey had effectively been suspended, considering what it had described as Turkey's hostility towards Syria.[33] It argued that this hostility violated the principles of economic cooperation and investment protection on which the treaty was based.[34] Syria claimed that the suspension of diplomatic relations between itself and Turkey weighed in favour of finding that the treaty had been suspended.[35] Regarding the legal consequences

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23 Para. 108 of the *Guris* case.

24 *Id*. Paras. 110–111.

25 *Id*. Para. 113.

26 *Id.*

27 *Id.*

28 *Id*. Para. 114.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id*. Para. 119.

33 *Id*. Para. 141.

34 *Id.*

35 *Id.*

of the alleged suspension of the treaty, Syria submitted that no rights could arise during the period of the treaty's effective suspension.[36] Effectively Syria argued that there were no treaty obligations after April 2011, when Turkey hosted a meeting with armed militants hostile to Syria. Consequently, the claimants did not enjoy any rights.[37]

The tribunal rejected Syria's contentions in this respect.[38] The tribunal notes that the Turkey-Syria BIT does not contain any provisions addressing the suspension of the treaty. It determines that this question must accordingly be decided "by application of general international law."[39] The tribunal finds that in terms of the Vienna Convention on the Law of Treaties (hereinafter, the VCLT), Syria was required to give Turkey written notice if it intended to suspend the treaty.[40] It finds that in the absence of such notice, the BIT could not be suspended.[41] The tribunal also finds that the provision of Article 3 of the 2011 Draft ILC Articles on the Effect of Armed Conflict on Treaties (hereinafter, the 2011 ILC Articles) reflects customary international law.[42] The provisions provide that the "existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between State Parties to the conflict." The tribunal explains that the provision applies equally to international and non-international armed conflicts.[43] It accordingly declines to classify the conflict in Syria as either "an 'international' armed conflict (as the Respondent contends) or 'non-international' armed conflict (as the Claimants contend)."[44]

The tribunal also notes the commentary to the 2011 ILC Articles, which explains that a substantive examination of the treaty is needed to determine if it remains operative during an armed conflict.[45] The tribunal notes that the Turkey-Syria BIT does not contain a clause excluding its operation during times of armed conflict.[46] It finds that the presence of a full-protection and security clause and the war clause points to an intention that the treaty remains in operation during an armed conflict.[47]

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36 Para. 141 of the *Guris* case.

37 *Id.*

38 *Id*. Para. 143.

39 *Id.*

40 *Id*. Para. 144.

41 *Id.*

42 *Id*. Para. 146.

43 *Id.*

44 *Id.*

45 *Id*. Para. 147.

46 *Id*. Para. 148.

47 *Id.*

It finds that the use of terms such as "war," "insurrection" and "civil disturbance" in Article IV(3) captures "both inter-State and internal forms of conflict."[48] The tribunal finds that there is a presumption that a BIT continues to operate during an armed conflict as a general rule.[49] This presumption can only be rebutted if it became clear from the treaties' provisions that the parties intended for it to be suspended during an armed conflict.[50] Having already held that the treaty's provisions point to the contrary, the tribunal rejects Syria's arguments regarding the suspension of the treaty in its entirety.[51]

1.3. Tribunal's Findings on the Alleged Breach of the War Clause

The Turkey-Syria BIT contains a war clause which provides that

> Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.[52]

The claimants argued that Syria had violated the war clause by failing to extend the treatment due to Italian investors under Article 4 of the Italy-Syria BIT to them.[53] That BIT requires Syria to offer "adequate compensation" to investments protected under the BIT in respect of any losses suffered during an armed conflict.[54] Syria argued that the war clause in the Turkey-Syria BIT creates no obligation upon it to extend the provisions of the Italy-Syria BIT to the claimants.[55]

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48 Para. 148 of the *Guris* case.

49 *Id*. Para. 150.

50 *Id.*

51 *Id.*

52 Art. IV(3) of the Turkey-Syria BIT.

53 Para. 239 of the *Guris* case.

54 Article 4 of the Syria-Italy BIT provides that "[s]hould investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in which the investment has been effected shall offer adequate compensation in respect of such losses or damages. Irrespective of whether such losses or damages have been caused by governmental forces or other subjects, compensation payments shall be freely transferable as provided for in article 8 of this Agreement. The investors concerned shall receive the same treatment as the nationals of the other Contracting Party and, at all events, no less favourable treatment than investors of Third States."

55 Para. 239 of the *Guris* case.

The tribunal agrees with Syria and finds that the war clause provides "a relative standard of treatment."[56] Its operation is contingent on the state taking "measures" to address losses suffered by investors in the context of an armed conflict.[57] It requires Syria to extend any measures it may take to provide for such losses, in respect of its own nationals or those of third-states, to Turkish investors.[58] However, ultimately the measures must be taken before any liability can arise in terms of the war clause.[59] The tribunal finds that measures refers to "laws, regulations, and administrative or material acts" adopted by the state.[60] It holds that there is no evidence showing that Syria had taken any "measures" to compensate Italian investors for losses arising from the conflict.[61]

The tribunal explains that the claimants' case is premised on an interpretation of the term "measures" that would include the international law right to receive an offer of compensation that exists under the Italy-Syria BIT.[62] It finds that this argument confuses the concept of "measure" with the different concept of "treatment."[63] The latter concept is used in various articles of the Turkey-Syria BIT, including the war clause itself, and is a broader and more abstract concept.[64] Treatment is achieved through measures.[65] Accordingly, the tribunal finds that Italian investors have the right to receive specific treatment under Article 4 of the Syrian-Italian BIT.[66] However, as long as Syria does not take measures to give effect to these rights, the war clause in the Turkey-Syria BIT does not entitle the claimants to compensation under it.[67]

1.4. Tribunal's Findings on the War Clause as Lex Specialis

The claimants also relied on the general MFN clause in Article III(2) of the Turkey-Syria BIT.[68] They argued that the general MFN clause is not excluded by virtue of the

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56 Para. 242 of the *Guris* case.

57 *Id.*

58 *Id.*

59 *Id*. Para. 244.

60 *Id*. Para. 243.

61 *Id.*

62 *Id*. Para. 244.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id*. Para. 246. Article III(2) of the Turkey-Syria BIT provides that "[e]ach Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."

war clause.[69] Syria argued that the war clause was *lex specialis*. Consequently, the substantive protections in other treaty provisions are excluded in relation to losses "owing to war, insurrection, civil disturbance or other similar events."[70] The claimants argued that Syria was incorrect as the war clause is merely intended to provide additional protection during an armed conflict and does not in any way displace other provisions in the BIT.[71]

The tribunal explains that the clear meaning of the war clause is that Syria must grant Turkish investors MFN treatment and national treatment, "whichever is the most favourable," with regard to the measures that may be taken against losses under certain circumstances.[72] It agrees that this clause is of course formulated for a specific situation, that is, losses caused by "war, insurrection, civil disturbance or other similar events."[73] However, it holds that this specificity does not *per se* lead to the conclusion that the treatment provided in the war clause is exclusive of other provisions.[74] The tribunal finds that the war clause also does not say that its application excludes other BIT provisions.[75] It finds that if the intention of the contracting states were for the war clause to operate as an exclusion, exemption or repeal clause, the tribunal would expect them to have stipulated such a broad result in the text of the treaty.[76]

Regarding the general MFN clause specifically, the tribunal acknowledges that the war clause also addresses MFN treatment.[77] This it explains is a highly specific form of MFN treatment that only arises in the context of those exceptional circumstances provided for in the clause.[78] It finds that there is no conflict between the war clause and the more general MFN clause as compliance with the war clause would be consistent with the general MFN clause.[79] It accordingly holds that "the two articles are entirely concordant."[80] The tribunal finds another provision can only exclude a treaty provision as *lex specialis* where there is an actual conflict between the different provisions.[81]

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69 Para. 229 of the *Guris* case.

70 *Id.*

71 *Id.*

72 *Id*. Para. 231.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id*. Para. 260.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id*. Para. 261.

The majority of the tribunal finds that the war clause is "directed to an issue which may be debated as a matter of customary international law, namely whether war-losses programmes, which are sometimes discretionary, must be extended to foreign nationals on a footing of equality."[82] The majority indicates that it finds comfort in its conclusion from the various arbitral tribunals, which supposedly also concluded that specific MFN clauses do not exclude more general MFN clauses.[83]

1.5. Importing the Unqualified Extended War Clause Through the General MFN Clause

The tribunal finds that the ordinary meaning of the term "treatment accorded" in the general MFN clause includes the treatment that has actually been accorded and the treatment required by law.[84] It holds that the requisite treatment can come from an investment treaty between the host country and a third country.[85] The tribunal indicates that relying on provisions in other treaties is hardly controversial in investment law.[86] If the state parties wanted to exclude "treatment" owed in terms of other treaties, they were free to do so expressly within the treaty.[87] In the absence of such exclusion, the tribunal must interpret the clause in accordance with its ordinary meaning.[88] Therefore, the tribunal finds that the claimant is entitled to avail itself of the more favourable provisions in other treaties to which Syria is a party.[89]

The tribunal also finds that the term "in similar situations" does not require an investor to show that any discrimination had, in fact, occurred.[90] It disagrees with the

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82 Para. 261 of the *Guris* case.

83 *Id.* The cases the tribunal cites as purportedly supporting its conclusion are: *Siemens AG v. Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 90; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, para. 206; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, paras. 244, 375–377; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, paras. 270–271; *El Paso Energy International Co v. Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, para. 559; *Total SA v. Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, paras. 226 and 229; *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, paras. 319–320; *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, paras. 362–363; *Impregilo SpA v. Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, paras. 340–341.

84 Para. 252 of the *Guris* case.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id*. Para. 253.

90 *Id*. Para. 255.

tribunal in *İçkale İnşaat Limited Şirketi v. Turkmenistan* (hereinafter, the *İçkale* case),[91] who interpreted the terms "in similar situations" as restricting the scope of an MFN clause to *de facto* discrimination.[92] It holds that the terms "in similar situations" require no more than a proper application of the *eiusdem generis* principle.[93] The tribunal holds that it is difficult to agree with an interpretation that would allow a state to altogether avoid its MFN obligations by failing to accord third-country nationals the treatment they are legally entitled to.[94] This, it holds, would contradict the basic concept of MFN treatment.[95]

The tribunal holds that in terms of the *eiusdem generis* principle, it must first determine the scope of the general MFN clause to settle which matters are covered by it.[96] It holds that the MFN clause in the Turkey-Syria BIT is formulated broadly and not restricted to certain areas of treatment, such as the management of the investment. Therefore, the tribunal finds that the general MFN clause includes all treatment "that falls to be accorded under the Treaty in 'situations' in which the Treaty finds application."[97]

The tribunal finds that the war clause in the Italy-Syria BIT and the war clause in the Turkey-Syria BIT are in *pari materiae*.[98] The general MFN clause requires the tribunal to inquire whether the treatment in the Italy-Syria BIT is more favourable to the investor.[99] It concludes that is undoubtedly the case as the Turkey-Syria BIT provides for a relative standard of treatment in the case of war losses contingent upon the treatment offered to other investors.[100] In contrast, the Italy-Syria BIT provides investors with a right to receive compensation irrespective of the treatment offered to any other investors.[101] The investor is accordingly permitted to rely on the treatment owed to Italian investors by virtue of the general MFN clause.[102]

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91 ICSID Case No ARB/10/24, Award, 8 March 2016 (hereinafter, the *İçkale* case).

92 *Id*. Para. 329.

93 Para. 255 of the *Guris* case.

94 *Id.*

95 *Id.*

96 *Id*. Para. 278.

97 *Id.*

98 *Id*. Para. 279.

99 *Id*. Para. 280.

100 *Id*. Paras. 280–281.

101 *Id*. Para. 280.

102 *Id*. Para. 281.

1.6. Strict Liability in Terms of an Unqualified Extended War Clause

The tribunal indicates that it is aware that some investment treaties provide for compensation for damages caused by the "forces or authorities" of the host country.[103] It contrasts these traditional extended war clauses with the unqualified extended war clause contained in the Italy-Syria BIT.[104] The tribunal points out that a common feature in conventional extended war clauses, requiring attribution to the state, is absent from the unqualified extended war clause. It holds that the unqualified extended war clause covers damages regardless of the identity of the person who caused it. The article's first sentence refers to "loss or damage" arising as a result of any of the listed events, but does not stipulate that such "loss or damage" must be caused by the actions of the host country.[105] Therefore, it holds that the application of this provision is automatically triggered where losses arise due to any of the listed events.[106]

The tribunal holds that the inclusion of the second component providing for liability regardless of whether "governmental forces or other subjects" have caused the "losses or damages" serves to place its conclusion beyond doubt.[107] The tribunal holds that the breadth of the term "or other subjects" in the clause contrasts with the more restricted "governmental forces."[108] Therefore, an attribution analysis is not required: losses arising from the harmful behaviour of any person or entity in the course of a listed event is sufficient to establish liability.[109] The legality of the conduct, or lack thereof, is also entirely immaterial to the question of liability under the unqualified extended war clause.[110] Even if the state acts in a manner required out of military necessity, the obligation to pay compensation will remain.

2. Critical Analysis of the *Guris* Case

This contribution disagrees with the *Guris* case on specific key points. The partial dissenting opinion of Professor Ziade correctly points out that of the nine decisions the tribunal relied on, which purportedly supported its conclusion that general MFN clauses aren't excluded by the more specific MFN provisions in a war clause,

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103 Para. 284 of the *Guris* case.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id*. Para. 285.

109 *Id.*

110 *Id*. Para. 286.

only one dealt with the point.[111] The other decisions dealt with whether different standards, such as the full protection and security (FPS) standard, are excluded by the war clause as *lex specialis*.[112] A standard war clause cannot normally exclude standards such as FPS as they deal with different subject matters.[113] The war clause deals with non-discrimination concerning compensation for war losses, an obligation contingent upon the treatment of other investors. In contrast, FPS provides an objective obligation for the state to provide investments with the level of security reasonably expected from a state at its level of development.[114]

The author is aware that in the *Cengiz* case, the general MFN clause was not excluded by the MFN treatment contained in the war clause.[115] However, the general MFN clause considered in the *Cengiz* case was confined to matters pertaining to the "management, use, enjoyment or disposal" of the investment.[116] This makes the *Cengiz* case fundamentally distinguishable from the *Guris* case. The concurrent application of the restricted general MFN clause would not have rendered the war clause redundant. The general MFN clause, in that case, did not cover compensation due to war losses.[117] The finding that one clause would not render the other redundant was key to the conclusion that the general MFN clause and the war clause operate concurrently.[118] Although referencing the *Cengiz* case earlier in its decision, the majority fails entirely to engage with these material differences.

An established principle of treaty interpretation is that an interpretation that would render other treaty provisions redundant is to be avoided.[119] The *Guris* dissenting opinion correctly points out that concurrently applying the broadly formulated general MFN clause in the Turkey-Syria BIT would render the war clause redundant.[120] This is indeed alluded to by the majority when it finds that the war clause merely gives effect to the more general MFN clause in certain situations.[121] The majority's finding that the war clause is directed "to an issue which may be debated as a matter

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111 *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria*, ICC Case No. 21845/ZF/AYZ, Partial Dissenting Opinion of Nassib G. Ziadé, 31 August 2020 (hereinafter, the *Guris* dissenting opinion), para. 18.

112 *Id.*

113 Para. 357 of the *Cengiz* case.

114 *Id*. Para. 361.

115 *Id*. Para. 357.

116 *Id.*

117 *Id*. Para. 358.

118 *Id*. Para. 354.

119 Para. 226 of the *Strabag* case.

120 Para. 17 of the *Guris* dissenting opinion.

121 Para. 260 of the *Guris* case.

of customary international law"[122] is also entirely unconvincing. If the general MFN clause were intended to apply during an armed conflict, the investor would have been able to rely on it to seek treatment on a footing of equality. The question of what is required in terms of customary international law would have been entirely irrelevant. Ultimately, the equality of treatment would have arisen from the treaty and not from customary international law.[123] This argument would only be persuasive if the general MFN clause was restricted to particular matters that would not have covered compensation for war losses as with the MFN clause in the *Cengiz* case. Therefore, this contention by the majority still fails to address the need to include the war clause if it operates concurrently with the more general MFN clause.

The tribunal ought to have dismissed the reliance on the more general MFN clause where it would have rendered the war clause entirely redundant.[124] Had it so dismissed the reliance on the more general MFN clause, the tribunal should have confined its analysis to the question of the extent to which the war clause allowed the investor to seek the "treatment" owed to Italian investors. This contribution agrees with the tribunal's analysis indicating that an investor would only be able to rely on the war clause in the Turkey-Syria BIT to seek compensation if Syria had taken actual measures to compensate such investors.[125] In the authors view, Turkish investors could not therefore import the strict liability clause in the Italy-Syria BIT and their claim fell to be assessed in terms of other standards applicable during an armed conflict such as FPS.

The *Guris* dissenting opinion also takes issue with the interpretation the majority attached to the terms "in like circumstances."[126] The dissenting opinion points to a 2015 ILC study in which it was explained that the inclusion of the words "in like circumstances" placed some limitation on MFN clauses so that "only those investors or investments that are 'in like circumstances' with those of the comparator treaty can do so."[127] This requires a fact-based comparison with an investor from a third state.[128]

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122 Para. 261 of the *Guris* case.

123 There is no MFN obligation in terms of customary international law. A state's MFN obligations, therefore, arise entirely from a treaty and not from customary international law in either event. *See* in this respect Simon Batifort & J.B. Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111(4) Am. J. Int'l L. 873, 878 (2017).

124 Para. 17 of the *Guris* dissenting opinion. *See also* para. 226 of the *Strabag* case and *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, paras. 300–315.

125 Para. 244 of the *Guris* case.

126 Para. 21 of the *Guris* dissenting opinion.

127 *Id.*

128 Para. 22 of the *Guris* dissenting opinion.

The majority contends that the specific exclusion of certain treaties from the scope of the MFN clause points to an intention not to exclude treatment arising from a treaty.[129] It argues that this supports its findings that there is no need for a factual comparison to another investor.[130] This contribution agrees with the majority that the specific exclusion of certain treaties and not others may point to an intention not to exclude treatment arising from treaties from the scope of the MFN clause. However, in the author's view, this merely suggests an MFN obligation even if the source of the obligation giving rise to the treatment accorded is a treaty. It does not exempt the investor from showcasing that another similarly situated investor was entitled to the treatment. If the investor had showcased to the tribunal that an equally situated Italian investor had suffered losses and was owed compensation, they would have been able to rely on the general MFN clause. However, even if the investor had showcased such a similarly situated Italian investor, it remains the primary contention that the general MFN clause was inapplicable as its concurrent application with the war clause would render the latter redundant.

3. The Practical Implications of the Case for Syria

After years of conflict, the Syrian economy has been decimated. The continuous bombing has destroyed much of the infrastructure needed to run a well-functioning economy.[131] This includes significant damage to critical infrastructure, including more than one-third of the housing stock and half of the sanitation and education facilities.[132] The Syrian government has estimated that the reconstruction of the country will cost about $400 billion.[133] Syria is already likely to face substantial challenges in raising these funds, even if Western governments were to abandon sanctions policies against it.[134] The significant liability that Syria could be exposed to in the aftermath of the *Guris* case could greatly exacerbate these challenges. In 2020 Guatemala had, for example, paid an ICSID creditor to avoid defaulting on its sovereign debt.[135] The ICSID creditor had obtained an attachment order against Guatemala in the United States that would have seen bond payments liable to

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129 Para. 255 of the *Guris* case.

130 *Id.*

131 Eugenio Dacrema & Valeria Talbot (eds.), *Rebuilding Syria: The Middle East's Next Power Game?* 59–61 (2019).

132 *Id*. at 60.

133 *Id*.

134 *Id*. at 67.

135 Jack Ballantyne, *Guatemala pays ICSID award to avoid default*, Global Arbitration Review, 26 November 2020 (July 6, 2021), available at https://globalarbitrationreview.com/guatemala-pays-icsid-award-avoid-default.

attachment.[136] Where such orders are obtained, a state would need to settle the arbitral award or risk falling into perpetual default, severely limiting the extent to which the state can access credit on the international capital markets.

The extent to which the *Guris* case exposes Syria to liability depends on the number of treaties it has signed with MFN provisions. Syria has signed 44 bilateral investment treaties, of which 34 are in force.[137] Of the treaties signed by Syria, 23 contain MFN clauses. If the tribunal were to be correct in its findings that the general MFN clause is not excluded by the MFN treatment included in the war clause, investors from the following countries would all be able to rely on the "treatment" owed to Italian investors: Cyprus;[138] France;[139] Greece;[140] Germany;[141] India;[142] Iran;[143] Jordan;[144] Lebanon;[145]

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136 Ballantyne, *supra* note 135.

137 Syrian Arab Republic, Investment Policy Hub (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/204/syrian-arab-republic.

138 Art. 4 of the Agreement between the Government of the Republic of Cyprus and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2007) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4946/download (hereinafter, the Cyprus-Syria BIT).

139 Art. 3 of the Convention between the Government of the French Republic and the Government of the Syrian Arab Republic on Reciprocal Encouragement and Protection of Investments (1977) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1283/download.

140 Art. 4(1) of the Agreement between the Government of the Hellenic Republic and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2003) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1481/download (hereinafter, the Greece-Syria BIT).

141 Art. 3(1) of the Agreement between the Federal Republic of Germany and the Syrian Arab Republic Concerning the Encouragement and Reciprocal Protection of Investments (1977) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1422/download.

142 Art. 4(1) of the Agreement between the Government of the Republic of India and the Government of the Syrian Arab Republic on the Mutual Promotion and Protection of Investments (2008) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1605/download (hereinafter, the India-Syria BIT).

143 Art. 4(1) of the Agreement between the Government of the Islamic Republic of Iran and the Government of Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (1998) (July 6, 2021), available at https://edit.wti.org/app.php/document/show/052b47cb-4c18-402c-9092-17858cc3d865 (hereinafter, the Iran-Syria BIT).

144 Art. 2(5) of the Agreement on the Encouragement and Protection of Investments between the Hashemite Kingdom of Jordan and the Government of the Syrian Arab Republic (2001) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1764/download (hereinafter, the Jordan-Syria BIT).

145 Art. 3(1) of the Agreement between the Government of the Lebanese Republic and the Government of the Arab Republic of Syria on Encouragement and Reciprocal Protection of Investment (2010) (July 6, 2021), available at https://edit.wti.org/app.php/document/show/f2ed0df0-cf2c-4b86-b01d-738ee-ef2cc3f (hereinafter, the Lebanon-Syria BIT).

Malaysia;[146] Romania;[147] Slovakia;[148] Spain;[149] Switzerland;[150] the Czech Republic;[151] and Ukraine.[152]

The other challenge for Syria is that even if a tribunal held that the war clause is *lex specialis* as contended for in this contribution, this would not preclude all investors from importing the unqualified extended war clause contained in the Italy-Syria BIT. This arises from the fact that most of the BITs to which it is a party use broadly formulated war clauses that do not restrict treatment to "measures taken."[153] The Turkey-Syria BIT and Syria's BIT with Russia are its only BIT's restricting treatment to "measures taken."[154] Where the broader term of "treatment" is used without being subject to "measures taken," the war clause itself would entitle the investor to the

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146 Art. 3(1) of the Agreement between the Government of Malaysia and the Government of the Syrian Arab Republic for the Promotion and Reciprocal Protection of Investments (2009) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5690/download (hereinafter, the Malaysia-Syria BIT).

147 Agreement between the Government of Romania and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2008) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6202/download (hereinafter, the Romania-Syria BIT).

148 Art. 3(1) of the Agreement between the Slovak Republic and the Syrian Arab Republic for the Promotion and Reciprocal Protection of Investments (2009) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2265/download.

149 Art. 4(1) of the Agreement between the Kingdom of Spain and the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2003) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2282/download (hereinafter, the Spain-Syria BIT).

150 Art. 5(1) of the Agreement between the Swiss Confederation and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (2007) (July 6, 2021), available at https://edit.wti.org/app.php/document/show/06986697-a7bf-47e8-b26b-d71797c8638e (hereinafter, the Switzerland-Syria BIT).

151 Art. 3(1) of the Agreement between the Czech Republic and the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2008) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/987/download (hereinafter, the Czech Republic-Syria BIT).

152 Agreement between the Government of Ukraine and the Government of the Syrian Arab Republic on Promotion and Mutual Protection of Investments (2002) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6253/download (hereinafter, the Ukraine-Syria BIT).

153 Art. 6(2) of the Cyprus-Syria BIT; Art. 6(1) of the Greece-Syria BIT; Art. 6 of the India-Syria BIT; Art. 7 of the Iran-Syria BIT; Art. 3(4) of the Jordan-Syria BIT; Art. 5 of the Lebanon-Syria BIT; Art. 4 of the Malaysia-Syria BIT; Art. 5(2) of the Romania-Syria BIT; Art. 5(2) of the Slovakia-Syria BIT; Art. 6(1) of the Spain-Syria BIT; Art. 8 of the Switzerland-Syria BIT; Art. 4(1) of the Czech Republic-Syria BIT; and Art. 4(1) of the Ukraine-Syria BIT. The author is aware that the India-Syria BIT has been terminated. However, it will continue in force for a further 10-years after termination in terms of Article 15(4) of the India-Syria BIT.

154 Art. 5(1) of the Russia-Syria BIT; Art. IV(3) of the Turkey-Syria BIT.

"treatment" legally owed to Italian investors. These war clauses also do not subject the scope of its MFN treatment to investors in like circumstances.

This highlights the fact that the problem with unqualified extended war clauses does not only arise from an overly broad interpretation by the tribunal. This state of affairs can only be rectified through substantive reforms. Merely adopting any of the more restrictive interpretations contended for in this contribution, or the *Guris* dissenting opinion would be ineffective at truly limiting liability. These interpretations would have excluded liability in the *Guris* case but would not do so in many other cases.

4. Unqualified Extended War Clauses and Armed Conflict in Cameroon

4.1. Foreign Investors and Armed Conflict in Cameroon

Cameroon is a lower-middle-income country and is the largest economy in the Economic and Monetary Community of Central Africa (CEMAC).[155] Despite having a higher per capita GDP than the average in Sub-Saharan Africa, Cameroon has seen a growing number of its citizens living in poverty.[156] The growth in the number of people living in poverty conditions has been partially driven by factors such as slower economic growth and the volatility in global oil prices.[157] It has been reported that FDI levels into Cameroon are quite low relative to the size of its economy. Nevertheless, FDI into Cameroon has consistently been above $600 million a year.[158] Investors from France have traditionally dominated inward FDI into Cameroon. In recent years there has also been substantial growth in the number of Chinese investors investing in Cameroon.[159]

Boko Haram has been in Cameroon since 2009. Following the armed conflict between Boko Haram fighters and Nigerian security forces in Maiduguri, several Boko Haram militants crossed the border to seek refuge in the northernmost part of Cameroon.[160] Boko Haram's presence in Cameroon has undergone tremendous changes in the following years. At first, there had been relatively limited skirmishes between Cameroon and the armed group. However, from 2011 it began recruiting Cameroonians as fighters and used the Far North as a safe haven. The militants now

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155 The World Bank in Cameroon: Overview, The World Bank (July 6, 2021), available at https://www.worldbank.org/en/country/cameroon/overview.

156 Samuel Fambon et al., *Slow Progress in Growth and Poverty Reduction in Cameroon*, in Channing Arndt et al. (eds.), Growth and Poverty in Sub-Saharan Africa 293, 301–303 (2016).

157 *Id*. at 302.

158 United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2021: Investing in Sustainable Recovery*, UNCTAD/WIR/2021 (2021), at 249 (July 6, 2021), available at https://unctad.org/system/files/official-document/wir2021_en.pdf.

159 *Id*.

160 *Cameroon: Growing Boko Haram Threat*, 51 Afr. Res. Bull. Polit. Soc. Cult. Ser. 20245A–20246C (2014).

frequently engage in armed attacks against security forces in the region and the civilian population. Redaelli noted that

> the intensity of the armed violence opposing the Cameroon armed forces and Boko Haram, as well as the level of organization of Boko Haram in Cameroon, allow us to conclude to the existence of a [non-international armed conflict].[161]

4.2. Unqualified Extended War Clauses in Cameroonian BITs

Cameroon is a party to two treaties containing unqualified extended war clauses. The Cameroon-Italy unqualified extended war clause provides that

> Investors of one of the Contracting Parties whose investments have suffered losses due to war or any other armed conflict, revolution, national emergency, or revolt occurred in the territory of the other Contracting Party, the latter Party shall provide a fair and equitable treatment in accordance with Article 3(2) of this Agreement. In any case, they *will be entitled to compensation*.[162]

The first part of the clause appears to be a standard non-discrimination war clause. However, from the last sentence, it becomes clear that the war clause entitles the investor to compensation. This entitlement to receive compensation is also not qualified by any preconditions in the treaty. Accordingly, it is an example of an unqualified extended war clause, albeit less detailed than the clause in the Italy-Syria BIT.

The Agreement between the Government of the United Republic of Cameroon and the Government of The Socialist Republic of Romania on The Reciprocal Guarantee of Investments (hereinafter, the Cameroon-Romania BIT) also contains an unqualified extended war clause. This clause provides that

> Investors of one Contracting Party whose investments have suffered losses as a result of war, armed conflict or a state of national emergency in the territory of the other Contracting Party *shall receive from the latter the necessary compensation to cover the losses incurred*. The amounts relating to such compensation shall be freely transferable.[163]

It is immediately apparent that the clause in question is an unqualified extended war clause. It requires the state to provide compensation "to cover the losses

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161 *A Non-International Armed Conflict Against Boko Haram in Cameroon's Far North*, Rulac, 16 November 2020 (July 6, 2021), available at https://www.rulac.org/news/a-non-international-armed-conflict-against-boko-haram-in-cameroons-far-nort.

162 Art. 5(6) of the Cameroon-Italy BIT.

163 Art. 5(4) of the Cameroon-Romania BIT.

incurred." Therefore, Italian and Romanian investors are entitled to compensation should their investments incur losses in Cameroon amidst an armed conflict. The extent to which other investors in Cameroon will be able to rely on these clauses is contingent upon them being protected by an MFN clause. However, not all investors protected by an MFN clause will automatically be able to rely on these unqualified extended war clauses as some treaties contain restricted MFN clauses that do not cater for "treatment" in its broadest sense. The Canada-Cameroon BIT, for example, only provides for MFN treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory."[164]

Its war clause also only provides for MFN treatment "with respect to *measures*" the state takes to compensate investors.[165] As the tribunal in the *Guris* case correctly noted, the term "measures" is more restricted than "treatment" and requires action on the state's part.[166] The mere fact that Italian and Romanian investors enjoy an international law right to obtain compensation does not mean that Cameroon has taken any measures. Canadian investors cannot rely on the war clause to seek compensation until such time as Cameroon takes regulatory or other "measures" to provide any investors with compensation for losses.

However, the war clause in the Agreement between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments (hereinafter, the Korea-Cameroon BIT) is formulated in much broader terms. The clause provides that

> Investors of one Contracting Party, whose investments suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar situation in the territory of the other Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other forms of settlement, *treatment no less favourable* than that which the latter Contracting Party accords to its own investors or to investors of any third State.[167]

The treaty here does not restrict the term "treatment" by subjecting it to "measures taken." Where the broader concept of treatment applies, it is not subject to the state taking any actual measures.[168] In such instances, the investor will be allowed to rely

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164 Art. 5(2) of the Canada-Cameroon BIT.

165 *Id*. Art. 7.

166 Para. 244 of the *Guris* case.

167 Art. 4(1) of the Cameroon-Korea BIT.

168 Para. 244 of the *Guris* case.

on the more favourable treatment owed to another investor. Korean investors can, therefore, rely on the international law treatment owed to Italian and Romanian investors even if Cameroon has not taken any actual "measures." This is particularly important because even if future tribunals agreed with this contribution that the war clause is *lex specialis*, Korean investors would still be able to claim the treatment due to Romanian and Italian investors.

The majority of BITs to which Cameroon is a party uses the term "treatment" without it being qualified through the inclusion of the word "measures." The second part of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Cameroon (hereinafter, the UK-Cameroon BIT) war clause is a standard extended war clause that remains subject to the restrictive rules applicable to it.[169] However, the clause itself notes that it is "[w]ithout prejudice to paragraph (I) of this Article."[170] Accordingly, if more favourable treatment can be obtained under the first part of the war clause, that treatment will apply. The more restricted extended war clause will not, therefore, in any way constrain investors from the United Kingdom from relying on the treatment due to Italian and Romanian investors.

The USA-Cameroon BIT also contains an extended war clause. However, unlike the UK-Cameroon BIT, its extended war clause does not explicitly say that the clause is without prejudice to the non-discrimination war clause.[171] Nevertheless, the mere existence of this extended war clause is unlikely to impede American investors from being able to rely on the treatment due to Italian and Romanian investors. It cannot be said that the extended war clause in the USA-Cameroon BIT in any way derogates from the more conventional non-discrimination war clause. These two clauses do not ordinarily deal with the same subject matter, and accordingly, no *lex specialis* argument can reasonably arise. The general war clause deals specifically with non-discrimination regarding any "treatment" accorded to other investors with respect to losses in the course of an armed conflict.[172] The extended war clause, in turn, deals with specific situations in which investors have a right to receive compensation irrespective of any treatment accorded to other investors.

Chinese and German investors will also be able to rely on the broadly formulated standard non-discrimination war clauses contained in their respective nations' BITs

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169 Art. 4(2) of the UK-Cameroon BIT.

170 *Id*.

171 Art. IV(2) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment (1986) (July 8, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/599/download (hereinafter, the USA-Cameroon BIT).

172 *Id*. Art. IV(1).

with Cameroon.[173] The Trade, Investment Protection and Technical Cooperation Agreement between the Swiss Confederation and the Federal Republic of Cameroon (hereinafter, the Swiss-Cameroon BIT) does not contain a war clause. In the absence of a war clause, there can be no argument that a more specific clause restricts the general MFN clause. Therefore, Swiss investors in Cameroon will be able to rely on their broadly worded MFN clause to seek the treatment to which Romanian and Swiss investors are entitled to concerning compensation for war losses.[174]

From the discussion on the various BITs to which Cameroon is a party, it has become apparent that the majority of BIT protected investors in the country will be able to rely on the unqualified extended war clauses contained in the Italian and Romanian BITs. Even if a tribunal agreed with the interpretation contended for in this contribution that the war clause is generally *lex specialis* concerning MFN treatment, this would not offer Cameroon much relief. The broadly formulated war clauses in its BITs would not restrict investors from being entitled to rely on the "treatment" offered to certain investors in terms of the unqualified extended war clauses. It is submitted that this state of affairs is highly unsustainable as it may well expose a developing country such as Cameroon to virtually unlimited liability to foreign investors in its territory. The mere fact that investors incurred losses resulting from an armed conflict would entitle them to compensation. This could well effectively make IIL a shield to protect investors against business risks they had voluntarily assumed. Investors who knowingly invest in volatile regions would benefit from the higher returns often associated with such investments without genuinely being exposed to the heightened risk–a risk premium for risks borne by the state.

5. Unqualified Extended War Clauses and Armed Conflict in Yemen

5.1. Foreign Investors and Armed Conflict in Yemen

The Yemeni government has been engaged in a non-international armed conflict with Houthi rebel groups since 2014.[175] In 2015 President Hadi resigned and fled to Saudi Arabia, when the Houthi rebels occupied Sana'a, the capital of Yemen, and later his last refuge in Aden.[176] President Hadi later withdrew his resignation and

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[173] Art. 5(3) of the Agreement between the Government of the Republic of Cameroon and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (1997) (July 8, 2021), available at https://edit.wti.org/app.php/document/show/9ae94ed8-ec33-480e-a3a7-f2bb14a12dc5; Art. 3(3) of the Treaty between the Federal Republic of Germany and the Federal Republic of Cameroon on Promotion of Investment of Capital (1962) (July 8, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/588/download.

[174] Art. 7(1) of the Swiss-Cameroon BIT.

[175] Louis Koen & Brooke Hanson, *The Obligation on an Intervening State to Respect the Host State's IHL and IHRL Obligations in an Intervention by Invitation: An Analysis of the Saudi Intervention in Yemen*, 6(1) Groningen J. Int'l L. 203, 206 (2018).

[176] *Id*.

invited Saudi Arabia and its Gulf Cooperation Council (GCC) partners to use military force against the rebels.[177] The international community has continued to recognise President Hadi's government as the legitimate government of Yemen, and Saudi Arabia has intervened in the conflict on its behalf.

The United Nations has described it as the world's greatest humanitarian disaster.[178] The World Food Programme (WFP) has indicated that around 66% of the Yemeni population faces hunger.[179] In recent years there has been some limited progress towards a peace agreement as Southern separatist and the government has agreed to a ceasefire.[180] Oil production has also resumed in some areas.[181] However, most oil projects by foreign investors, such as the French oil giant Total, have not been operational in years. Total has also now sold the last of its operations in Yemen.[182] The presence of an unqualified extended war clause in any Yemeni treaties may expose the country to substantial liability. It could effectively allow these foreign investors to claim profits lost while the security risk in Yemen made it virtually impossible for them to carry on with their operations.

5.2. Unqualified Extended War Clauses in Investment Treaties with Yemen

The Agreement between the Government of the Republic of Italy and the Government of the Republic of Yemen on the Promotion and Protection of Investments (hereinafter, the Italy-Yemen BIT) contains an unqualified extended war clause which provides that

> Should investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in whose territory the investment has been effected *shall offer adequate compensation* in respect of such losses or damages…[183]

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177 Koen & Hanson 2018, at 206.

178 Hashim T. Hashim et al., *Yemen's Triple Emergency: Food Crisis Amid a Civil War and COVID-19 Pandemic*, 2 Public Health Pract. 100082 (2021).

179 Laurent Bukera, *Yemen*, World Food Programme (WFP) (2021) (July 10, 2021), available at https://www.wfp.org/countries/yemen.

180 Ahmed Al-Haj, *Saudis say Yemen's government, separatists agree to truce*, ABC News, 20 June 2020 (July 10, 2021), available at https://www.abc4.com/news/saudis-say-yemens-government-separatists-agree-to-truce/.

181 EIA Update on Energy Production in Yemen, U.S. Energy Information Administration (EIA) (2020) (July 10, 2021), available at https://www.eia.gov/international/content/analysis/countries_long/Yemen/yemen.pdf.

182 *Id*.

183 Art. IV of the Italy-Yemen BIT.

This unqualified extended war clause is virtually identical to the one contained in the Italy-Syria BIT. The clause is broadly formulated and will cover armed conflicts and an entire range of events that fall below the threshold of a non-international armed conflict.[184] This clause also does not explicitly include non-state actors. However, a tribunal is unlikely to regard this as limiting liability to conduct by the state as the clause itself merely depends on losses arising from any of the listed events. The tribunal in the *Guris* case interpreted the unqualified extended war clause in that case in a similar manner. The second component of the clause, which includes non-state actors explicitly, was merely regarded as confirmation that the interpretation of the first component was correct. In establishing liability, it is immaterial if the losses arose due to the conduct of the Yemeni government and its allies or Houthi rebels.

The war clauses contained in Yemeni BITs are quite diverse. As with Cameroon and Nigeria, several BITs do not restrict the war clause to "measures taken" but instead only use the broader term "treatment." Therefore, investors from these countries would be able to rely on the treatment owed to Italian investors. These countries are Austria,[185] China,[186] Ethiopia,[187] France,[188] Germany,[189] Hungary,[190] Jordan,[191]

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184 *See* Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)*, 12(3) J. Confl. Secur. L. 419 (2008) with respect to the threshold for a non-international armed conflict.

185 Art. 6 of the Agreement between the Republic of Austria and the Republic of Yemen for the Promotion and Protection of Investments (2002) (July 7, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/228/download.

186 Art. 5 of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Yemen on the Promotion and Reciprocal Protection of Investments (1998) (July 7, 2021), available at https://edit.wti.org/app.php/document/show/718c3112-dd74-4efb-91ae-053807d18e20.

187 Art. 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen on the Reciprocal Promotion and Protection of Investment (1999) (July 7, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1181/download.

188 Art. 4(1) of the Agreement between the Government of the French Republic and the Government of the Arab Republic of Yemen on the Promotion and Protection of Investments (1984) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1296/download.

189 Art. 4(3) of the Treaty between the Federal Republic of Germany and the Republic of Yemen Concerning the Encouragement and Reciprocal Protection of Investments (2005) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4796/download.

190 Art. 4(1) of the Agreement between the Republic of Hungary and the Republic of Yemen for the Promotion and Reciprocal Protection of Investments (2004) (July 6, 2021) available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1559/download.

191 Art. 3(2) of the Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Yemen on the Mutual Promotion and Protection of Investments (1996) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1778/download.

Lebanon,[192] the BLEU,[193] and the Czech Republic.[194] However, the war clauses in Yemen's treaties with both the Russian Federation and Turkey restrict the operation of MFN treatment to "measures taken."[195] The Russian treaty also limits the general MFN clause to matters pertaining to the investment framework concerning the "management" or the "disposal" of the investment. It is submitted that receiving compensation for war losses does not ordinarily form part of the management or disposal of an investment. The *Cengiz* tribunal also implicitly recognised this when it found that the general MFN clause and the war clause dealt with different subject matters.[196] Russian investors would accordingly not be able to rely on the war clause or the general MFN clause to seek the treatment owed to Italian investors. However, as soon as Yemen takes actual measures to compensate other investors, they may rely on the war clause to seek compensation as well.

The Agreement between the Government of the Islamic Republic of Iran and the Government of the Republic of Yemen on the Promotion and Reciprocal Protection of Investments (hereinafter, the Iran-Yemen BIT) contains a somewhat unique war clause that does not use the term "treatment" at all. The war clause, in that case, provides that

> Should an investor of one of the Contracting Parties incur losses or damages on its investment in the territory of the other Contracting Party due to revolution, war, other forms of armed conflict, state of emergency, civil strife, riot, or other similar events, the Contracting Party in which the investment has been effected shall accord to such investor compensation in respect of such losses or damages not less favorable than that accorded to its own investors or to investors of any other country whichever is more favorable.[197]

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192 Art. 4(3) of the Agreement between the Government of the Republic of Yemen and the Government of the Republic of Lebanon (1999) (July 6, 2021), available at https://edit.wti.org/app.php/document/show/e04f2373-ca74-4671-b520-990d716dccc5.

193 Art. 5 of the Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Yemen Concerning the Reciprocal Encouragement and Protection of Investments (2000) (July 6, 2021), available at https://edit.wti.org/app.php/document/show/e118d805-0fce-4043-80b4-85dd32f11d4c.

194 Art. 4(1) of the Agreement between the Czech Republic and the Republic of Yemen for the Promotion and Reciprocal Protection of Investments (2008) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1000/download.

195 Art. 5(1) of the Agreement between the Russian Federation and the Government of the Republic of Yemen on the Promotion and Mutual Protection of Investments (2002) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5938/download; Art. III(2) of the Agreement between the Republic of Turkey and the Republic of Yemen Concerning the Reciprocal Promotion and Protection of Investments (2000) (July 6, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2357/download.

196 Para. 357 of the *Cengiz* case.

197 Art. 7 of the Iran-Yemen BIT.

The clause in this instance will likely be interpreted in a manner akin to clauses limiting the obligation to "measures taken." The clause confines the duty of non-discrimination entirely to "compensation accorded." Therefore, this war clause cannot be used to seek the "treatment" owed to Italian investors. The same war clause can be found in Yemen's investment treaty with Oman.[198] The extent to which investors from Iran and Oman can rely on the treatment owed to Italian investors is accordingly dependant on whether or not the war clause is *lex specialis*.

From the preceding discussion, it becomes apparent that some treaties to which Yemen is a party would restrict investors' ability to import the unqualified extended war clause. However, many countries still have broadly worded war clauses that would permit reliance on the "treatment" owed to Italian investors. If Yemen is forced to take "measures" to compensate any of those investors, the obligation to accord compensation to the other investors is triggered in either event. The limitations in those extended war clauses are only effective as long as Yemen can avoid the need to take measures to compensate other investors for war losses.

It has been estimated that Yemen will need around $25 billion over five years just to repair basic infrastructure in its 16 largest cities.[199] Yemen is already likely to experience substantial challenges in raising the necessary funds. If Yemen were to be required to compensate investors for all losses incurred, it might well make it impossible for Yemen to fund the required reconstruction after the conflict. There is an urgent need to address the substantial imbalance between investors' rights and the need for Yemen to address the needs of its people. In the author's view, unqualified extended war clauses are a prime example of an instance in which gains have been privatised while risks are socialised. The risk may also appear purely hypothetical, as no investor has ever invoked this clause against Yemen. However, the *Guris* case serves as a clear warning that states should not grow complacent by the infrequency at which a particular clause has been invoked and regard the risk as inconsequential.

6. The Role of the BRICS Countries in Reforming IIL

BRICS countries such as South Africa, India and Brazil have been particularly vocal on the need to reform IIL.[200] These countries recognise the urgent need to address

198 Art. 7 of the Agreement for the Reciprocal Promotion and Protection of Investments between the Government of the Sultanate of Oman and the Government of the Republic of Yemen (1998) (July 7, 2021), available at https://edit.wti.org/app.php/document/show/3a70b787-8edd-4daf-a55d-2c088b87fb23.

199 World Bank, *Yemen Dynamic Needs Assessment: Phase 3 – 2020 Update* (2020), at 1 (July 8, 2021), available at https://documents1.worldbank.org/curated/en/490981607970828629/pdf/Yemen-Dynamic-Needs-Assessment-Phase-3-2020-Update.pdf.

200 Malebakeng A. Forere, *The New Developments in International Investment Law: A Need for Multilateral Investment Treaty?*, 21 Potchefstroom Electron. L.J. 1 (2018). The South African approach has also not been without criticism. *See, e.g.*, Mmiselo F. Qumba, *South Africa's Move Away from International Investor-State Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?*, 52(1) De Jure 358 (2019).

the imbalance between investors' rights and states' ability to regulate in the public interest.[201] It is widely believed that IIL imposes extreme limitations on states power to regulate and provides investors with overly broad rights.[202] The BRICS countries have all expressed support, in principle, for the reform of IIL in their submissions to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.[203] However, UNCITRAL Working Group III is principally focused on procedural reforms. South Africa noted in its submissions to the working group that

> Any discussion on [Investor State Dispute Settlement] ISDS has to be located in a wider context and reform dialogue – to *include reform of the terms of the underlying treaties*, because reforming ISDS is in itself not sufficient to solve the current problems the regime faces. *Many problems of the current regime can only be tackled through a reform of substantive standards*…[204]

This contribution aligns itself with the views of South Africa. The unqualified extended war clauses discussed here are a prime example of an instance where the problem arises not only through interpretation but also through the very wording of the clause itself. It is acknowledged that these unqualified extended war clauses could theoretically be addressed through bilateral discussions between the parties to such treaties. However, practically speaking, several of the countries specially affected by these clauses, such as Yemen, lack the diplomatic capacity to seek such reforms. The internationally recognised government of Yemen barely has control over its territory, which results in discussion on ISDS reform being relatively low on its list of immediate priorities.

Akinkugbe also correctly notes that critical voices from the Global South have been largely marginalised in discussions on the reform of IIL.[205] This is further exacer-

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201 Fabio C. Morosini, *Reconceptualizing the Right to Regulate in Investment Agreements: Reflections from the South African and Brazilian Experiences*, SSRN (2018), at 2 (July 7, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209000.

202 *Id*.

203 United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China*, A/CN.9/WG.III/WP.181, 19 July 2019 (July 7, 2021), available at https://undocs.org/en/A/CN.9/WG.III/WP.177; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of the Russian Federation*, A/CN.9/WG.III/WP.188/Add.1, 31 December 2019 (July 7, 2021), available at https://undocs.org/en/A/CN.9/WG.III/WP.188/Add.1; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of South Africa*, A/CN.9/WG.III/WP.176, 17 July 2019 (July 7, 2021), available at https://undocs.org/en/A/CN.9/WG.III/WP.176 (hereinafter, the South African UNCITRAL submissions).

204 Paras. 19–20 of the South African UNCITRAL submissions.

205 Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53(1) Case W. Res. J. Int'l L. 7, 10 (2021).

bated by the limited expertise available on IIL in some states. In its submissions to the working group, Mali candidly notes that developing countries often have "only limited expertise in complex legal issues."[206] This limited expertise also affects the agreement's content as states may not always be fully aware of the consequences of specific clauses contained in these agreements. Therefore, the support of a group with greater diplomatic influence, such as the BRICS, may be necessary to place these reforms on the international agenda. However, this must be done to allow these countries a greater opportunity to have their concerns heard and not per se to let the BRICS countries take over the entirety of the reform agenda.

South Africa's stance on the extent of a state's obligation to provide an investor with physical security is reflected in its Protection of Investment Act.[207] The Act shows a clear preference for limiting states liability to what is practically possible within the state's available resources.[208] Although it does not speak specifically to South Africa's stance on unqualified extended war clauses, it provides insight into South Africa's attempts to limit obligations on the state, which would be practically impossible to implement. In light of its submissions to the UNCITRAL working group, South Africa supports significant substantive reforms. If its other BRICS partners were to join it in pushing to have substantive reforms such as unqualified extended war clauses placed on the agenda, it may yet succeed.

Despite the substantial potential for the BRICS countries to advance the reform of IIL, some scholars are of the view that the BRICS countries have substantially diverged from each other in terms of their policy stance.[209] As previously noted, all of the BRICS countries acknowledge the need for reform in IIL. However, they seem to differ somewhat on the extent to which reforms are needed.[210] Cai argues that China's support for gradual change diverges substantially from the fundamental changes sought by Brazil, India and South Africa.[211] The author agrees that China has not publicly expressed support for radical changes to the contemporary IIL regime. However, it has expressed an evident willingness to reform those areas of IIL where there is a vast imbalance between investor's rights and the ability of the state to regulate. Man has, for example, argued that although the inclusion of sustainable development in international investment agreements has a positive impact, few

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206 United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Mali*, A/CN.9/WG.III/WP.181, 17 September 2019 (July 7, 2021), available at https://undocs.org/en/A/CN.9/WG.III/WP.181.

207 Forere 2018, at 14.

208 Sec. 9 of the Protection of Investment Act 22 of 2015; Forere 2018, at 14.

209 Cai 2018, at 217.

210 *Id*.

211 *Id*.

countries do so.[212] She points out that one of the few exceptions is China, which is increasingly incorporating sustainable development into its international investment agreements, especially in agreements with its African partners.[213] Clauses creating strict liability are perhaps some of the clearest examples of an area with a substantial imbalance between the investor and the state. The author submits that this is an area where China would likely support its BRICS partners in seeking more significant substantial reforms.

Russia has also been supportive of substantive reforms to IIL. However, it is not clear what the Russian position is on unqualified extended war clauses. Russia has not included such clauses within its bilateral investment treaties. However, Russia is a party to one such clause contained in the Agreement on Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community (the EAEC Investment Agreement). This unqualified extended war clause provides that

> *Investors have the right to compensation* for damage to their investment and income as a result of *civil unrest, hostilities, revolution, insurrection, state of emergency or other similar circumstances* in the territory of the recipient state...[214]

This unqualified extended war clause is also broadly formulated and covers a range of events that fall well below the threshold of a non-international armed conflict. The consequences of this clause for members of the EAEC may be tempered somewhat by the fact that MFN clauses frequently excludes agreements signed as part of a regional integration agreement. Nevertheless, for purposes of this contribution, the existence of the clause raises important questions as to whether the Russian approach to limiting state liability during an armed conflict diverges from that of some of its other BRICS partners. Notwithstanding this clause, the author does not believe that the Russian government supports broad, unqualified extended war clauses as a general Russian investment policy. If it had supported the expansion of such clauses, the author would expect to have seen such clauses in at least some of its BITs concluded after the EAEC Investment Agreement.[215]

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212 Amy Man, *Old Players, New Rules: A Critique of the China-Ethiopia and China-Tanzania Bilateral Investment Treaties*, in Clair Gammage & Tonia Novitz (eds.), Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks (2019) (July 8, 2021), available at https://uwe-repository.worktribe.com/output/845897.

213 *Id*. at 2.

214 Art. 5 of the Agreement on Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community (2008) (July 8, 2021), available at https://edit.wti.org/app.php/document/show/732e30de-bd49-431b-a69e-ab7797c2ce58.

215 Russia has concluded several agreements since the EAEC Investment agreement. None of these agreements contain unqualified extended war clauses. *See, inter alia*, the Agreement between the

Conclusion

From this contribution, it becomes apparent that the relatively infrequent occurrence of unqualified extended war clauses does not make it of lesser importance to understand these clauses. Italian BITs generally contain these clauses in BITs precisely with those engaged in an armed conflict. The broad interpretation of MFN clauses adopted by investment tribunals also results in a vast increase in the number of investors who may rely on an unqualified extended war clause. This also showcases the need for states to pay greater attention to MFN clauses when implementing treaty reforms. States have not paid adequate attention to the reform of MFN clauses when adopting treaty reform. The Nigeria-Morocco BIT has, for example, widely been hailed as a prime example of a reformed BIT.[216] Yet, that treaty contains a largely unreformed MFN provision in its war clause, which uses the broader term "treatment" without being subject to "measures taken."[217] If the treaty comes into force, investors from Morocco could potentially rely on the unqualified extended war clause in the Nigeria-Italy BIT instead of the more limited specific extended war clause contained in the Nigeria-Morroco BIT.

In this contribution, it has also been argued that states should not regard the risk of unqualified extended war clauses as immaterial merely because such clauses had not been frequently invoked in the past. The *Guris* case, and the implications it holds for broadly formulated unqualified extended war clauses, may not be as widely known yet. However, its discussion on arbitration news subscription services means it has been brought to the attention of precisely those advising investors.[218] Pandora's Box has been opened, and more investors will likely rely on such clauses in future arbitrations. This would not be surprising given the substantial surge in compensation sought by investors over losses suffered during an armed conflict.

Government of the Russian Federation and the Government of the Kingdom of Morocco on the promotion and mutual protection of capital investments (2016) (July 8, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5963/download; the Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran About Promotion and Mutual Protection Capital Investments (2015) (July 8, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5935/download; the Agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the Promotion and Mutual Protection of Investments (2015) (July 8, 2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5999/download and the Agreement between the Russian Federation and Government of the Republic of Uzbekistan on Encouragement and Mutual Protection of Investments (2013) (July 8, 2021), available at https://edit.wti.org/app.php/document/show/c946a0d0-63f6-4805-be84-0af482f05120.

216 Chidebe Nwankwo, *Balancing International Investment Law and Climate Change in Africa: Assessing Vertical and Horizontal Norms*, 17(1) Manch. J. Int'l Econ. L. 48, 61–63 (2020).

217 Art. 9(1) of the Morocco-Nigeria BIT.

218 Bohmer, *supra* note 7.

The unqualified extended war clauses make obtaining compensation substantially easier than proving a breach of standards such as full protection and security.

This contribution has also opined that the BRICS countries can play a clear role in placing the elimination of unqualified extended war clauses on the international agenda. Their support may well be essential to assist smaller states who lack the diplomatic capacity and/or expertise in investment law matters. However, there is a need for the BRICS countries to adopt a more unified approach when seeking reform. This contribution has acknowledged that it is unlikely that the BRICS countries will adopt an entirely unified approach given their unique national interests. The clearest point of consensus among the BRICS countries has been the need to reform those areas of IIL that grants investors disproportionate rights. Unqualified extended war clauses represent an ideal point for these nations to adopt a unified approach, given the far-reaching implications of such clauses for developing countries.

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BRICS IN CREATING DIGITAL EDUCATIONAL ENVIRONMENTS: SOCIAL AND LEGAL ASPECTS OF 'A NEW NORMAL'

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The global challenges brought about by the recent pandemic outbreak of COVID-19 have forced many countries to seek out effective digital tools for supporting higher education. The issue of not only the technological complexity of the digitalization of education but also the necessity to develop and standardize the social and legal frameworks of E-education in the BRICS countries has become acute. This article examines how the BRICS countries regulate the digital transformation of higher education and discusses the changes that need to be made to social and legal regulation in order to accommodate the process of digital transformation. The authors' research leads them to the conclusion that the process of social and legal modification of higher education in the aspect of its digital transformation is patchy. On the one hand, it is forced by unpredictable global challenges like the pandemic outbreak. In this aspect, the digital transformation across the BRICS countries tends to be rather international. On the other hand, the absence of common settings and digital standards within the BRICS countries could intensify the digital stratification among universities and lead to a decrease in the quality of higher education. The authors propose the establishment of a set of common digital standards that comprise a unified ecosystem of digital tools and services, a common model for a "digital university," unified standards of digital competences and educational services, frameworks and standards of technical modernization as the basis of digital transformation and the creation of a common technical landscape.

Keywords: E-education; BRICS countries; distance education; digital transformation; emergency remote teaching; conditions; standards; digital sovereignty.

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Introduction

Before the pandemic, the process of digital transformation of different aspects of social life appeared to be more or less evolutionary. Nowadays, it is quickly becoming a challenging reality. It is increasingly evident that higher education is also rapidly changing. The main strategic point of this change is the transformation of a traditional, physically-based learning model into an online one with the help of breakthrough digital smart technologies.

The term "digital transformation"[1] comprises changes in various economic, cultural, social and technological aspects, as well as in educational processes and their outcomes. It does this by investing efforts in improving the standard of living and general living conditions of citizens through excellence in education, which prepares specialists with a high level of competence and the skills needed to work in a constantly evolving digital environment. At the same time, we are noticing a certain imbalance in certain public spheres, which manifests itself in as a lag in not only the updated managerial, methodological and expert systems but also in the relevant legislative framework due to the advanced changes taking place in the world. The educational cluster is among the challenges that trigger the need for joint efforts and require multilateral solutions. Taking into consideration the needs of today's digital native students, who spend

[1] What Is Digital Transformation? Complex Guide for 2022, Netguru (Mar. 2, 2023), available at https://www.netguru.com/glossary/digital-transformation.

much of their time on the Internet and get nearly all of their information from online platforms, it is necessary to unite the existing international experiences, practices and achievements to implement digitalization into education and to outline its legal norms, rules and ways of developing and reinforcing it.

According to "The Strategy for BRICS Economic Partnership 2025,"[2] digital transformation is considered one of the main areas for partnership. It has been declared that the BRICS countries acknowledge the importance of eliminating the digital divide and developing digital literacy. Deepening partnership cooperation and drawing on all of the collective experience of the BRICS countries creates an innovative impulse to boost the sustainable development of significant areas, including education, with the means of digital technologies.

The necessity to develop technology-enhanced teaching and learning in the BRICS area was confirmed in the Cape Town Declaration on Education and Training during the 6th BRICS education ministers meeting of 10 July 2018. The initiative proposed by the Republic of India to improve E-education and its policy was supported at this meeting and sealed in the common decision "to promote a transformative education agenda that actively addresses twenty first century challenges and opportunities, especially regarding the technological changes commonly known as the fourth industrial revolution."[3] This plan would include a comparative study of digital learning (E-learning) across universities in the BRICS member states and the implementation of the best practices in online university-level courses. There is no doubt that the key trends in higher education modernization are a result of advances in communication and interconnection.

The policy of E-learning in the BRICS countries is based on multiple trends and thus meets various needs that range from providing access to higher education for less privileged areas as in Brazil, India and South Africa to promoting national education on an international level as in China and Russia. Despite their existing socio-economic and geopolitical differences, the BRICS countries are striving to improve their national digital education by means of a global transformation.

E-learning is at the center of scientific interest for many researchers. It is being widely studied from the viewpoints of pedagogy, psychology, education management and some others (Zhang et al.,[4] Gerasimova et al.[5]). However, this issue

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[2] BRICS Russia 2020, *Strategy for BRICS Economic Partnership 2025* (November 2020) (Mar. 2, 2023), available at http://www.brics.utoronto.ca/docs/2020-strategy-1148155.pdf.

[3] The 6th BRICS Education Ministers Meeting, Cape Town Declaration on Education and Training, 10 July 2018 (Mar. 2, 2023), available at http://nu-brics.ru/media/uploads/filestorage/documents/final_declaration_10_july_2018_approved_by_ministers.pdf.

[4] Xiaolei Zhang et al., *The New Historical Divide of Online Education: Dialogues with Key Leaders During the Epidemic*, 3(4) ECNU Review of Education 755 (2020).

[5] *Герасимова В., Меламуд М., Тутаева Д., Романова Ю., Женова Н.* Внедрение технологии электронного обучения на факультете дистанционного обучения Российского экономического универ-

has not been sufficiently studied as far as its social and legal aspects are concerned. A comparative study of E-education in different countries also reveals numerous scientific gaps. Our analysis of previous work conducted in the aforementioned sphere within the framework of the BRICS organization revealed the importance and timeliness of the provided scientific investigation.

In the present paper, we have researched the experience of the BRICS countries in regulating digital transformation in higher education. The overall strategy of our research is aimed at defining the main social trends and challenges of digital transformation in higher education in the BRICS countries as well as the legal regulations in this field. Therefore, the research tasks were as follows:

• to identify the main global and national settings and trends in digital higher education within the BRICS countries;

• to determine the main features of the social and legal regulation of digital higher education in the BRICS countries;

• to analyze the feasibility of common digital conditions in higher education.

Comparative analysis and case study methods are used in our research to help us determine the main features of the digital transformation at the tertiary education level in the BRICS countries.

The first part of the paper is devoted to the main issues surrounding the digital transformation of higher education and such key terms as digital transformation, common digital conditions, digital divide and digital sovereignty. Next, we deal with the experience of the BRICS countries in developing digital transformation. In order to identify the best practices, we compare the social challenges and legal tools of digital education across the BRICS countries and investigate how successfully the tools are implemented and challenges resolved. In this regard, we have analyzed some data from the United Nations Education, Scientific and Cultural Organization (UNESCO) and other documents related to the BRICS countries. The sources of information used in our research include UNESCO and OECD documents, declarations by the BRICS Ministers of Education and laws on education.

1. The Digital Transformation of Higher Education: Challenges and Perspectives

The analysis of the current situation of higher education in the world shows that despite the diversity of contextual settings, conditions and experiences, there are large-scale mutually influencing trends that have become common in many countries. These emerging trends are shaping a new teaching-learning ecosystem, such as more effective ways of knowledge transfer and acquisition, tools and services

ситета имени Г.В. Плеханова // Журнал социальных исследований и образовательных исследований. 2018. Т. 9. № 2 [Vera Gerasimova et al. *The Adoption of E-Learning Technology at the Faculty of Distance Learning of Plekhanov Russian University of Economics*, 9(2) J. Soc. Res. Educ. Res. (2018)].

for digital assessment, the organization of practices, internships for students, and upskilling.

The establishment of the BRICS Network University in 2014 is a good example of one of these large-scale trends. It is stated that the Network University is an educational project aimed at (a) integrating advanced educational systems into teaching-learning management in order to develop high-quality educational programs and (b) facilitating joint research on the process and outcomes of the fourth industrial revolution in the BRICS countries. The digitalization of the BRICS Network University activities is widely supported by all of the BRICS member states, according to the Declaration of the 7th Meeting of BRICS Ministers of Education of 21 October 2020. It was noted that the digital transformation of higher education has great significance for the promotion of the Fourth Industrial Revolution. In addition, the creation of National Research and Education Networks (NRENs) helped in the development of international learning standards and systems, which are primarily associated with the provision of Internet service.[6]

The use of digital and online educational technologies has resulted in a large number of students who have been presented with an excellent opportunity to overcome various obstacles and limitations in order to complete their courses with maximum convenience regarding the choice of place, time and pace of studying. These advances have made many universities massive and inclusive. Lately, an increasing number of universities have begun to offer free online courses in a wide variety of disciplines, which attracts new students and makes the educational process more accessible and comprehensive. According to the UNESCO Institute for Statistics,[7] the Federative Republic of Brazil, the Republic of India and the People's Republic of China are the leaders in this trend. Nevertheless, a growing gap is observed between mass (mainstream) and elite universities. This is specifically true for China, which tends to invest money in elite universities. The same cannot be said about South Africa, a country that tries to develop the available educational opportunities for the poor districts of the country.

The major challenge and strategic driver in the higher education industry is the use of emerging technologies, the development of online courses and engaging with online student enrollments. These variables help with a number of issues, from the accessibility of higher education through reducing its cost to global social, economic, political and other benefits. The development of free educational resources, such as Massive Open Online Courses (MOOCs), is at the forefront of the modernization of

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[6] Declaration of the 7th Meeting of BRICS Ministers of Education, 21 October 2020 (Mar. 2, 2023), available at http://conf.rudn.ru/conf/nu_brics/2020%20Russia%20%28online%29.pdf.

[7] Paulo A. Meyer M. Nascimento, *Some Trends in Higher Education and Research in BRICS Countries* (Mar. 2, 2023), available at https://nkibrics.ru/system/asset_docs/data/54cf/749e/6272/690a/8b22/0000/original/Some_trends_in_higher_education_and_research_in_BRICS_countries.pdf?1422881950.

higher education. An analysis of the official documents relating to MOOCs[8] shows that China ranked number one among the BRICS countries in terms of top providers of MOOCs. Overall, there seems to be some evidence to indicate that the main digital transformations of higher education in the BRICS countries are connected with the introduction of online courses and the development of national digital platforms. Such an approach not only promotes national education on an international level, such as in China and Russia, but also brings about cross-cultural recognition of the qualifications of the graduates and the excellence of the universities. Moreover, it helps Brazil, India and South Africa open access to higher education to less privileged social classes, enabling them to become beneficiaries of the modern transformational trends in education.

The BRICS countries focused on issues of digitalization for the first time within the framework of the Meeting of Ministers of Communications in 2015. As a result, the problem of the digital transformation of higher education ranks among other such aspects as the digital divide, digital sovereignty, digital transformation, digital educational platforms etc. Furthermore, this leads to an urgent necessity to fill the existing legal gap and carefully develop a substantial set of legal norms, acts and other fundamental regulations that define both E-education and open online courseware within the framework of the BRICS countries. The issue remains complicated due to numerous collateral legal handicaps, such as online security, cybersecurity, information security, personal data protection, copyright protection, proctoring, integrated management and others. In the near future, higher education management will potentially face the inevitability of solving legislative and education delivery mechanism problems that are especially complicated in the context of online instruction.

In October 2019, the United Nations Educational, Scientific and Cultural Organization (UNESCO) held a conference, during which the governments agreed to define, certify or license, and promote the standards related to the legal and technical specifications for online teaching and open educational course materials.[9] This initiative came about very timely in the context of the unforeseen COVID-19 pandemic, and it works for the common interest of getting the future of higher education on the right trajectory. Currently, a transformational paradigm of various scenarios for the development of higher education, including online education, is being carried out in each country.

The necessity to develop and introduce common digital standards and conditions is supported by many researchers all over the world as "the establishment of

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[8] Class Central (Mar. 2, 2023), available at https://www.classcentral.com/.

[9] Malcolm Brown et al., *2020 EDUCAUSE Horizon Report: Teaching and Learning Edition* (2020) (Mar. 2, 2023), available at https://library.educause.edu/-/media/files/library/2020/3/2020_horizon_report_pdf.pdf?la=en&hash=08A92C17998E8113BCB15DCA7BA1F467F303BA80.

standardized practice in higher education."[10] According to the EDUCAUSE Horizon Report 2020, the implementation of educational technology must be based on open educational standards.[11]

Generic, structured conditions are connected with the quality of education, which becomes a major challenge from the digital perspective. Many countries including BRICS have to work out their own standards to provide quality education.[12]

The outbreak of the pandemic forced the global community to intensify the necessity of introducing generic structured conditions and to introduce the so-called "emergency remote education"[13] alongside other associated terms with it such as "disrupted classes,""undisrupted learning."[14] The Ministries of Science and Education of a number of countries strongly recommended that universities switch to a remote form of work with students. Distant learning encompassed academic and scientific activity as well as the management of the educational process. As the situation progressed, it became apparent that many universities were methodologically and technically not ready for distance teaching. Both professors and students experienced different difficulties in attempting to engage in the digital space of online education. There were both subjective and objective reasons for this, ranging from the students' as well as professors' computer illiteracy and their inadequate digital knowledge in general to the lack of the universities' own technical incapacity to transfer education online. In this period of digital transformation not only of the educational sphere but also of society as a whole, providing opportunities for distance learning is becoming a new area of responsibility for universities. Since a person immersed in an electronic device is an integral, distinguishing feature of the present time, education is committed to empowering the generation of digital talent.

Cross-cutting digitalization and adoption of digital technologies in education started before the COVID-19 outbreak, but the pandemic accelerated the process greatly. We suppose that the COVID-19 crisis period faced the transformation of such core higher education values[15] as equitable access and institutional autonomy.

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[10] Victoria I. Marín et al., A *Comparative Study of National Infrastructures for Digital (Open) Educational Resources in Higher Education*, 12(2) Open Praxis 241 (2020).

[11] Brown et al., *supra* note 9.

[12] *Клягин А.В. и др.* Шторм первых недель: как высшее образование шагнуло в реальность пандемии [Alexander V. Klyagin *The Storm of the First Weeks: How Higher Education Stepped into the Reality of a Pandemic*] (2020).

[13] Aras Bozkurt et al., *A Global Outlook to the Interruption of Education Due to COVID-19 Pandemic: Navigating in a Time of Uncertainty and Crisis*, 15(1) Asian J. Distance Educ. 1 (2020).

[14] UNESCO Institute for Information Technologies in Education, *Online and Open Education in Shanghai: Emergency Response and Innovative Practice during COVID-19 Pandemic* (June 2020) (Mar. 2, 2023), available at https://unesdoc.unesco.org/ark:/48223/pf0000373891/PDF/373891eng.pdf.multi.

[15] Scholars at Risk, *Promoting Higher Education Values: A Guide for Discussion* (December 2017) (Mar. 2, 2023), available at https://www.scholarsatrisk.org/wp-content/uploads/2018/08/SAR_Promoting-Higher-Education-Values-Guide.pdf.

It is necessary to point out that digitalization can have both positive and negative effects in the educational spheres of the BRICS countries. On the one hand, digital technologies play a pivotal role in improving the overall quality of education. As a result, students from impoverished regions can have access to a better education. On the other hand, the digital divide can aggravate social inequality between students from elite and provincial universities.

The necessity to transform education by digital means during the COVID-19 pandemic and post-pandemic period was recognized as an urgent one. One of the ways to establish common frameworks for digital security is through the development of joint or collaborative programs in the fields of computer science and information security. The timeliness of addressing this issue was confirmed in the Declaration of the 7th Meeting of BRICS Ministers of Education on 21 October 2020.

In our opinion, the issue of a technical standard refers to a standard of conditions. The elaboration of mutual technical standards became strictly necessary during the pandemic period, causing an urgently required sudden shift towards remote education.

Before the COVID-19 pandemic period, the main focus was on the harmonization of educational quality assurance standards, rather than on the advancement of technology. We argue that the adoption of common norm settings and principles of emergency remote education should be based on generally valid common digital standards and values.

The participants of the twelfth BRICS Academic Forum to the Leaders confirmed the crucial importance of "a comprehensive and a balanced approach" to the development of information and communications technologies as a means of both technical and security advancement.[16] It was further emphasized that during the pandemic, distance or blended learning became an important tool and an indicator of high-quality education.

Common digital standards are closely associated with a certain standard of security. The essential role of standards of security in the development of advanced technologies is recognized in all spheres of cooperation among the BRICS countries.[17]

One common issue for all of the BRICS countries is that the pandemic crisis aggravated the problem of the digital divide, the digital literacy of the teaching staff and students and the lack of students' responsibility and motivation. The digital divide is associated with inequalities in access to information technologies.[18] The digital

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[16] BRICS Russia 2020, Academic Forum, *Recommendations of the 12th BRICS Academic Forum to the Leaders: BRICS New Vision for a Better World* (October 2020) (Mar. 2, 2023), available at https://brics-russia2020.ru/images/106/14/1061406.pdf.

[17] Форум БРИКС по инновационным сетям будущего // НКИ БРИКС, Россия. 1 ноября 2020 г. [BRICS Forum on Innovative Networks of the Future, BRICS National Research Committee, Russia, 1 November 2020] (Mar. 2, 2023), available at c/posts/show/5fad582a62726945d5760000.

[18] Massimo Ragnedda & Glenn W. Muschert (eds.). *The Digital Divide: The Internet and Social Inequality in International Perspective* 344 (2013).

divide can be described as "the gap between individuals, households, businesses and geographic areas regarding their opportunities to access information and communication technologies and their use of the Internet for a wide variety of activities."[19] According to the 2021 EDUCAUSE Horizon report,[20] the digital divide remains one of the most important social problems that only widens during times of pandemic. It is acknowledged that the pandemic has exposed the problem of the digital divide, uncovering its negative impact in a great number of countries.

The problem of the digital divide is a concern that affects all of the BRICS countries. According to the World Bank, the challenges of both the COVID and post-COVID periods can be classified into two categories: short-term and long-term.[21] It is worth noting that educational inequality is a warning sign for the short and long-term consequences of the world's deepening economic crisis, the stagnation of all kinds of internal and international cooperation and so-called "technical debt."[22]

Like other countries, the BRICS countries launched emergency remote education[23] in an attempt to cope with the COVID-19 pandemic. As a result, the pandemic necessitated the development of new kinds of literacies, such as "lockdown literacies" to deal with teaching at a physical distance from students, namely, distance learning.[24]

According to the 2021 EDUCAUSE Horizon report, the issue of providing quality online learning will have a significant impact on the future of higher education all over the world.

The researchers offer to make a distinction between so called "weak sovereignty" and "strong" sovereignty. Weak sovereignty refers to the protection of digital rights by private companies, whereas strong sovereignty means having the protection provided by the government. Brazil, India and South Africa tend to base their policies on weak sovereignty, whereas Russia and China have put into practice a policy of strong sovereignty. According to the experts, the authorities of a country with strong sovereignty can further exacerbate the digital isolation of that country.[25]

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19 OECD, *Understanding of the Digital Divide* (2011), at 5 (Mar. 2, 2023), available at https://www.oecd.org/sti/1888451.pdf.

20 Kathe Pelletier et al., *2021 EDUCAUSE Horizon Report: Teaching and Learning Edition* (2021) (Mar. 2, 2023), available at https://library.educause.edu/-/media/files/library/2021/4/2021hrteachinglearning.pdf?#page=4&la=en&hash=64CACBDA4DAC0F6158951941AD2A8952A9A81100.

21 World Bank, *The COVID-19 Crisis Response: Supporting Tertiary Education for Continuity Adaptation and Innovation* (2020) (Mar. 2, 2023), available at https://documents1.worldbank.org/curated/en/621991586463915490/The-COVID-19-Crisis-Response-Supporting-Tertiary-Education-for-Continuity-Adaptation-and-Innovation.pdf.

22 *Id.*

23 UNESCO, *Extraordinary Session of the Global Education Meeting, Education Post-COVID-19: 2020 Global Education Meeting Declaration*, ED/ADG/2020/03 (2020) (Mar. 2, 2023), available at https://unesdoc.unesco.org/ark:/48223/pf0000374704.

24 Ben Williamson et al., *Covid-19 Controversies and Critical Research in Digital Education*, 46(2) Learn. Media Tech. 117 (2021).

25 *Кутюр С., Тоупин С.* Что означает понятие «суверенитет» в цифровом мире? // Вестник международных организаций. 2020. Т. 15. № 4. С. 48–69 [Stephane Couture & Sophie Toupin, *What Does the Notion of "Sovereignty" Mean When Referring to the Digital?*, 15(4) Bull. Int'l Organizations 48 (2020)].

The main hindrances to the digital transformation of higher education are largely connected with a lack of digital infrastructure, the digital divide and poor digital skills.

Thus, this section has discussed the primary issues concerning the digital transformation. In general, therefore, it appears that digital trends modeling a new educational ecosystem all over the world determine both the challenges and future perspectives of higher education establishments. What follows is a detailed consideration of the empirical evidence reshaping the educational landscape in the BRICS countries.

2. Higher Educational Systems of the BRICS Countries in the Digital Era

2.1. Brazil: the National Policy in the Digitalization of Education

According to the Brazilian Digital Strategy, education is included as one of the national goals for ensuring digital development.[26] In 2007, the National Program of Educational Technology was established by the Ministry of Education in Brazil. This program initiates the implementation of information technology (IT) in educational establishments. As a result, the vast majority of universities have focused their efforts on the significant enhancement of educational technologies and infrastructure with the help of digital transformation.

During the COVID-19 pandemic, distance education highlighted the concerns surrounding the digital divide, especially among the underprivileged.[27] One of the possible explanations for the rapid growth of the digital divide in Brazil is the decentralized nature of its educational system. Consequently, Brazil is seeking effective tools to bridge the social and digital gaps "between regions and institutions in terms of access, quality, and funding of education."[28]

Brazil has also developed national free online platforms such as UNESP Aberta (https://unespaberta.ead.unesp.br), UNICAMP (https://moocs.ggte.unicamp.br) and FGV (https://portal.fgv.br) as part of their efforts to offer greater opportunities for education and training through online learning. One of the most distinctive features of these platforms is that they were established by separate universities and are specialized in teaching law, business, education, and science courses among others. The independence of Brazilian universities is fully guaranteed by Article 207 of the Brazilian Constitution, which grants autonomy to the universities.[29]

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[26] Ioannis Lianos & Alexey Ivanov, *Digital Era Competition: A BRICS View*, Report by the BRICS Competition Law and Policy Centre, HSE-Skolkovo Institute for Law and Development (2019), at 101 (Mar. 2, 2023), available at https://publications.hse.ru/mirror/pubs/share/direct/321442173.pdf.

[27] Carlos Monroy et al., *Education in Brazil*, World Education News and Reviews, 14 November 2019 (Mar. 2, 2023), available at https://wenr.wes.org/2019/11/education-in-brazil.

[28] OECD, *Education Policy Outlook in Brazil: With a Focus on International Policies* (2021) (Mar. 2, 2023), available at https://www.oecd-ilibrary.org/education/education-policy-outlook-in-brazil_e97e4f72-en.

[29] Ewelina K. Niemczyk & Jan de Groof, *Brazilian Education System: Aims, Achievements and Alignment with the BRICS Organisation*, in Deon Vos et al. (eds.), A New Dawn 149, 170 (2020).

The growing popularity of E-learning among Brazilians can be attributed to the increasing number of people who wish to get enrolled in higher education but either live in distant rural territories or cannot afford it because of low income. The information technology and Internet facilities are more than adequate in Brazil to offer online courses in higher education.

Brazil tends to focus on developing the standard of online education offered on a national level. However, one of the reasons for the country to ignore the promotion of online courses on an international level is the lack of legal regulation of E-education represented by foreign investors. According to Ambient Insight, Brazil is strongly against the expansion of foreign providers of E-education.[30] This finding confirms that Brazil recognizes the strategic necessity of establishing and defending its digital sovereignty.

Article 206 of the Brazilian Constitution provides for the guarantee of standards of quality.[31] Despite this, there is little consideration given to the issue of creating common digital standards.

2.2. Russia: Digital Transformation in Education

In recent years, Russia has been paying great attention to supporting research and development in the field of artificial intelligence and creating programs for online learning. The pandemic has compelled us to move along this path more actively than was previously the case.

According to the Decree on National Objectives for Russia's Development up to 2030, digital transformation is considered to be one of the main national goals of the Russian Federation's development. As a result, the Ministry of Science and Higher Education of the Russian Federation passed "The Strategy of Digital Transformation of Science and Higher Education" in 2021. The purpose of the strategy is the development of "digital sophistication (maturity)" in higher education as an important criterion of digital transformation. Digital transformation should be understood as referring to a meaningful change and enhancement of activities based on new models, approaches and means of communication brought about by digital technologies.[32]

According to Article 16 of the Federal Law on Education (2012), E-learning in Russia is considered to be an organization (an arrangement) of educational activities with

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[30] Tony Bates, *A Survey of Distance Education in Brazil*, Online Learning and Distance Education Resources, 4 November 2016 (Mar. 2, 2023), available at https://tonybates.wpengine.com/2016/11/04/a-survey-of-distance-education-in-brazil/.

[31] Niemczyk & de Groof 2020.

[32] Стратегия цифровой трансформации отрасли науки и высшего образования (утв. Минобрнауки России) [Strategy of Digital Transformation of Science and Higher Education (approved by the Ministry of Education and Science of Russia)] (Mar. 2, 2023), available at https://minobrnauki.gov.ru/upload/iblock/e16/dv6edzmr0og5dm57dtm0wyllr6uwtujw.pdf.

the help of databases and information technologies.[33] The term "electronic education" is used in the Russian laws pertaining to education. However, the variety of online resources available compels Russian legislators to regulate the online education field, creating a need to introduce the legal status of "Internet education."

New amendments in Article 16 of the Federal Law on Education describe the legitimacy and binding character of E-education in cases of emergency. Russian legislation codifies the circumstances in which E-learning must be used in emergency situations. It is necessary to mention that part 3 of Article 16[34] speaks about the necessity to create conditions for E-learning that include "electronic learning resources, information technology, relevant technological tools that provide complete learning …" Nevertheless, the digital standards are not prescribed in spite of the fact that "in the near future, investing in technology to support learning beyond the school boarders will be required both for schools and their students."[35]

Due to the widespread availability of IT technologies and Internet facilities to Russians, as well as the huge distances between educational institutions and students, the market for online education in Russia is developing dynamically every year. In comparison with traditional forms of education, online education stands out for its mobility, relevance and cost of services provided. Based on modern technology, an increasing number of Russian universities are beginning to promote modern educational formats, primarily to improve the quality of education. The process is governed by the Ministry of Science and Higher Education of the Russian Federation and by the national priority project "Modern Digital Educational Environment in the Russian Federation."

The Russian educational platforms offer online courses in the basic subjects studied at Russian universities. For instance, the platform Openedu.ru was created in 2015 by the Association "National Platform for Open Education," established by leading Russian universities. All of the courses are developed in accordance with the requirements of federal and state educational standards; all of the courses meet the requirements for learning outcomes of educational programs implemented in universities; and special attention is paid to the effectiveness and quality of online courses as well as to the procedures for evaluating learning outcomes. Currently, more than 480,000 people are trained at the platform Universarium (390,000 through the portal www.universarium.org and approximately 90,000 using mobile apps).

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[33] Федеральный закон от 29 декабря 2012 г. № 273-ФЗ «Об образовании в Российской Федерации» // СПС «КонсультантПлюс» [Federal Law No. 273-FZ of 29 December 2012. On Education in the Russian Federation, SPS "ConsultantPlus"] (Mar. 2, 2023), available at https://www.consultant.ru/document/cons_doc_LAW_140174/.

[34] *Id.*

[35] Pierre Gouëdard et al., *Education Responses to COVID-19: Implementing a Way Forward*, OECD Education Working Papers No. 224 (2020) (Mar. 2, 2023), available at https://www.oecd-ilibrary.org/education/education-responses-to-covid-19-implementing-a-way-forward_8e95f977-en.

Twenty-four percent of users are citizens of other countries (the Republic of Belarus, Kazakhstan, Ukraine, etc.). The Universarium platform hosts more than eighty different courses from thirty top Russian universities, successful companies and business coaches. The courses are targeted at a wide audience, including secondary and high school students, college and university students, recent graduates and those seeking any kind of professional training.

According to the passport of the project "The Modern Educational Digital Environment in the Russian Federation,"[36] by 2025, more than 11 million students will have taken online courses. The number of online courses available is predicted to be no less than 4000. The benefits of using online courses are obvious, including the following: increasing the attractiveness and variability of educational programs; optimizing expenses; flexibility and individualization of education; objective and independent control of students' knowledge; engaging top professors and affording professors release time for research and scientific work.

2.3. India: The Specific Challenges of Digital Education

According to India's National Educational Policy 2020, digital education is considered a means of giving disadvantaged students the opportunity to have access to higher education and providing the possibilities for lifelong learning.[37]

According to the "National Mission of Education through Information and Communication Technology," E-learning is considered "an effort multiplier for providing access, quality and equality in the sphere of providing education to every learner in the country."[38] It is necessary to highlight that the Indian government strictly regulates the promotion of E-learning in higher education and treats it as a major source of "import" rather than "export."[39] That is why the National Education Policy adopted in India in July 2020 comprises special conditions for foreign universities, namely to set up their foreign campuses in India using ICT.[40]

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[36] Постановление Правительства Российской Федерации от 15 апреля 2014 г. № 295 «Об утверждении государственной программы Российской Федерации «Развитие образования» на 2013–2020 годы» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 295 of 15 April 2014. On Approval of the State Program of the Russian Federation "Development of Education" for 2013–2020, SPS "ConsultantPlus"] (Mar. 2, 2023), available at https://www.consultant.ru/document/cons_doc_LAW_162182/.

[37] Ministry of Human Resource Development, Government of India, *National Education Policy 2020* (Mar. 2, 2023), available at https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf.

[38] Declaration of the 7th Meeting of BRICS Ministers of Education, *supra* note 6.

[39] Mary Bold et al., *BRICS and Clicks*, 12(1) J. Asynchronous Learning Networks 5 (2020).

[40] Shuriah Niazi & Yojana Sharma, *New policy highlights university autonomy, internationalisation*, University World News, 7 August 2020 (Mar. 2, 2023), available at https://www.universityworldnews.com/post.php?story=20200807160631529.

COVID-19 has forced many countries to rethink the role of IT in modern society. Many countries have launched special guidelines for digital education. India introduced advisory guidelines in an effort to improve both synchronous and asynchronous education. Moreover, in May 2020, India introduced a program for multimode access to digital and online education[41] that is intended to help overcome the digital divide at the educational level.[42] The implementation of this program resulted in the development of a new digital educational platform known as DIKSHA (Digital Infrastructure for Knowledge Sharing) that will support and promote the national sovereignty of India under the slogan "One Nation, One Digital Platform." In addition, the Department of Higher Education developed the system of private coaching to bridge the divide. We believe that the development of this unified digital platform will help to solve the problem of "a severely fragmented higher educational ecosystem."[43]

In India, the specific challenges of digital education are focused on "raising digital literacy through broader access to digital devices."[44] According to the "PM eVidya Programme,"[45] initiated by the Indian government during the spring 2020 coronavirus lockdown, the top 100 universities of the National Institutional Ranking Framework are now allowed to offer fully online degree programs. This not only meets the expectations of a fifty percent increase in students' enrollment over the next fifteen years, but it also makes India one of the fastest-growing online education markets.

Thus, we can conclude that the strategy for the development of digital education in India is most closely connected with the necessity to expand the domestic digital market, which helps safeguard the national security of the country. The strategy of the PM eVidya Programme motivates Indian universities to use both their own and foreign online programs. As for foreign online programs, India tends to use the online education models of the United Kingdom and the United States.[46] Moreover, online education in India intensifies the country's association "with equity with

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41 Department of School Education & Literacy, Ministry of Human Resource Development, Government of India, *PRAGYATA Guidelines for Digital Education*, at 39 (Mar. 2, 2023), available at https://www.mhrd.gov.in/sites/upload_files/mhrd/files/pragyata-guidelines_0.pdf.

42 *Id.*

43 National Education Policy 2020, *supra* note 37.

44 OECD, *Economic Outlook for Southeast Asia, China and India*: *Rethinking Education for the Digital Era* (2020), at 101 (Mar. 2, 2023), available at https://www.oecd-ilibrary.org/docserver/1ba6cde0-en.pdf?expires=1688999811&id=id&accname=guest&checksum=61AAC2502008D1A9B3518DC0369A6EE0.

45 PM eVidya – One Nation, One Digital Platform (Mar. 2, 2023), available at https://pmmodiyojana.in/pm-evidya/#About_PM_eVidya-_One_Nation_One_Digital_Platform.

46 *Online Higher Education in India during the COVID-19 pandemic*, ORF, 26 May 2020 (Mar. 2, 2023), available at https://www.orfonline.org/research/online-higher-education-in-india-during-the-covid-19-pandemic-66768/.

infrastructure, finance, and social standing present in the country."[47] It is necessary to emphasize that the productive potential of online education needs reimagining, as it is currently seen only as an "emergency remote teaching" option. The "Digital India" campaign is aimed at improving digital literacy while also bringing about other obvious global reach benefits, such as expanding, liberalizing and inclusive access to higher education; time, money and physical infrastructure cost savings; environmental friendliness (no paper books or examinations, thereby preserving trees); flexibility in learning schedules; the development of intrinsic motivation; and the reduction or elimination of corruption, favoritism and bureaucracy.[48]

India, in terms of its number of online national platforms such as SWAYAM (Study Webs of Active-Learning for Young Aspiring Minds) and NPTEL (The National Programme on Technology Enhanced Learning) ranks second among the BRICS countries. The process of developing such platforms was initiated by the government of India. SWAYAM and NPTEL were designed by the Indian Institutes of Technology (IITs) and Indian Institutes of Management (IIMs) under the supervision of the Ministry of Human Resource Development (MHRD) and the All India Council for Technical Education (AICTE) to achieve the key goals of national education policy, namely to make education accessible, equitable, and of high quality. Both the aforementioned Indian online platforms are completely free of charge and offer over 2500 engineering, science, and humanity courses in fields such as architecture and planning; engineering and technology; management and commerce; math and sciences; humanities and the arts; law; education and others.

The rise in demand for E-education in India is a result of the government's endeavors to implement an educational project to combat the struggle with illiteracy in vast rural areas with the help of digital technologies.[49] Traditional education in India is becoming increasingly expensive and, as a result, less accessible to the low-income population. Online education is a good complement and alternative to traditional education, as it makes acquiring knowledge easier, less expensive and more affordable. The launch of national Massive Online Open Courses (MOOCs) in India raised enrollments in higher education by thirty percent in 2021. The digitalization of education will provide India with a larger number of educated people, qualified specialists and professionals, thereby contributing to the social and economic growth of the country and achieving the government's national goals.

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47 Department of School Education and Literacy, Ministry of Human Resource Development, Government of India, *India Report – Digital Education* (June 2020) (Mar. 2, 2023), available at https://mhrd.gov.in/sites/upload_files/mhrd/files/India_Report_Digital_Education_0.pdf.

48 Ivanov & Lianos, *supra* note 26.

49 Technavio, *Distance Learning Market in India 2016–2020* (October 2016) (Mar. 2, 2023), available at https://www.technavio.com/report/india-k12-and-higher-education-distance-learning-market-india-2016-2020.

2.4. China: The National Informatization Development Strategy

China plans to become the world leader in higher education by 2050.[50] One of the means to achieve this goal is digital transformation. National digital education standards and guidelines in this country are developed by the Chinese E-Learning Technology Standardization Committee (CELTSC) under the sponsorship of the Chinese government.

China tends to use the term "Informatization" of education.[51] According to the Outline of the National Informatization Development Strategy, the informatization of education is aimed at "innovating public services, guaranteeing and improving people's livelihood."[52]

The National Long-Term Educational Reform and Development Plan 2010–2020, states that "all levels of digital education service systems shall be available in urban and rural basic schools, promoting the educational content, teaching methods and methods of modernization."[53] All measures of E-learning development are connected with national interests and Chinese sovereignty.[54] According to the OECD Development Centre,[55] China's greatest digital education challenge is primarily associated with "bridging the digital talent gap between demand and supply."[56]

The promotion of digital sovereignty in China is also supported by the development of national repositories and centralized online platforms.

The necessity to initiate E-education in China is supported by the government plan that provides the conditions for universities both to reform China's traditional, "cramming" teaching mode and to advance to the top in the international rankings. The process is regulated and supervised by the Ministry of Education according to the National MOOC Recognition Program. Within the framework of the national plan for middle and long-term state reforms and development, prestigious universities

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[50] *Машкина О.А.* Страны БРИКС: стратегии развития высшего образования // Вестник Московского университета. Серия 20: Педагогическое образование. № 2. С. 40–48 [Olga A. Mashkina, *BRICS: Development Strategies for Higher Education*, 20(2) Bull. Moscow U. Series 20: Tchr. Educ. (2017)].

[51] Lih-Ching C. Wang et al., *The E-learning Experience: General Truths and the Chinese E-learning Experience*, 38(3) Int'l J. Instructional Media 225 (2011).

[52] *Outline of the National Informatization Development Strategy*, China Copyright and Media, 27 July 2016 (Mar. 2, 2023), available at https://chinacopyrightandmedia.wordpress.com/2016/07/27/outline-of-the-national-informatization-development-strategy/.

[53] Chunyan Wang & Guodong Zhao, *Open Educational Resources in the People's Republic of China: Achievements, Challenges and Prospects for Development*, UNESCO Institute for Information Technologies in Education (2011) (Mar. 2, 2023), available at https://iite.unesco.org/pics/publications/en/files/3214700.pdf.

[54] Mini Gu et al., *Education in China*, WENR, 17 December 2019 (2019) (Mar. 2, 2023), available at https://wenr.wes.org/2019/12/education-in-china-3.

[55] OECD, *supra* note 28.

[56] OECD, *supra* note 44, at 101.

are financed to develop MOOCs. The Open University of China, initiated and directed by the Ministry of Education, is one illustration of this concept: the educational process combines face-to-face sessions and online learning. The total amount of the country's MOOC funding currently equals fourteen million dollars.

China possesses all of the necessary conditions for digital transformation, including the necessary IT and Internet infrastructure and capabilities, well-developed national MOOC platforms, the full support of the government, legislative norms and E-education regulations. Furthermore, China is determined to promote its education on international online platforms like EdX, Coursera and FutureLearn. As a result, the experts predict that the Chinese market will significantly transform in the near future.[57]

2.5. South Africa: the Potential of the Digital Learning

Emergency education in South Africa has been mostly connected with television and radio. The educators point out that the utilization of radio and television is considered a short-term emergency solution. As a result, educators have to review and provide for the completion of the curriculum.[58] The long-term emergency solution should instead be connected with the development of the necessary infrastructure for online learning.[59]

The universities of South Africa were advised to make use of their "emergency break" to explore the potential of digital learning.[60] In order to accomplish this purpose, a remote education policy is under implementation. This project addresses crucial issues such as digital structure, development of teachers' digital skills and the digital transformation of education.

There are a number of licensed software platforms used (Learning Management Systems (LMS), Course Management Systems (CMS) and other virtual learning environments), although there is only one national online educational platform (MOOC SA (https://moocs.org.za)). Several universities (for instance, the University of South Africa (UNISA), the University of Cape Town, the University of Witwatersrand, the University of Kwazulu Natal and the University of Johannesburg) successfully use the software platforms to administer teaching, which may be a transitional step on the way to online education. In addition, the Massive Open Online College is a groundbreaking educational and training project for South Africa. The MOOC SA

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57 Joseph Crawford et al., *COVID-19: 20 Countries' Higher Education Intra-Period Digital Pedagogy Responses*, 3(1) J. Appl. Learn. Teach. 9 (2020).

58 Department of Basic Education, *2020 Draft Framework for Curriculum Recovery Post COVID-19* (2020) (Mar. 2, 2023), available at https://www.sirpierre.co.za/wp-content/uploads/2020/04/Curriculum-Recovery-Plan-Final-Draft-6-April-2020.pdf.

59 Williamson et al. 2021.

60 Crawford et al. 2020.

has become a sub-mainstream MOOC platform that hosts free courses created by domestic and foreign professionals.

Conclusion

According to Article 60 of the 10th BRICS Summit Johannesburg Declaration held in Johannesburg, South Africa on 26 July 2018,[61] it was stated "to develop effective policies to bridge the digital divides, including through supporting people to learn and by adopting new technologies and ensure effective mechanisms for transfer of relevant technologies." It is necessary to emphasize the importance of equal access to the Internet as one of the ways to gap and eliminate the digital divide. Article 56 of the BRICS Leaders Xiamen Declaration confirms the necessity for all states to "participate on an equal footing in the evolution and functioning of the Internet."[62]

However, all of the BRICS countries are facing the acute problem of so-called "digital sovereignty." There is no doubt that the expansion of cyberspace due to advancements in Internet technologies necessitates consideration of the issue of digital sovereignty. In the academic literature, we are able to find an integral part of it, namely, "data sovereignty," which is characterized as "a spectrum of approaches adopted by different states to control data generated in or passing through national internet infrastructure."[63] In the field of digital education, however, the notion of "digital sovereignty" is most commonly associated, in our opinion, with the right to education in global cyberspace and freedom from the digital divide, both of which promote the interests of national security. For example, a two-month campaign to protect students' rights in cyberspace was launched by the Cyberspace Administration of China in 2020.[64] It was aimed at improving the quality of online courses. Moreover, the breakthrough of digital learning in pandemic times necessitated the introduction of a draft regulation requiring foreign teachers to comply with the requirements of Chinese laws and regulations while developing the contents of courses that

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61 BRICS in Africa: Collaboration for Inclusive Growth and Shared Prosperity in the 4th Industrial Revolution, 10th BRICS Summit Johannesburg Declaration, Johannesburg, South Africa, 26 July 2018, BRICS Information Centre (Mar. 2, 2023), available at http://www.brics.utoronto.ca/docs/180726-johannesburg.html.

62 BRICS Leaders Xiamen Declaration, Xiamen, China, 4 September 2017, BRICS Information Centre (Mar. 2, 2023), available at http://www.brics.utoronto.ca/docs/170904-xiamen.htm.

63 Dana Polatin-Reuben & Joss Wright, *An Internet with BRICS Characteristics: Data Sovereignty and the Balkanisation of the Internet*, 7 July 2014 (Mar. 2, 2023), available at https://www.usenix.org/system/files/conference/foci14/foci14-polatin-reuben.pdf.

64 *China launches campaign to improve online courses for minors*, Xinhua, 7 August 2020 (Mar. 2, 2023), available at http://english.www.gov.cn/statecouncil/ministries/202008/07/content_WS5f2d542-fc6d029c1c26376b2.html.

"should not undermine Chinese sovereignty, security, honorable reputation and public interest."[65]

Consequently, we examined the available research data on MOOCs and online platforms in the BRICS countries that is available from Class Central Aggregator and found some interesting tendencies. The results showed that China, India and Russia are developing their national online platforms and introducing their courses both on the international and national levels, whereas Brazil and South Africa are not sufficiently represented on the international level when we take into consideration international platforms such as EdX (https://www.edx.org), Coursera (https://www.coursera.org) and FutureLearn (https://www.futurelearn.com). Furthermore, judging by this ranking, China and India dominate the majority of key positions. Additionally, we found that the number of English courses offered by Brazilian online platforms is quite limited.

The evaluation of the results of the study as well as a comparative analysis of the findings revealed that the potential benefits of global strategies for the digitalization of education become possible only with the consideration and application of modern achievements, including the areas of IT development, a strong legal framework and the readiness of universities for this kind of transformation.

As we can see, higher education in the BRICS countries, like any other country in the world, is subjected to the influence of the digital revolution. The research showed that China, India and Russia are trying to promote their representation on the international level by launching MOOCs on platforms such as EdX, Coursera and FutureLearn. Brazil and South Africa, on the other hand, are developing more MOOC systems on the national level.

As a means to achieving prosperity and digital development for the BRICS countries, the creation of a unified online BRICS platform might be proposed and initiated within the framework of the Network University. We think that the indicators relating to the promotion of MOOCs and their inclusion in popular online platforms will also be included in various university rankings in the near future.

The analysis of the definition of digital learning and related notions shows that there is no common term for it, even in such BRICS documents as the declarations of the BRICS Network University. Unlike Russia and China, the terms "distance education," "open learning" and "online education" are used[66] in legal documents in India. It is possible that the term "distance education" might be the generic term for all of its forms, such as online learning, E-learning and digital education.[67] According

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[65] *China solicits public opinion on foreign teacher regulation*, Xinhua, 22 July 2020 (Mar. 2, 2023), available at http://english.www.gov.cn/statecouncil/ministries/202007/22/content_WS5f17923fc6d029c1c2636756.html.

[66] Technavio, *supra* note 49.

[67] Bozkurt et al. 2020.

to UNESCO, distance education is any "educational process in which all or most of the teaching is conducted by someone removed in space and/or time from the learner, with the effect that all or most of the communication between teachers and learners is through an artificial medium, either electronic or print."[68] In this aspect, we agree with the opinion about the necessity to harmonize the education system's terminology.[69] It becomes especially important in the field of online education.

We found that the challenges of digital transformation are primarily connected with the digital divide, digital national sovereignty and the absence of common digital standards in the BRICS countries. All of the BRICS countries are committed to diminishing and eliminating the digital divide. The necessity of developing digital skills as a common digital standard for the successful digitalization of education is recognized in the BRICS countries. In this respect, Russia offered to establish a BRICS school of digital literacies.[70]

Within the framework of the BRICS National Research Committee, extensive preparations are being made to hold a championship devoted to the description and development of BRICS future skills and certification system in the digitally related industrial fields.[71] Consequently, this should stimulate interest in the methodological approaches to acquiring digital literacy.

It is necessary to mention that the legal regulation of digital education, particularly during the pandemic period, is exercised on the local (Brazil, India and China) and national (Russia and South Africa) levels.

Some successful attempts at introducing international online platforms (China, India and Russia) and establishing the Network University were made to enhance the education systems of the BRICS countries and eliminate possible cyberspace risks.

At the ninth BRICS Education Ministers Meeting,[72] special efforts were made to comply with the new requirements of the digital transformation of BRICS higher education, including the acknowledgment of the necessity of common digital standards. As a result, the BRICS countries agreed to share best practices in online educational courses on national platforms. Nevertheless, the creation of a common cross-platform has not been under consideration yet.

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68 Mariana Patru & Evgueni Khvilon, *Open and Distance Learning: Trends, Policy and Strategy Consideration*, UNESCO, ED.2003/WS/50 (2002) (Mar. 2, 2023), available at https://unesdoc.unesco.org/ark:/48223/pf0000128463.

69 Diana Yampolskaya et al., *Harmonization Problems of the Education Systems Indicators in the BRICS Countries*, 6(1) BRICS L.J. 5 (2019).

70 Alexandra Morozkina, *Regional Perspective of Digitalization in BRICS*, 15(4) Int'l Organisations Res. J. 70 (2020).

71 *BRICS Future Skills Challenge Launches Its First Events*, BRICS Information Portal, 25 May 2022 (Mar. 2, 2023), available at http://infobrics.org/post/35781.

72 The 9th BRICS Education Ministers Meeting Was Held Online, BRICS Information Portal, 31 May 2022 (Mar. 2, 2023), available at http://infobrics.org/post/35819.

As a common digital standard, the establishment of a BRICS digital educational cross-platform might become an absolute necessity in times of challenges such as international digital transformations and national digital sovereignty. A certain balance between global digital transformation and digital sovereignty could be achieved on the basis of such a unified BRICS cross-platform. The BRICS alliance intends to strengthen cooperation in this sphere in subsequent years.

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INSTITUTIONAL ARBITRATION: INDIA'S ATTEMPT TO TRANSPIRE AS AN INTERNATIONAL HUB OF ARBITRATION IN SOUTHEAST ASIA

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International arbitration has flourished as a private adjudicatory forum and is consistently evolving because of its versatile nature, assimilating the needs of modern arbitration users. Arbitration institutes have bent over backward for the development of international arbitration. All jurisdictions, through sporadic amendments, upgrade their curial law in alignment with the current global arbitration norms. The leading jurisdictions of Southeast Asia, specifically Singapore, Malaysia, and Hong Kong, through timely updates in their curial law and atonement of their premier arbitration institute's policies incorporating the recent trends, continue to grow and rival each other as regional players in international arbitration. Keeping in mind India's position in the global market, it is about time that India reserves its name among the leading arbitration hubs in Southeast Asia. Upon consideration of the trifecta of the curial law, the role of the premier arbitral institution, and the deference of the judiciary of a leading arbitration hub, the author through critical analysis, coherent reasoning, and statistical interpretation of data attempts to unveil the following questions raised. Firstly, whether India's endeavour to strengthen and reinforce institutional arbitration in India vide the Amendment Act, 2019 would derive the desired result. Secondly, whether India's attempt to become an international hub of arbitration that could rival Singapore, Hong Kong, and Malaysian arbitration institutes would be successful. Consequently, India's attempt to march alongside the leading arbitral forces in Southeast Asia is like a lucid dream having the potential of manifestation.

Keywords: international arbitration; curial law; arbitral institutions; institutional arbitration; arbitration hub; atonement; India: Southeast Asia.

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Introduction

International arbitration is considered the best alternative to adjudicate a dispute between the parties with a protocol similar to that of judicial adjudication. Arbitration can be broadly differentiated based on the process administered into two kinds, institutional arbitration, and ad-hoc arbitration. Under the former, there is a specific institute that administers the complete process of arbitration, whereas, in the latter, the parties themselves appoint individual arbitrators to conduct and regulate the arbitration proceeding. The benefits and the result of institutional arbitration straight away outweigh the benefits of ad-hoc arbitration.[1]

It would not be incorrect to say that, arbitration has not been much success, as the Indian legislature contemplated. Amongst the various reasons that contributed towards such a state of affairs, conceivably, the most prominent was the lack of entrenched arbitration institutions in India. The Indian Parliament after far-reaching

[1] Deepto Roy & Madhukeshwar Desai, *Institutional Arbitration in India: The Way Forward*, in Shashank Garg (ed.), Alternative Dispute Resolution: The Indian Perspective 92 (2018). Wherein, the authors of the article evaluate the situation pertaining to institutional arbitration in India and its benefits.

criticism,[2] at first amended the Act in the year 2015 to fill certain lacunas in the Act,[3] incorporate time-bound arbitration[4] and fast-track arbitration,[5] but despite the recommendations of the Law Commission, failed to include institutional arbitration in the Arbitration and Conciliation Act, 1996[6] (ACA). However, the Act was amended in the year 2019 to incorporate provisions to strengthen and regulate institutional arbitration with an objective to transpire India as an international hub of arbitration.

Moreover, there cannot be any omission of the role of India in the global market; looking at India's size and profile; India will inevitably play a pivotal role in resolving and preventing the recurring global crisis by influencing overreaching macro-economic concerns such as trade, capital flow, economic policies and functioning of international financial organizations.[7] In presence of the invisible hand of the market for wealth creation with the assistance of the hand of trust, India holds a dominant economic power globally.[8] The Indian economy, became the sixth-largest economy after overtaking France in 2018, was expected to overtake the United Kingdom's GDP in 2019 to become the fifth-largest economy globally.[9] Although, in 2020 due to the COVID pandemic, India missed the fifth-largest economy status to the United Kingdom by 13 billion dollars only.[10] Further, due to India's response strategy, the macro-economic indicators reflect that India is sure-footed to face the challenges of 2022–2023.[11] In the

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2 "India's journey towards becoming an international commercial hub that could rival Singapore and London was hampered by a largely ineffective Act and an arbitration regime." *See* Prakash Pillai & Mark Shan, *Persisting Problems: Amendments to the Indian Arbitration and Conciliation Act*, Kluwer Arbitration Blog, 10 March 2016 (Sep. 20, 2022), available at https://arbitrationblog.kluwerarbitration.com/2016/03/10/persisting-problems-amendments-to-the-indian-arbitration-and-conciliation-act/.

3 The ambiguity in relation to applicability of part one to foreign seated arbitration and a shift to seat oriented jurisdiction by amending the Arbitration and Conciliation Act 1996, s. 2(2) (India).

4 Arbitration and Conciliation Act, 1996, s. 29A (India) (hereinafter, ACA).

5 *Id.* s. 29B.

6 Law Commission of India, *Report No. 246 on Amendments to the Arbitration and Conciliation Act* (August 2014) (Sep. 20, 2022), available at https://indiankanoon.org/doc/194486288/.

7 Ministry of Finance, *India and the Global Economy*, in Economic Survey 2011–2012, at 357 (Sep. 20, 2022), available at https://www.indiabudget.gov.in/budget2012-2013/es2011-12/echap-14.pdf.

8 Ministry of Finance, *Wealth Creation: The Invisible Hand Supported by the Hand of Trust*, in 1 Economic Survey 2019–2020 (Sep. 3, 2022), available at https://www.indiabudget.gov.in/budget2020-21/economicsurvey/index.php/.

9 IHS Markit, *Week Ahead Asia-Pacific Economic Preview*, 3 August 2018, at 3 (Sep. 24, 2022), available at https://cdn.ihs.com/www/pdf/999780_999769_1.0.pdf.

10 Indivjal Dhasmana, *India misses fifth-largest economy in the world tag by $13 billion*, Business Standard, 5 July 2022 (Sep. 3, 2022), available at https://www.business-standard.com/article/economy-policy/india-misses-chance-of-being-fifth-largest-economy-in-world-by-a-whisker-122070401154_1.html.

11 Ministry of Finance, *State of the Economy*, in Economic Survey 2022–2023, at 3 (Sep. 3, 2022), available at https://www.indiabudget.gov.in/economicsurvey/.

year 2022 India, nevertheless, surpassed the United Kingdom economy and became the fifth-largest economy in the world.[12] Shri. Narendra Modi at the outset of the National Democratic Alliance government 2.0 in 2019 has envisaged a bright and prosperous vision for the Indian economy. Moreover, "India aims to grow into a USD 5 trillion economy by 2024–25, which will make India the third-largest economy globally."[13] It is amply evident that India is heading towards a new era of economic growth and development and the legislature is shifting gears to pave the way for private investment and establishing penetrating institutional arbitration would be an integrated step in meeting that end.

Acknowledging the significance of arbitration in resolving commercial disputes expeditiously, in the year 2017, the Indian Government constituted a High-Level Committee (HLC) supervised by Mr. Justice B.N. Srikrishna, a former Supreme Court judge.[14] The HLC suggested taking over an existing arbitration institute, the International Centre for Alternative Dispute Resolution (ICADR), using state funds, and overhaul it into a premier arbitration institute having national character.[15] Acting upon the recommendation of the HLC, the Parliament introduced and passed the New Delhi International Arbitration Centre (NDIAC) Bill 2019.[16] The NDIAC Act 2019 came in to force on 2 March 2019.[17]

Various arbitral institutes have been established in India.[18] However, the majority of the Indian parties prefer ad-hoc arbitration in India[19], either due to want of

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12 International Monetary Fund, *World Economic Outlook: War Sets Back the Global Recovery* (April 2022) (Sep. 3, 2022), available at https://www.imf.org/en/Publications/WEO/Issues/2022/04/19/world-economic-outlook-april-2022/.

13 Ministry of Finance, *Shifting Gears: Private Investment as the Key Driver of Growth, Jobs, Exports and Demand*, in Economic Survey 2018–2019, at 4 (Sep. 4, 2022), available at https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/echap01_vol1.pdf.

14 Department of Legal Affairs, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (2017) (Sep. 4, 2022), available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

15 *Id*. at 94.

16 *The Quest for Making India as the Hub of International Arbitration*, pmindia, 12 June 2019 (Sep. 24, 2022), available at https://www.pmindia.gov.in/en/news_updates/the-quest-for-making-india-as-the-hub-of-international-arbitration.

17 New Delhi International Arbitration Centre Act 2019, s. 2(2) (India) (hereinafter, NDIACA).

18 Arbitration Organisations in India, Singhania (Sep. 7, 2022), available at https://singhania.in/blog/arbitration-organisations-in-india/; Nani Palkhivala Arbitration Centre (Sep. 7, 2022), available at http://www.nparbitration.com/; Indian Council of Arbitration (Sep. 7, 2022), available at https://www.icaindia.co.in/; Mumbai Centre for International Arbitration (Sep. 7, 2022), available at https://mcia.org.in/; and few others.

19 PricewaterhouseCoopers, *Corporate Attitudes & Practices Towards Arbitration in India* (May 2013) (Sep. 24, 2022), available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf. *See also* U. Vijay Metha, *Institutional Arbitration: The Emerging Need for a Robust Dispute Resolution Mechanism in India*, 76 Prac. Law. 82 (2018).

awareness or the delay caused by unnecessary judicial intervention, or a fallacious pre-conceived notion of institutional arbitration being expensive. On the contrary, the number of international arbitrations cases administered by a foreign arbitral institute involving Indian parties is on the rise.[20] Now the points for determination which the author seek to unveil are, firstly, whether India's endeavor to strengthen and reinforce institutional arbitration in India via the Amendment Act, 2019 would encourage institutional arbitration in India and, secondly, whether India's attempt to become an international hub of arbitration that could rival Singapore, Hong Kong, and Malaysian arbitration institutes, would be successful.

Against this background, the present article aims at providing an outline of the contemporary arbitration regime in India, Singapore, Malaysia, and Hong Kong as well as scrutinize the recent steps taken by India to become an international hub of arbitration. In light of this, it is paramount to embark with an analysis of institutional arbitration in India (1). Thereafter, the study and statistical analysis of institutional arbitration in Southeast Asia (2) with a focus on the regional players. Subsequently, the author shall shed light on the possibility of India as an international arbitration hub (3) discussing the recent developments, followed by some suggestions and conclusion.

1. Institutional Arbitration in India: Like There Is No Tomorrow

The Arbitration and Conciliation Amending Act, 2019 (AA, 2019) is a commendable step in the right direction, considering the role of institutional arbitration in developing international arbitration as a successful private adjudicatory forum.[21] Even though the AA, 2019 was anticipated at some earlier point of time. It is better late than never. The 2018 report of Queens Mary and White & Case survey suggests that majority of respondents prefer an institute for their general reputation, recognition, administrative assistance and previous experience.[22] Thus this legislative delay will affect the credibility of India as an international seat due to the lack of penetrating international institutions and previous experience. Nevertheless, now it is time for the Indian arbitration community to work diligently to realise this distant vision of conquering the transnational arbitration space and not to rush like there is no

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20 "India is ranked 2nd contributor with 103 cases to SIAC"; *see* Singapore International Arbitration Centre, *Annual Report* (2018), at 16 (Sep. 25, 2022), available at https://siac.org.sg/wp-content/uploads/2022/06/SIAC_AR2018-Complete-Web.pdf.

21 Meng Chen, *Emerging Internal Control in Institutional Arbitration*, 18 Cardozo J. Conflict Resol. 295 (2017); Ivette Esis, *The Role of Arbitral Institutions in the Development of International Arbitration*, 16 Braz. J. Int'l L. 37 (2019); Cavinder Bull, *An Effective Platform for International Arbitration: Raising the Standards in Speed, Costs and Enforceability*, in Peter Quayle & Xuan Gao (eds.), International Organizations and the Promotion of Effective Dispute Resolution 7 (2019).

22 Queen Mary University and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 9 (Nov. 30, 2022), available at https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf.

tomorrow. Further, the author examines institutional arbitration in India under three segments, first, appointment by arbitral institutions: a welcome step forward, second, arbitration council: accreditation of uncertainty, and lastly, New Delhi International Arbitration Centre: all that glitters is not gold.

1.1. Appointment by Arbitral Institutions: A Welcome Step Forward

The ACA defined "arbitral institution" as, "an arbitral institution designated by the Supreme Court or a High Court under this Act."[23] Whereas the word "arbitration" is defined as "any arbitration whether or not administered by permanent arbitral institution."[24]

"An 'institutional arbitration' is one that is administered by a specialist arbitral institution under its own rules of arbitration."[25] Moreover, as noted by Prof. Remy Gerbay:

> The notion of "institutional arbitration" requires: (1) a permanent organisation; (2) a set of arbitration rules; and (3) an agreement of the parties to reserve, to the permanent organisation, some decisional authority beyond the mere task of acting as a default appointing authority.[26]

Thus, any arbitration proceeding administered by any permanent arbitration institute designated by the Supreme Court or High Court as per the rules of such institute and with all its administrative assistance would be deemed to be an institutional arbitration. There is also a very distinct yet nuanced difference between "institutional arbitration" and "arbitral institution," the latter only being an actor in the arbitration proceeding.[27] "The term 'arbitral institution' means a permanent organisation to which parties to a dispute reserve some decisional authority to facilitate an arbitration conducted in accordance with a set of arbitration rules."[28] An arbitral institution can appoint an arbitrator, but it does not imply that it would be institutional arbitration, as the parties might have agreed to conduct arbitration with a set of different arbitration rules and venue than that of that institute. Thus, the appointment of an arbitrator by an arbitral institute can be either ad-hoc or institutional arbitration.

The objective of the AA, 2019, is to strengthen and promote institutional arbitration in India and to reduce judicial interference, making the process expeditious.

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23 ACA, *supra*, s. 2(ca).

24 *Id*. s. 2(a).

25 *Redfern and Hunter on International Arbitration* 44 (6th ed. 2015).

26 Remy Gerbay, *The Functions of Arbitral Institutions* 18 (2016).

27 *Id.*

28 *Id.*

The AA, 2019 has come into force except for section 3 of the AA, 2019, which is the new appointment process.[29] However, analysis of the new appointment process is imperative to determine whether India as an international seat is heading in the right direction and what impediments this novel process would cast upon the courts, the users, and the arbitral institutions when it will be implemented.

Currently, the application for appointment of any arbitrator under the ACA lies before the High Court/Supreme Court as the case may be and it is often than rare that the arbitrators who are appointed are either the retired judges of the High Court or the Supreme Court, which to an extent reflects fraternisation and the intricate circle of mutual benefits. Such a trend of appointment may also cause a delay in the conduct of arbitral proceedings due to the age-long practice of fostering the civil rules of practice by such former judges in the arbitral proceeding despite it being expressly not made applicable and also escalate the cost of the arbitral proceedings due to charging high fees and repeated adjournments.[30] But now, the new appointment process promises a novel and better appointment process.

The new process of appointment of an arbitrator is mechanical and leaves all questions of substantive nature to be determined by the arbitral tribunal.[31] The procedure of appointing an arbitrator under the AA, 2019, is a welcome step forward and in alignment with the global norms. Upon failure of appointing an arbitrator under subsection 4 or 5 or 6 of section 11, an application is to be made to arbitral institutes designated by Supreme Court in cases of international commercial arbitration (ICA) and High Courts in domestic arbitration, and the arbitral institute designated by such courts shall make the appointment.[32] The new procedure to an extent eliminates the issue of non-availability of reliable, specialised, and recognised arbitrators as there is no single appointing authority. However, instead, a panel of accredited arbitral institutes are available for referring to the appointment of an arbitrator. The cumulative effect of such legislative endeavor resonates with the object of the AA, 2019 as the number of arbitrators available under different institutes would meet the desired need of the user, as well as, eliminate the conundrum of busy schedules and non-availability

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[29] Ministry of Law and Justice, Department of Legal Affairs, Notification, 30 August 2019 (Sep. 20, 2022), available at https://legalaffairs.gov.in/sites/default/files/notificaiton%20arbit.pdf.

[30] Dhananjay Mahapatra, *Ex-judges as arbitrators earn thrice their last salary in a day*, Times of India, 1 April 2022 (Sep. 9, 2022), available at https://timesofindia.indiatimes.com/india/ex-judges-as-arbitrators-earn-thrice-their-last-salary-in-a-day/articleshow/90581166.cms/; Abhyuday Agarwal, *Is it possible to become an arbitrator even if you are not a retired judge?*, iPleaders Blog, 12 November 2018 (Sep. 9, 2022), available at https://blog.ipleaders.in/possible-become-arbitrator-even-not-retired-judge/; Dhananjay Mahapatra, *Supreme Court mulls young lawyers as arbitrators to cut cost*, Times of India, 28 August 2021 (Sep. 9, 2022), available at https://timesofindia.indiatimes.com/india/supreme-court-mulls-young-lawyers-as-arbitrators-to-cut-cost/articleshow/85703488.cms/.

[31] Shivani Vij & Varun Mansinghka, *Judicial (Non)Appointment of Arbitrators in India: A Case Study of 'Inadequate Stamping' as a Ground for Non-Appointment*, 35(4) Arb. Int'l 505 (2019).

[32] ACA, *supra*, s. 11.

of dates for hearing thus saving time and cost and making the process expeditious. The appointment of arbitrators by such designated arbitral institutes reduces judicial interference in the appointment process (but not in the designation of such institutes in its panel, which indicates an indirect control of the judiciary) and also addresses the issue of increased time and cost in arbitration, which is one of the paramount concerns of the domestic and international users of arbitration in India.

1.2. Arbitration Council: Accreditation of Uncertainty

There is an Insertion of Chapter I A via the AA, 2019 titled "Arbitration Council of India." The creation of another authority in order to regulate and certify arbitration institutes is India's strategy of encouraging and strengthening institutional arbitration. Arbitration Council of India is established and incorporated,[33] consisting of a chairman, who has been, a Supreme Court Judge or Chief Justice or Judge of High Court; five other members, out of which two are ex-officio and one part-time member, all appointed by the Central Government and a chief executive officer.[34] The primary function of the Arbitration Council of India is framing policies for grading and regulating arbitral institutions, recognising accreditation of arbitrators by such institutes, and secondary functions, such as conducting training, examination relating to arbitration and conciliation, maintaining depository of arbitral awards, making recommendations and other ancillary functions.[35]

At first, this seems like a promising solution to the issue of the dearth of established arbitration institutes in India. Nevertheless, upon careful examination of the present situation and the growth of ICA globally, it is only a quick fix for encouraging the establishment of local arbitral institutes. Because the premier international arbitral institutes would not establish their regional institute in India, due to the adoption of a procedure that is dominantly under the supervision and control of a governmental agency and judiciary. Instead, setting up a consultation office would be sufficient to lure Indian parties, given their international reputation and efficient result.[36] Thus, it is uncertain whether the ACI establishment would foster an appropriate environment for these international players, but it will, beyond doubt encourage the establishment of more local/national arbitral institutes subject to the elimination of corruption and nepotism.

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[33] ACA, *supra*, s. 43B.

[34] *Id*. s. 43C.

[35] *Id*. s. 43D.

[36] Subhiksh Vasudev, *The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?*, Kluwer Arbitration Blog, 25 August 2019 (Sep. 9, 2022), available at http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/?doing_wp_cron=1590466230.8007149696350097656250.

1.3. New Delhi International Arbitration Centre: All That Glitters Is Not Gold

Transnational arbitration institutes have been around for almost over a century, starting with the Permanent Court of Arbitration in 1899 followed by the International Chamber of Commerce International Court of Arbitration in 1923 and many more regional and international institutes followed. In India, the ICADR was established in the year 1995 to encourage the use of alternative dispute resolution methods and make available other facilities in the furtherance of the same. However, the ICADR was unable to cope with the dynamic nature of arbitration practices and thus failed to facilitate as an international arbitration institute, the government via the New Delhi International Arbitration Centre Act, 2019 (NDIACA) replaces ICADR with the sole object of making India an international hub of arbitration by providing speedy and efficient dispute resolution mechanism.[37]

As per Stephen York, the following elements could contribute positively toward a thriving arbitration center:[38]

1. Implementing a globally accepted curial law, i.e. UNCITRAL Model Law with innovative modification to address contemporary issues.

2. Developing a pro-arbitration judiciary that fosters a pro-arbitration stance such as, supporting party autonomy, arbitration agreements, and less interference.

3. Offering best in class physical facilities and other ancillary assistance at relatively lower costs as compared to other institutes.

4. Maintaining a panel of reputed international arbitrators and providing a transparent, effective, and unbiased administration to parties.

Further, as pointed out by eminent speakers, such as Hon'ble Justice Nariman, Justice Sikri, Justice Madan B. Lokur, Mr. Mukul Rohatgi, senior advocate and other learned speakers, in different technical sessions at the "International Conference on Arbitration in Era of Globalisation," that, the need of the hour is to reduce the delay in disposal of the arbitration proceeding; setting up a separate Arbitration Bar to encourage standard practices by the lawyers; encourage Med-Arbitration and encourage institutional arbitration in India.[39]

NDIAC is established[40] and is declared as an institute of national importance.[41] NDIAC comprises of a chairperson, who has been a judge of Supreme Court or High Court; three-members, out of which two should be eminent persons having substantial knowledge and experience in institutional arbitration being full time

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37 NDIACA, *supra*, statement of object and reasons.

38 Stephen York, *India as an Arbitration Destination: The Road Ahead*, 21(2) Nat'l L. Sch. India Rev. 77, 92 (2009).

39 Indian Council of Arbitration, *Report on International Conference on Arbitration in the Era of Globalisation* (2015) (Sep. 9, 2022), available at https://www.icaindia.co.in/Quaterly-January-March-2016.pdf.

40 NDIACA, *supra*, s. 3.

41 *Id*. s. 4.

or part-time members, and one representative of a recognised body of commerce and industry as a part-time member, all appointed by the central government; and three ex-officio members of different government departments as a secretary, financial advisor and chief executive office.[42] The primary object[43] and functions[44] of NDIAC are to develop itself as a flagship arbitral institution, providing administrative assistance, maintaining a panel of accredited arbitrators and conducting arbitration in a proficient manner, which is cost and time-efficient. NDIACA also establishes a chamber of arbitration[45] and an arbitration academy[46] in order to promote arbitration practices, maintaining a panel of experienced arbitrators and inculcating good arbitration practices by providing training to arbitral institute enabling them to rival with other international arbitral institutions.

Now looking at the diligently drafted legislation, NDIACA, it could be accurately said that the Act is giving effect to almost every possible recommendation made either by Justice B.N. Srikrishna committee or otherwise.[47] Nevertheless, the question is, whether NDIAC would become a global leading arbitration institute handling a majority of ICA's workload? Considering, India's ability to provide specialised and cost-efficient services as compared to Singapore or Europe, along with, restructuring the available facilities, drafting new NDAIC rules incorporating globally accepted innovative trends and impanelling specialists and eminent arbitrators would increase the chances of answering this question in affirmative but as we all know, everything that glitters is not gold.

Institutional arbitration is at a nascent stage in India. However, the neighbouring Southeast Asian countries, namely Singapore, Hong Kong, and Malaysia, have been in business for decades. Let us take a look at the institutional rules of their premier arbitration institutes and their growth as a regional seat in Southeast Asia.

2. Institutional Arbitration in Southeast Asia: Regional Players

It is imperative to study and analyse the characteristics of the leading arbitration institutions in Southeast Asia and the trends these institutes have innovated or emulated to tackle the emerging challenges of modern ICA in order to endure as

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42 NDIACA, *supra*, s. 5.

43 *Id*. s. 14.

44 *Id*. s. 15.

45 *Id*. s. 28.

46 *Id*. s. 29.

47 Binsy Susan & Neha Sharma, *New Delhi International Arbitration Centre: Building India into a Global Arbitration Hub*, Kluwer Arbitration Blog, 4 May 2018 (Dec. 18 2020) http://arbitrationblog.kluwerarbitration.com/2018/05/04/new-delhi-international-arbitration-centre-building-india-global-arbitration-hub/?print=print&doing_wp_cron=1590468625.3242650032043457031250.

the best regional players, to determine whether India could rival these regional players. Consequently, the author has focused on these three regional players' arbitration legislation, premier arbitral institution rules, and deference of judiciary– first, Singapore; second, Malaysia; and third, Hong Kong.

2.1. Singapore

The legal framework of arbitration in Singapore is commendable. The Singaporean legislature provides a dual-track scheme for its arbitration regime. The Arbitration Act, 2001 (AA), deals with domestic arbitration where the seat is within Singapore.[48] Whereas, International Arbitration Act, 1994 (IAA), applies to international disputes irrespective of whether the seat is in Singapore or not.[49] Distinguishing the arbitration proceeding under IAA and AA, the key differences lie in the operation of the extent of judicial intervention, respect for party autonomy and the grounds for challenging the arbitral award.[50]

Singapore International Arbitration Centre (SIAC) is administering arbitration since 1991, as an independent non-profit organisation with a mission "to be acknowledged as a truly international arbitration institute dedicated to providing world-class quality and efficient service, promoting arbitration as a preferred mode of dispute resolution, while achieving the highest satisfaction for its employees and stakeholders."[51] SIAC is a statutory appointing institute[52] which offers arbitration under its own rules as well under UNCITRAL rules, financial management, and administrative assistance at competitive rates.

SIAC conducting arbitration proceeding under its own rule may administer the arbitration as per the agreement of the parties under any of the following rules:

1. SIAC Rules 2016 for international arbitration.
2. SIAC Domestic Arbitration rules 2002.
3. SIAC Investment Arbitration rules 2017.
4. SIAC Singapore Exchange Derivatives Trading (SGX-DT) Rules.
5. SIAC Singapore Exchange Derivatives Clearing (SGX-DC) Rules.

SIAC has atoned its primary international arbitration rules five times since its inception. First in 1997, followed by 2007, 2010, 2013, and lastly, the currently

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48 Arbitration Act 2001, s. 3 (Singapore).

49 International Arbitration Act 1994, s. 5 (Singapore); Henny Mardiani, *Arbitration in Singapore*, 16 J. Arb. Stud. 217, 219 (2006).

50 The level of judicial intervention in IAA is minimum whereas in AA it is much greater. Moreover, under AA stay of court proceeding is discretionary and not mandatory as that of IAA. *See* Mardiani 2006, at 220–221.

51 Our Vision, Mission & Core Values, Singapore International Arbitration Centre (Dec. 24, 2022), available at https://www.siac.org.sg/2014-11-03-13-33-43/why-siac/our-vision-mission-core-values.

52 International Arbitration Act 1994, s. 8(2) (Singapore).

applicable rules of 2016, that came into force on 1 August 2016. These amendments help SIAC to upgrade its rules to match contemporary trends and address the challenges encountered by the previous rules.

In 2010, SIAC introduced new rules and incorporated two innovative changes. First, an expedited procedure[53] under Rule 5 of SIAC rules of 2010 to attain greater efficiency in the arbitral proceeding and of the arbitral process. Second, provision for appointing an emergency arbitrator[54] under Rule 26 of SIAC rules of 2010 to remedy immediate and interim issues before the composition of the tribunal. Moreover, in 2016, SIAC took the opportunity to upgrade its rules by inculcating some more innovative improvements. Providing a mechanism to address disputes arising under multiple contracts between same or multiple parties in a single arbitration;[55] provision relating to joinder of a party or non-party to the arbitration proceeding prior to the constitution of the tribunal;[56] provision pertaining to consolidation of two or more pending arbitration into a single arbitration, either prior or post constitution of the tribunal[57] and introduces a procedure for early dismissal of claims and defences.[58]

The following table (Table 1) sets out the number of cases handled by SIAC and the different applications filed in the last decade. Analysing the table below, the author observes that the number of cases undertaken by SIAC in the last decade has increased by 143.1%, and the number of international arbitration cases undertaken by SAIC from 2013 to 2019 has increased by 51%. Lastly, the total amount in dispute each year in the last decade has increased from 1.32 billion USD to 8.09 billion USD, amounting to a stupendous increase of 512.88%, which is commendable and also a clear indicator of the success of SIAC as an International arbitration institute. Further, analysing the different applications filed under various rules of SIAC, it is observed that there is a consistency in the applications filed each year under different heads without much increase or decrease. That is an indication of the positive efficacy of the various innovations incorporated by SIAC in its rules. The researcher, in particular, observes that under the head "expedited procedure" are the most number of applications filed. Expedited procedure applications witnessed an increasing trend from the year 2010 to 2017 of 435%, then witnesses a decrease of 42.99% from the year 2017 to 2019, resulting in the overall growth of 205%, undoubtedly indicating a successful and efficient formula devised by SIAC for saving time and cost.

Table 1: **Cases handled by SIAC**

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53 Singapore International Arbitration Centre Rules 2015, Rule 5 (hereinafter, SIAC Rules).

54 *Id.* Rule 30.

55 *Id.* Rule 6.

56 *Id.* Rule 7.

57 *Id.* Rule 8.

58 *Id.* Rule 29.

SIAC (2010–2019)								
Year	Total Cases*	Number of international cases**	Total sum in dispute (billion USD)	Emergency arbitrator application (since 2010)	Expedited procedure Application (since 2010)	Consolidation application (since2016)	Joinder Application (since 2016)	Early Dismissal Application (since 2016)
2010	197	–	–	2	20	–	–	–
2011	188	–	1.32	–	–	–	–	–
2012	235	–	3.61	–	–	–	–	–
2013	259	222	3.5	19	36	–	–	–
2014	222	179	5.04	12	44	–	–	–
2015	271	227	6.23	5	69	–	–	–
2016	342	273	11.85	6	70	20	1	0
2017	452	374	4.07	19	107	55	10	5
2018	402	337	7.06	12	59	50	9	17
2019	479	416	8.09	10	61	53	10	8

All data published here have been obtained from the website of SIAC.[59]

* Includes international and domestic cases as well administered and *ad hoc* cases.

** Includes administered and ad-hoc cases

(–) means data not available or data not clear

The expedited procedure at SIAC call for a special emphasis as it has been one of the salient features of its rules since the time it has been introduced, i.e. from 2010. The expedited procedure, when introduced in 2010, was a relatively simple procedure which has evolved and undergone significant transformation, making it a more effective, flexible and robust mechanism. Rule 5 of the SIAC rules of 2010 states:

1. A party may apply to the centre in writing before the full constitution of the tribunal requesting to conduct the arbitral proceeding as per the expedited procedure in the following cases:

a. The aggregate sum of the dispute is not more than S$5,000,000; or

[59] Annual Reports, Singapore International Arbitration Centre (Dec. 26, 2022), available at https://siac.org.sg/annual-reports.

b. Upon an agreement of the parties to conduct the arbitration as per expedited procedure; or

c. Cases involving exceptional urgency.

2. The chairman will determine after hearing the parties on an application filed under Rule 5.1, whether the arbitral proceeding shall be conducted as per the expedited procedure or not. Upon allowing the application, the expeditious procedure shall be as follows:

a. The registrar is empowered to reduce any time limits at his discretion provided under these Rules.

b. Unless otherwise determined by the chairman, the arbitration shall be conducted by a sole arbitrator.

c. Upon an express agreement of the parties, the tribunal shall decide the dispute based on the documentary evidence only. Otherwise, the tribunal shall hold a detailed hearing.

d. The tribunal shall pass an award within six months from the date of the constitution of the tribunal. Except in cases where the registrar extends the time due to exceptional circumstance; and

e. All awards passed by the tribunal under expedited procedure shall contain the reasons upon which the award is made in summary form, except where the parties have agreed otherwise.

Moreover, the SIAC Rules were amended in the year 2013, but there were no changes made to Rule 5. However, in 2016, SIAC made several changes in the expedited procedure, which are as follows:

1. The amount of dispute was increased by S$1,000,000 to make the total amount of S$6,000,000.

2. Under Rule 5.1, provision regarding simultaneous intimation of the notice to the other party and the registrar of the application made under Rule 5.1, was added. Such additional notice would fulfil the requirement of due notice to the other party, thus eliminating the ground of setting aside the awards on, no proper notice served.

3. An additional ground that is, taking into consideration the circumstance of the case, was added for determination of an application filed under Rule 5.1 by the registrar, under Rule 5.2. Thus, expanding the scope of scrutinising an application under Rule 5.2.

4. The procedure adopted for hearing and examination of witnesses under Rule 5.2 l was amended. Now, the tribunal is empowered to decide on the application after dialogue with the parties on the question of the procedure of hearing. It facilitates better communication between the parties, with the tribunal acting as a mediator and also avoids deadlocks amongst the parties on such agreements.

5. Rule 5.3 was inserted. It provides for mandatory application of procedure provided in Rule 5.2 even in cases where the parties have adopted expedited procedure in their agreement having contrary terms to that of Rule 5.2.

6. Rule 5.4 was inserted. Now the parties have an additional option of making an application to not to continue with the application made under Rule 5.1. It incorporates flexibility in the arbitration proceeding enabling the parties to retract from the expedited procedure and thus also encourages the use of such procedure.

Apart from the immaculate arbitration legislation and ground-breaking arbitral institution rules, the Singapore judiciary has also assisted Singapore as a jurisdiction in reaching new heights. Adoption of a pro-arbitration stance by the Singapore judiciary is another factor in the proliferation of the arbitration practice in Singapore.[60] In *Insigma Technology Co. Ltd. v. Alstom Technology Ltd*.[61], the Singapore Supreme Court affirmed the adoption of hybrid agreements by SIAC, allowing SIAC to apply other institution rules, thus prioritising party autonomy in international arbitration.

An asymmetric arbitration clause allows only one party (usually the one who holds leverage in the transaction) to resolve the dispute through any option he deems fit, either arbitration or litigation. In *Wilson Taylor Asia Pacific Pte Ltd. v. Dyna-Jet Pte Ltd*.[62] the Singapore Court of Appeal determined the validity of an asymmetric arbitration clause. The appellant raised an argument that the arbitration clause lacks mutuality, and it grants the right to initiate arbitration only to one party, which makes it optional and thus is not an arbitration agreement. The Court of Appeal upheld the validity of a one-sided arbitration clause stating that the mutuality argument and the optionality arguments raised by the appellant before the High Court are not effective in precluding an asymmetric agreement from being a valid arbitration agreement.

In *PUBG Corp. v. Garena International I Pte Ltd. and others*,[63] an appeal was filed against an order of stay of court proceeding subjected to submission to arbitration. The Court of Appeal dismissing the appeal held that the arbitration clause contained in the settlement agreement bounds us and it conforms to the principle of judicial non-interference and *kompetenz-kompetenz* principle. The arbitral tribunal is to decide the validity of such settlement agreement and whether it has jurisdiction or not.

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60 York 2009, at 88; Warren B. Chik, *Recent Developments in Singapore on International Commercial Arbitration*, 9 Singap. Y.B. Int'l L. 259, 263–8 (2005); Lawrence G.S. Boo, *SIAC and Singapore Arbitration*, 1 Asia Bus. L. 32 (2008).

61 *Insigma Technology Co. Ltd v. Alstom Technology Ltd*. [2009] S.G.C.A. 24. *See* Donald P. Arnavas & Robert Gaitskell, *Trendsetters: Asia-Pacific Jurisdictions Lead the Way in Dispute Resolution*, 4(1) Arb. L. Rev. 170, 174 (2013) ("The Singapore Court of Appeals recently affirmed that it was proper for SIAC to assume jurisdiction over a case that required it to apply a hybrid of SIAC and ICC procedural rules, noting that SIAC was quite capable of performing the required functions and that the concept of party autonomy permitted the parties to choose the arbitration rules that would govern their arbitration"); Christopher Lau & Christin Horlach, *Party Autonomy: The Turning Point?*, 4(1) Int'l Disp. Resol. 121, 122 (2010) ("The Singapore Court of Appeal confirmed the validity of a hybrid arbitration clause").

62 [2017] S.G.C.A. 32.

63 *PUBG Corp. v. Garena International I Pte Ltd. and others* [2020] S.G.C.A. 51.

Thus, SIAC has turned the tables on handling the international arbitration workload of Southeast Asia by perfecting the trifecta of legislation, arbitration institute and judiciary, and has emerged as a clear winner, with the correct institutional rules, meticulously drafted legislature and a pro-arbitration judiciary. Singapore is no doubt, an international hub of arbitration.

2.2. Malaysia

The Malaysian legislature enacted a single consolidated stature replacing the archaic Malaysian Arbitration Act, 1952, to deal with the matters and procedure of both domestic and international arbitration. The Malaysian Arbitration Act, 2005 (the 2005 Act) is a very close emulation of the UNICTRAL Model Law on ICA, 1985, and is also vehemently inspired by the New Zealand Arbitration Act, 1996.[64] The 2005 Act has been amended twice since then, first in 2011, addressing certain lacunas of the 2005 Act as pinpointed through judicial interpretations,[65] and then again in 2018, making the 2005 Act an analogous mirror of the amended UNCITRAL Model Law, 2006. Furthermore, to replace the name of Kuala Lumpur Regional Centre for Arbitration to the Asian International Arbitration Centre.

The 2005 Act contains four parts. Whereas, part one and part two, apply to international as well as domestic arbitration and deal with preliminary provisions and general principles of arbitration, respectively; part three only applies to domestic arbitration unless the parties agree otherwise, dealing with additional provisions relating to arbitration. Lastly, part four provides for miscellaneous provisions, applicable to both international and domestic arbitration.[66]

Asian International Arbitration Centre (AIAC), which was earlier known as Kuala Lumpur Regional Centre for Arbitration[67] (KLRCA), is the leading statutory[68] arbitration institute in Malaysia. Handling the majority of the arbitration caseload of the country, AIAC provides globally recognised institutional support for conducting domestic and international arbitration. AIAC has adopted multiple rules, which align with the global community, to cater to the escalating demand of the world's business community. Special attention to the Islamic community has made AIAC stand apart from other international arbitration institutes. AIAC provides the following rules for conducting arbitration:

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64 Cecil W.M. Abraham & Daniel C.W. Chuen, *National Report for Malaysia (2018 through 2020)*, in Lise Bosman (ed.), 1 ICCA International Handbook on Commercial Arbitration (2020).

65 *Id*.

66 Arbitration Act 2005, s. 3 (Malaysia).

67 Avinash Pradhan, *Malaysia*, in James H. Carter (ed.), The International Arbitration Review 304 (2018) ("On 7 February 2018, the KLRCA was officially renamed the Asian International Arbitration Centre (AIAC). The name change, enabled through the passage of the Arbitration (Amendment) Act 2018 (First 2018 Amendment Act), is part of a larger rebranding for the centre, in line with its increasing recognition as an innovative hub for international alternative dispute resolution").

68 Arbitration Act 2005, s. 13 (Malaysia).

1. AIAC Arbitration Rules, 2018, which provides for AIAC's own arbitration rules for domestic and international arbitration and also UNCITRAL Arbitration Rules as revised in 2013.

2. AIAC i-Arbitration Rules, 2018, which provides for Shariah-compliant arbitration rules suitable for disputes arising from a business based on Islamic principles and also UNCITRAL Arbitration Rules as revised in 2013.

3. AIAC Fast Track Arbitration Rules, 2018, which provides an expedited procedure for conducting domestic and international arbitration.

KLRCA last adopted rules were KLRCA Arbitration Rules 2017, which are now adopted by AIAC as AIAC Arbitration Rules 2018 (the 2018 rules), with some few but significant changes. Under the 2018 Rules, even though the contract did not enclose an arbitration clause, the parties could still commence an arbitration proceeding or make an application for joinder of parties, subject to, the parties enter into a distinct arbitration agreement subsequently;[69] expanding the power of the tribunal in respect of imposing interest on awards and costs[70] and lastly, minor clarifications of several rules.

The key features of the 2018 rules are the provision for joinder of parties,[71] consolidation of proceedings,[72] technical review of the final draft of the award before it is issued[73] and provisions relating to an emergency arbitrator.[74] KLRCA introduced Fast Track Arbitration Rules in 2010 and since then have amended the rule three times, i.e. in 2012, 2013 and 2018. AIAC Fast Track Arbitration Rule 2018 are a vast improvement over its predecessor, KLRCA Fast Track Arbitration Rules, 2013. The Fast Track Arbitration Rule, 2018 made numerous essential changes in the procedure, the aggregate result of which is a more expedited arbitration procedure.

According to the annual reports of AIAC as shown in the following table (Table 2), in 2017, the total arbitration cases registered at KLRCA were 100, which is a 61.2% increase from the number of arbitration cases in 2016 but KLRCA witnessed a decrease in the number of arbitration cases by 10% in 2018. Moreover, the number

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69 Asian International Arbitration Centre Arbitration Rules 2018, Rules 2(1)(a), 9(3)(c) (hereinafter, AIAC Rules); *see* Morrison Foerster, *Asian International Arbitration Centre 2018 Rules Come into Force*, JD Supra, 15 March 2018 (Dec. 24, 2022), available at https://www.jdsupra.com/legalnews/asian-international-arbitration-centre-31256/.

70 AIAC Rules, *supra*, Rule 2(g).

71 The provision relating to joinder of parties was inserted in 2017 via Kuala Lumpur Regional Centre for Arbitration Rules 2017, under Rule 9; *see* Kuala Lumpur Regional Centre for Arbitration, *Arbitration Rules* (2017) (Dec. 24, 2022), available at https://www.aiac.world/wp-content/arbitration/Arbitration-Rules-2017.pdf (hereinafter, KLRCA Arbitration Rules).

72 The provision relating to consolidation of parties was inserted in 2013 via KLRCA Arbitration Rules 2013, under Rule 8; *see* KLRCA, *Arbitration Rules* (2013) (Dec. 24, 2022), available at https://www.aiac.world/wp-content/arbitration/arbitration/rules_arb_en/PDF-Flip/PDF.pdf.

73 The provision relating to technical review of award was inserted in 2017 via KLRCA Arbitration Rules 2017, under Rule 12; *see supra* note 71.

74 The provision relating to emergency arbitrator was inserted in 2013 via KLRCA Arbitration Rules 2013, under Schedule 2; *see supra* note 72.

of arbitration cases from 2015 to 2016 decreased by 39.8%, as the cases fell from 103 to 62. Lastly, the overall analysis from 2015 to 2018 shows a decreasing trend in the number of arbitration cases by 12.5%. Observing the international arbitration cases at AIAC, in 2016 only 11.29% of the total cases were international cases, in 2017 that number increased by 100% but still the number of international arbitration cases stood at 14% of the total cases. In 2018 the number of international cases was 11.11% of the total arbitration cases at AIAC. Thus, inferring that AIAC/KLRCA does not administer much arbitration cases, specifically international cases, as the number of cases over the last four years has almost been similar, with some minor increase or decrease each year. Nevertheless, AIAC is continuously endeavoring to attract more arbitration cases through various changes in its policies and rules.

The total number of arbitration cases registered at AIAC in the year 2018 was 90. Out of which, 20 cases were administered under the Act of 2005, 1 case was administered under KLRCA Rules 2013, 14 cases under KLRCA Rules 2017, 54 cases under AIAC Rules 2018 and only 1 case under KLRCA Fast Track Rule 2013. It displays that parties at AICA are more inclined and interested in conducting the arbitration with AIAC rules 2018, which are based on the UNCITRAL Model Law as revised in 2013 and other innovative procedures making the process efficient. Whereas, AIAC needs to upgrade its fast track rules or should either include an expedited procedure under its Arbitration Rules 2018, as there is only a single arbitration case conducted under the KLRCA Fast Track Rules 2013 in 2018, which implies distrust of the parties in the fast track procedure employed by AIAC.

Table 2: **Cases handled by AIAC/KLRCA**

AIAC/KLRCA					
Year	2018	2017	2016	2015	
Total registered arbitration cases*	90	100	62	103	
Number of registered international cases**	10	14	7	–	
Number of arbitration cases registered under different rules in 2018*	Act of 2005	KLRCA Rules 2013	KLRCA Rules 2017	AIAC Rules 2018	KLRCA Fast Track Rules 2013
	20	1	14	54	1

All information has been collected from the official website of AIAC[75]

* Includes international and domestic cases as well administered and *ad hoc* cases.

** Includes administered and *ad hoc* cases

(–) Data not available or not clear

[75] Annual Reports, Asian International Arbitration Centre (Dec. 28, 2022), available at https://www.aiac.world/Publications-.

Along with the promising arbitration legislation based on UNCITRAL Model Law, AIAC seems to struggle to lure the international parties to Malaysia, however the judiciary reflects a pro-arbitration stance providing a sigh of relief to the parties who do approach Malaysia as a seat. The author now sheds some light on a few recent judicial pronouncements of Malaysia, which have assisted in developing confidence and the growth of the arbitration regime in Malaysia. In *Sebiro Holdings SDN BHD v. Bhag Singh & Anor*,[76] the appellant filed an application in High Court challenging the appointment of a sole arbitrator in respect of a dispute on the ground that the appointed arbitrator was not the preferred arbitrator. The High court dismissed the application; thus, the appellant filed an appeal before the Court of Appeal.

The Court pointed out that, in the absence of any express consensus between the parties in the agreement regarding the qualification of the arbitrator, the parties cannot challenge the appointment for lack of qualifications. Moreover, it also stated that a party challenging the arbitrator should first make an application before the tribunal, if unsuccessful, only then an application to the court will be allowed under section 15 of the Act of 2005. This interpretation of the Court of Appeal is undoubtedly a purposive interpretation giving effect to basic principles of arbitration, such as reduced judicial intervention and the kompetez-kompetez principle.

In *Asean Bintulu Fertilizer SDN BHD v. Wekajaya SDN BHD*,[77] the arbitrator passed an award after a delay of four years. It was challenged under section 37 and 42 of the Act of 2005 on the following grounds. First, the award was against the public policy of Malaysia, and second, the arbitrator's determination was made in breach of principles of natural justice. The High Court dismissed the application, thus this appeal. The Court of Appeal upholding the award held that the award is not liable to be set aside automatically because the award was severely delayed and the court is satisfied that the arbitrator's ability to adjudge the dispute was not compromised due to the delay, thus declaring the award, not in breach of the public policy of Malaysia. Secondly, the parties were provided with sufficient and equal chances to represent their case, and the arbitrator considered all the evidence and submissions, and upon consideration, delivered a reasoned award. Thus, the Court of Appeal put forth a pro-arbitration stance, protecting the integrity of the arbitration process and giving effect to the finality of an award.

Malaysia is making constant endeavours at all levels, i.e. legislative, judiciary and non-governmental, to encourage arbitration practices. Malaysia has made staggering improvements in encouraging the use of arbitration and other alternative disputes resolutions methods at the domestic level. In ICA, Malaysia has not witnessed exponential growth but has managed to stay in the competition amongst other regional players.

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[76] [2015] 4 C.L.J. 209.

[77] [2018] 2 C.L.J. 257.

2.3. Hong Kong

The legislature of Hong Kong, in pursuit of an inclusive and state-of-the-art arbitration law, enacted the Arbitration Ordinance (Cap. 609) (AO 609) in 2011, replacing the earlier arbitration Ordinance (Cap. 341) (AO 341), which was partly based on the English Arbitration Acts and the UNCITRAL Model Law on ICA of 1985. The AO 609 is based on the latest version of The UNCITAL Model Law of 2006 with specific alterations.[78] It represents a unified regime of arbitration law which is applied uniformly to both domestic and international arbitration proceedings, in contrast to the AO 341, which instead implemented a bifurcated system of law. However, specific provisions in the AO 341 were applicable to both domestic and international arbitration. Under the new arbitration regime (AO 609) of Hong Kong, that came into effect on 1 June 2011, articles of the UNCITRAL Model Law are provided under various sections with or without modification in order to adhere to and comply with, the latest globally recognised uniform arbitration law.

The AO 609 applies uniformly to all arbitration proceedings, where the seat is in Hong Kong, irrespective of the nature of the arbitration and the place where the agreement was entered into.[79] Furthermore, where the seat of arbitration is in any country other than Hong Kong, only the provisions enumerated in section 5(2) shall apply.[80] Part 11 of the AO 609 is a peculiar feature which Hong Kong legislators have incorporated in the ordinance. Even though AO 609 represents a unified regime, Part 11 provides for "provisions that may be expressly opted for or automatically apply"; under which the parties, through a mutual agreement, may expressly provide the application of specific sections of schedule two as enumerated under section 99.[81] Moreover, if the agreement does not expressly provide the application of the provisions enumerated under section 99, all the provisions of schedule two shall automatically apply to particular domestic arbitration proceedings as mentioned under section 100.[82] Lastly, the legislature has also provided the parties with an

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[78] Arbitration Ordinance (Cap. 609), s. 2 and s. 4 (Hong Kong) (hereinafter, HKAO 609).

[79] *Id.* s. 5(1).

[80] *Id.* s. 5(2), which reads: "If the place of arbitration is outside Hong Kong, only this Part, sections 20 and 21, Part 3A, sections 45, 60 and 61, Part 10 and sections 103A, 103B, 103C, 103D, 103G and 103H apply to the arbitration."

[81] *Id.* s. 99, which reads: "An arbitration agreement may provide expressly that any or all of the following provisions are to apply–
(a) section 1 of Schedule 2;
(b) section 2 of Schedule 2;
(c) section 3 of Schedule 2;
(d) sections 4 and 7 of Schedule 2;
(e) sections 5, 6 and 7 of Schedule 2."

[82] *Id.* s. 100, which reads: "All the provisions in Schedule 2 apply, subject to section 102, to–

(a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or

option to opt-out. The parties can, through an express agreement to the contrary, exclude the application of section 100 and 101.[83] Thus, giving a conjoint reading of section 99, 100 and 102 of AO 609, it could be inferred that the provisions of schedule two if not expressly included in the agreement will only automatically apply in domestic arbitration and not to international arbitration. However, the chances of international parties expressly opting for application of provisions of schedule 2 are unlikely.[84]

Now shedding some light on the practice of arbitration in Hong Kong, the author studies the establishment and growth of the Hong Kong International Arbitration Centre (HKIAC), which through its exemplary performance as an arbitration institute, has disseminated the best practices in Southeast Asia since 1985. HKIAC is a financially independent, non-profit company limited by guarantee, it is also a statutory appointing authority.[85] HKIAC provides comprehensive state-of-the-art arbitration services, including the appointment of an arbitrator, arbitration rules, administrative support, and accommodation facilities for arbitrations.

Apart from the main HKIAC Administered Arbitration Rules of 2018, HKIAC offers its users a plethora of other arbitration rules to choose from according to which the parties can conduct their arbitration proceedings.[86] The continuous process

(b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that arbitration under the agreement is a domestic arbitration."

83 *Id.* s. 102, which reads:
"(1) Sections 100 and 101 do not apply if– *(Amended 11 of 2015 s. 4)*
(a) the parties to the arbitration agreement concerned so agree in writing; or
(b) the arbitration agreement concerned has provided expressly that–
(i) section 100 or 101 does not apply; or
(ii) section 2, 3, 4, 5, 6 or 7 of Schedule 2 applies or does not apply.
(2) Subsection (1)(b)(ii) does not derogate from the operation of section 99."

84 Neil Kaplan & Robert Morgan, *National Report for Hong Kong (2013 through 2018)*, in Lise Bosman (ed.), 1 ICCA International Handbook on Commercial Arbitration (2020).

85 HKAO 609, *supra*, s. 13.

86 Currently, Hong Kong International Arbitration Centre (hereinafter, HKIAC) offers the following rules to its users which they can adopt as per the requirement of their case:

1. HKIAC Administered Arbitration Rules of 2018, the standard HKIAC rules for international arbitration inclusive of all innovative and efficient provisions to make the process expeditious;

2. HKIAC Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules of 2015, offering the parties to conduct the arbitration under the UNCITRAL Arbitration Rules with the flexibility adopted by the 1976 and 2010 version (with or without application of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration);

3. Ad Hoc Arbitration under UNCITRAL Arbitration Rules 2013 or 2010 or 1976;

4. HKIAC Domestic Arbitration Rules of 2014;

5. HKIAC Short Form Arbitration Rules, formulated by Royal Institute of Chartered Surveyors, Hong Kong Branch and adopted by HKIAC, best suited for settling construction industry disputes in an accelerated manner;

6. HKIAC Securities Arbitration Rules, providing tailored rules for resolving disputes relating to securities;

of upgrading the arbitration rules is a commonly accepted practice in order to inculcate the recent trends prevailing in the international arbitration community. Before 2008 HKIAC administered arbitration under the UNCITRAL model Rules or the Hong Kong arbitration legislation; however, in September 2008, HKIAC introduced its own arbitration rules.[87]

Moreover, illuminating HKIAC Administered Arbitration Rules, HKIAC has atoned it several times. The rules were introduced in 2008 and have been amended twice since then. First, in 2013 and then in 2018. The latest version of HKIAC rules came into force on 1 November 2018, and the best-known and distinctive features incorporated by HKIAC are as follows:

1. An alternative option for determining the fee:[88] HKIAC is the foremost institute which has provided its users with an option of selecting the method for settling the fee and costs of the arbitral tribunal. The parties have an option to either fix the fee on an hourly rate or in accordance to the sum involved in the dispute, with the hourly rate method set as the default method of determining the fee.

2. Emergency Relief:[89] HKIAC inculcated provisions relating to emergency relief via the appointment of an emergency arbitrator before the establishment of the tribunal. Upon the appointment and transfer of the case to the emergency arbitrator, he or she will have to dispose of the application within 14 days.

3. Clubbing of parties and proceedings: HKIAC has codified various flexible procedures for simplifying the complication involved in proceedings encompassing multiple parties and contracts, and having a wide scope of application. These procedures include clubbing of additional parties,[90] merging arbitration proceedings,[91] single proceeding under multiple contracts[92] and concurrent proceedings.[93]

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7. HKIAC Electronic Transaction Arbitration Rules, drafted precisely for resolving electronic transaction disputes expeditiously;

8. Lastly, HKIAC Small Claims and "Documents Only" Procedure, separate specific rules which provides an expedited procedure for small claims up to US$50,000 and an accelerated procedure without conducting an oral hearing.

87 Matthew Gearing & Joe Liu, *The Contributions of the Hong Kong International Arbitration Centre to Effective International Dispute Resolution*, in Peter Quayle & Xuan Gao (eds.), International Organizations and the Promotion of Effective Dispute Resolution 40, 42 (2019).

88 HKIAC 2018 Administered Arbitration Rules, Art. 10, Schedule 2 and 3 (Dec. 28, 2022), available at https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (hereinafter, HKIAC Rules).

89 *Id.* Art. 23(1), schedule 4.

90 *Id.* Art. 27.

91 *Id.* Art. 28.

92 *Id.* Art. 29.

93 *Id.* Art. 30.

4. Expedited procedure:[94] expedited procedure was introduced through the 2008 rules. Since then, it has been widely utilised by the parties to accelerate their arbitration proceeding. The expedited procedure applies only to proceedings where (i) the total sum involved in the dispute is not more than HK$25 million; (ii) agreement of all the parties; or (iii) in exceptionally urgent cases. Under the expedited procedure, parties conduct the arbitration through a sole arbitrator (unless otherwise agreed to be conducted by three arbitrators) solely based on documents and within six months.

5. Early Determination Procedure[95] (EDP): HKIAC introduced a new procedure in 2018 rules to dismiss the meritless claims of law or fact through a separate application within a short period. The grounds for determining the application are meritless claims, or beyond the scope of the tribunal's jurisdiction, or the claim raised by another party, even though is tenable, an effective award could not be made in that party's favour which raised such claim. Moreover, to make the most of the intervening period taken by the tribunal to decide the application for EDP, the tribunal could still proceed with the arbitration proceeding, protecting the arbitration proceeding from any abusive EDP application.

6. Disclosure in third-party funding[96] (TPF): HKIAC, in response to the escalating usage of TPF in international arbitration and the increased plea to regulate TPF in arbitration proceeding introduced provisions in its rules dealing with disclosure, confidentiality and costs of TPF.

HKIAC often inculcates the recent trends prevailing in the international arbitration community and emulates the contemporary approaches adopted by other leading institutes, which has enabled HKIAC to update its rules regularly and warrants its users that at HKIAC, the arbitration proceedings are conducted as per the highest global standards.

The following table (Table 3) sets out the number of arbitration cases undertaken by HKIAC and its growth as an international arbitration institute in the last decade. Upon analysis of the table, it is axiomatic that HKIAC has been dealing with a large number of arbitration cases each year over the last decade, out of which the majority have had been international arbitration cases. The average number of arbitration cases undertaken by HKIAC in the last decade is 279, whereas the average number of international arbitration cases undertaken by HKIAC in the last decade is 199. Consequently, 71.3% of the average total cases undertaken by HKIAC were international in nature. Moreover, the total sum involved in disputes has increased by 65.7% from 2011 to 2018. Therefore, it would be correct to infer that HKIAC has shown great potential as an international institute as well in attracting international parties by adapting the correct model and strategies over the last

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94 HKIAC Rules, Art. 42.

95 *Id.* Art. 43.

96 *Id.* Arts. 34(1), 44 and 45(3)(e).

decade and has expanded its wings in the global market, specifically in Southeast Asia. Now illuminating the number of applications filed under different heads in the last five years, the researcher observes that the most number of applications were filed under the head expedited procedure, under which the number of applications has increased from nine in 2015 to nineteen in 2018 showing a staggering increase of 111%. It is a clear indication of the user's intention at HKIAC to seek expeditious justice and the efficacy of such a procedure to provide expeditious justice.

Table 3: **Cases Handled by HKIAC**

HKIAC (2009-2018)							
Year	Total Cases*	Number of international cases**	Total sum in dispute (USD Billion)	Emergency arbitrator application (since 2013)	Expedited procedure Application (since 2008)	Consolidation application (since 2013)	Joinder Application (since 2013)
2009	332	212	–	–	–	–	–
2010	291	175	–	–	–	–	–
2011	275	178	3.8	–	–	–	–
2012	293	199	1.8	–	–	–	–
2013	260	195	2	–	–	–	–
2014	252	171	2.8	2	–	3	1
2015	271	214	6.2	2	9	2	2
2016	262	227	2.5	2	15	4	3
2017	297	213	5	4	15	11	5
2018	265	212	6.3	3	19	9	2

All information has been collected from the official website of HKIAC[97]

* Includes international and domestic cases as well administered and *ad hoc* cases.

** Includes administered and *ad hoc* cases

(–) Data not available or not clear

[97] Annual Reports, Hong Kong International Arbitration Centre (Dec. 28, 2022), available at https://www.hkiac.org/about-us/annual-report.

After careful scrutiny of the arbitration legislation, as well as the role of the HKIAC in fostering a positive environment for the international users to select Hong Kong as their seat, the role of the judiciary cannot be omitted in promulgating a pro-arbitration approach in Hong Kong. In *Xiamen Xinjingdi Group Ltd. v. Eton Properties Ltd*.[98] the Hong Kong Court of Appeal held that, while deciding an application for refusal of enforcement of an award on the grounds mentioned in sections 86(1), 89(2) and 95(2) of the ordinance, the court shall always begin with a pro-enforcement bias of finality of such award. The court will seldom set aside an award on the ground of public policy, and the scope of public policy will be construed narrowly.[99]

Hong Kong, with its advanced infrastructure, upgraded arbitration regime, reassuring judiciary and a state-of-the-art international arbitration institute, is at the top of its game, rivalling some of the leading international arbitration institutes in Europe and Asia.

On the conspectus of the trifecta of a successful arbitration seat: the arbitration legislation, the arbitration institute and the approach of the judiciary, Singapore emerges a clear winner followed by Hong Kong and Malaysia. However, where India fits in the queue of leading arbitration seat in Southeast Asia is yet to be determined.

3. India as International Arbitration Hub: What the Future Holds

Attempts are either successful or teach us another way of how it would not succeed. India's latest attempt to become an international arbitration hub is yet to be tested. Fali S. Nariman, in his article "Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture," pinpoints a statement made by Gary B. Born[100] regarding international user's perception of arbitration in India, as a mild understatement of the year:[101]

> Many users [of international arbitration] remain cautious about seeking arbitrations in India, noting the ... attitude of Indian courts.

Suggesting that the users are not cautious but scared to seek arbitration in India. Moreover, Justice Nariman also observed:

> In India, it was just 15 years ago that we began experimenting with international commercial arbitration as practised in other parts of the world, with

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98 [2008] 4 H.K.L.R.D. 972.

99 *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd*. (1999) 2 H.K.C.F.A.R. 111.

100 Gary B. Born, *International Commercial Arbitration* (2009).

101 Fali S. Nariman, *Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture*, 27(2) Arb. Int'l 115, 116 (2011).

> a new law based on the UNCITRAL Model Law. I regret that we have not yet achieved what we initially set out to do when we enacted the Arbitration and Conciliation Act 1996, which was to establish an efficient, competent and credible system of international commercial arbitration.
>
> We have failed – or let me put it less positively – we have not succeeded in our attempt to establish a universally acceptable system of arbitration. But is there hope for the future? I believe there is – fervent hope and anxious expectation …[102]

Thus, the question which surfaces is whether India is dreaming of an elusive dream? The plausible answer to such a difficult question lies within the three pillars of a successful arbitration system which are, first, legal framework; second, judicial interpretation; and third, arbitration institutes. Consequently, the author seeks to analyse recent development in India in respect of these three pillars to determine whether India has perfected the trifecta by brewing an immaculate recipe of success this time.

3.1. Legal Framework

ACA regulates the legal framework for arbitration in India. ACA follows a bifurcated system of law, the application of which is decided according to the seat of the arbitration. Part one applies to proceedings where the seat of arbitration is in India (with certain exceptions), whereas, part two applies to foreign seated arbitration.[103] In 2019 the Indian legislature amended the ACA to introduce specific changes with the sole purpose of making the process expeditious, reducing judicial interference, greater confidentiality and reinforcing institutional arbitration practices in India.

A summarised analysis of the recent AA of 2019 is as follows:

1. Insertion of the definition of "arbitral institutes" under section 2 (ca); shift in the process of appointment of an arbitrator under section 11, as discussed in part 1 hereinabove.

2. The omission of the words "or at any time after the making of the arbitral award but before it is enforced in accordance with section 36" from section 17(1) has the effect of stripping the arbitral tribunal of its power of issuing an interim relief after the award is issued but before its enforcement. The legislature's intention behind such omission is to remove the additional procedural intricacy. As a party may, after an award is made, first apply to the tribunal for an injunction and, when refused, approach the court under section 9 seeking the same, thus elongating the procedure. Moreover, now section 17 is in line with section 9[104], as only the court has the power to entertain an application for the interim measure after an award is made.

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[102] Nariman 2011, at 116.

[103] ACA, *supra*, s. 2(2).

[104] Fali S. Nariman, *National Report for India (2019)*, in Lise Bosman (ed.), 1 ICCA International Handbook on Commercial Arbitration (2020).

3. Insertion of a new sub-section (4) in section 23, that states, "the statement of claim and defence under this section shall be completed within six months from the date the arbitrator or all the arbitrators, as the case may be, receive notice, in writing, of their appointment." The effect of this would be reflected in the time taken by the tribunal to make an award. Capping the maximum time of submitting the statement of claim and defence at six months, it would now compel the parties or institutes to keep a minimum period for the submission of claim or defence (within six months) in their agreement or rules, thus expediting the arbitral process and reducing the time taken by the tribunal in making the award.

4. Under section 29A, sub-section (1) is substituted.[105] Now the time limit for making an award in ICA is similar to domestic arbitration, that is twelve months. By taking such a step, India is attempting to build confidence among the international users in the Indian arbitration system and to encourage ICA in India by making the process as expeditious as possible.

5. The legislature inserted two new sections in order to protect the confidential information of the parties and to protect the arbitrator against the actions taken in good faith, namely, section 42A and section 42B[106]. How effective the provision pertaining to confidentiality of arbitral proceedings is yet to be tested; however, from a bare reading, it seems to be an emulation of section 75 under part III of ACA, allowing disclosure only for the purpose of enforcement of the award. Such a provision leaves room for further judicial scrutiny and interpretation.

6. Under section 34 sub-section (2) clause (a), the scope of proving the existence of the grounds enumerated is now restricted to the record of the arbitral tribunal only. The scope of record of the arbitral tribunal is again subjected to judicial interpretation.

7. The legislature incorporated and established the Arbitration Council of India via insertion of a new part, namely, part 1A. Refer to part 1 hereinabove.

8. Lastly, section 87 is inserted (though no longer effective) to tackle the effect of the Arbitration and Conciliation (Amending) Act, 2015 (AA of 2015) on the arbitral

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[105] The Arbitration and Conciliation (Amendment) Act 2019, s. 6(a) (India) (hereinafter, AA 2019); "In section 29A of the principal Act, –

(a) for sub-section (1), the following sub-section shall be substituted, namely:– (1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23: Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23."

[106] *Id.* s. 9; "After section 42 of the principal Act, the following sections shall be inserted, namely:– 42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

42B. No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder."

proceedings and the court proceeding resulting from such arbitral proceedings, which commenced prior to 23 October, 2015. The legislature provided the AA of 2015 a prospective effect.

An overview of the AA of 2019 illuminates a bright future for the Indian arbitration regime as the changes made resonate with expeditiousness and access to justice for international arbitration users selecting India as a seat of arbitration.

3.2. Judicial Interpretation

Moving towards judicial interpretation of arbitration law in India, the pro-arbitration stance of the Indian judiciary has become evident in its recent judgments. Starting with the pre-and-post BALCO conundrum of the applicability of part one of the ACA to foreign seated arbitration, in which the Indian courts at first[107] took a conservative approach to protect the interest of the Indian parties by applying part one to foreign seated arbitration, however in the BALCO[108] case such ruling was set aside by a bench of five justices of the Supreme Court holding that part one is not applicable to foreign seated arbitration as part one (I), and two (II) of ACA are mutually exclusive, upholding the general principle of international arbitration and putting forth a pro-arbitration stance. This conundrum was finally settled by the AA of 2015.

Moreover, in *Hindustan Construction Company Limited v. Union of India & Ors*,[109] the Apex Court of India struck down section 87, which was inserted by the AA of 2019, "as being manifestly arbitrary under Article 14 of the Constitution of India"[110] thus fostering a pro-arbitration approach. The Apex Court based its decision on the following grounds:

1. Insertion of section 87 via the AA 2019 is in ignorance of a previous judgment, *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd*.,[111] in which the Supreme Court held that such a provision would be in conflict with the object of AA of 2015 and gave the AA of 2015 a prospective effect except for the amendment made to section 36 of ACA, which was treated to be retrospective, bearing in mind the aim and objective of the ACA.

2. That, the Order XLI Rule 5 of Code of Civil Procedure 1908, which applies to all civil appeals, does not apply to an application to review an award only due to section 36 of ACA, which is another reason for not enacting section 87 as it puts section 36 on a back burner. The court stated that insertion of section 87 results in the reappearance of an automatic stay in pending cases restoring the past condition and is also averse to the object of the ACA and the AA of 2015.

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[107] *Bhatia International v. Bulk Trading S.A.* (2002) 4 S.C.C. 105; *Venture Global Engg v. Satyam Computer Services Ltd*. (2008) 4 S.C.C. 190.

[108] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*. (2012) 9 S.C.C. 552.

[109] A.I.R. 2020 S.C. 122.

[110] *Id.* ¶ 51.

[111] (2018) 6 S.C.C 287.

3. With the advent of the Insolvency Code, the award holder who relies upon the forthcoming award money to pay his supplier is bereft of the benefits of the award due to the doctrine of automatic stay and may become insolvent by failing to pay his provider thus have to go through the rigours of the Insolvency Code. It is another reason for holding section 87 of ACA as manifestly arbitrary.

In 2018 in the case of Union of India v Hardy Exploration and Production (India),[112] the Indian Apex Court took a parochial view regarding the issue of seat and venue and it is a typical case of one step forward and two steps backward. The Chief Justice of India, Justice Deepak Mishra in the Hardy Exploration case gave sophistical reasoning for vesting the Indian court with the jurisdiction regarding an arbitration seated at Kuala Lumpur, Malaysia. The fallacious reasoning was against the spirit of the Shashoua principle which was upheld in BALCO case. The dictum was based on the absence of any agreement between the parties regarding the seat and the absence of any positive affirmation regarding the determination of the seat by the arbitrator in the award, wherein, the court rejected mere conducting proceedings and signing the award at Kaula Lumpur would not amount to a determination. Such reasoning seems perverse and self-serving, especially when an equally good law already exists, i.e. the BALCO Judgment and the Shashoua principle. However, in 2019 in *BGS SGS SOMA JV v. NHPC Ltd*.,[113] the Supreme Court rectified its past mistakes and held the Hardy Exploration ratio not to be a good law. Consequently, when we analyse the Hardy Exploration and SGS SOMA cases together it seems like history is repeating itself reflecting the fickle attitude of the Indian judiciary of first assuming jurisdiction and then renouncing it (as it was seen in the pre-and-post BALCO conundrum). Nevertheless, the apex court is constantly making endeavours to make India a better arbitration seat with a pro-arbitration attitude.

Lastly, another recent pronouncement[114] of the Supreme Court presents a clear indication of the judiciary's support for making India an arbitration-friendly jurisdiction, thus facilitating an environment to grow as an international hub of arbitration.

3.3. Arbitration Institutes

The Indian government is taking all necessary measures to encourage arbitration practices in India, specifically for promoting institutional arbitration. ICADR has failed to live up to its expectation, and thus NDIAC will take its place. The role of NDIAC is already discussed in part 1 hereinabove.

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112 *Union of India v. Hardy Exploration and Production (India)*, MANU/SC/1046/208, (2019) 13 S.C.C. 472.

113 *BGS SGS SOMA JV v. NHPC Ltd.*, MANU/SC/1715/2019, (2020) 4 S.C.C. 234.

114 In *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India* (2019) 15 S.C.C. 131 ¶ 48, the Apex Court limiting the scope of public policy in India held that "under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act."

Indian Council of Arbitration is an all-India body established in 1965 under the collaboration of the Central Government and leading commercial organisations of India. The Indian Council of Arbitration is an undisputed leading arbitration institute in India[115] which offers a wide array of arbitration services including but not limited to administering arbitration under its own rules or UNCITRAL rules, state of the art and cost-efficient infrastructure facilities and administrative assistance in arbitration cases. There are various arbitration institutes as well in India administering arbitration under their own rules or UNCITRAL rules.[116]

The Indian Council of Arbitration, administer arbitration as per the agreement of the parties under the following rules:

1. ICA Rules of Domestic Commercial Arbitration of 2016.
2. ICA Rules of International Commercial Arbitration of 2016.
3. ICA Maritime Arbitration Rules of 2016.
4. UNCITRAL rules.

There is a paucity of readily available data regarding the number of arbitration cases undertaken by the Indian Council of Arbitration each year. However, the Indian Council of Arbitration had undertaken over 1700 arbitration cases between 1981 and 2009.[117] Moreover, the majority of cases were domestic in nature, and there were 15 to 30 cases every year which were international commercial or maritime cases.[118] In the year 2010–2011, the council administered 52 new cases, among which 8 were of international character.[119] As per the Indian Council of Arbitration's 47th annual report of 2011–2012, the Indian Council of Arbitration undertook 49 arbitration cases that year, out of which only 5 were international cases.[120] During 2012–2013 the Indian council of arbitration registered 52 new cases, out of which 5 were of international character.[121] In 2015–2016 Indian Council of Arbitration registered 74 arbitration cases, out of which 13 were international cases.[122] It is difficult to trace the growth of the Indian Council

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115 About Us, Indian Council of Arbitration (Feb. 10 2020) https://www.icaindia.co.in/htm/about-us.html.

116 Mumbai Centre for International Arbitration (MCIA); Delhi International Arbitration Centre ("DAC") and several other arbitral institutes established under various business associations and territory specific chambers of commerce and industry.

117 Nariman 2020, at 9.

118 *Id.*

119 Indian Council of Arbitration, *46th Annual Report 2010–2011* (Dec. 28, 2022), available at https://www.icaindia.co.in/icanet/activity/ICAAnnualReport20102011.pdf.

120 Indian Council of Arbitration, *47th Annual Report 2011–2012* (Dec. 28, 2022), available at https://www.icaindia.co.in/ica-annual.pdf.

121 Indian Council of Arbitration, *48th Annual Report 2012–2013* (Dec. 28, 2022), available at https://www.icaindia.co.in/annualreport2012-13.pdf.

122 Indian Council of Arbitration, *51st Annual Report 2015–2016* (Dec. 28, 2022), available at https://www.icaindia.co.in/ar-2016.pdf.

of Arbitration in respect to the number of arbitration cases undertaken. However, it is axiomatic that the Indian Council of Arbitration at present does not hold the potential to rival the leading arbitration institutes of Southeast Asia, such as Singapore and Hong Kong. Thus, all hope is now upon NDIAC, but it is too early to determine whether NDIAC will stand the test of time as a regional player or not.

Now returning to the question, whether India is dreaming an impossible dream of becoming an international hub of arbitration. India is heading on the correct path with the Indian Parliament keeping the legislative wheels turning towards a globally accepted curial law. The judiciary is expressing its arbitration-friendly stance, encouraging confidence amongst international users and the establishment of NDIAC as an institute of national importance adopting globally accepted institutional arbitration practices. The chances of India becoming an international hub of arbitration in Southeast Asia do not seem impossible, but an uphill battle that time will only tell.

Conclusion

The Indian legislature took some recent steps to encourage and entrench institutional arbitration in India. Upon the analysis of the AA of 2019, the author put forth the following arguments. Firstly, the amendment in section 11 of ACA would no doubt increase the role of arbitral institutes in the appointment of arbitrators, which would increase the awareness amongst domestic users of the benefits of administrative assistance and standard rules in an arbitration proceeding, consequently encouraging institutional arbitration in India. Secondly, the establishment of the arbitration council would help to foster a healthy mechanism of grading institutes, which the parties can approach with confidence for administering arbitration proceedings. The aggregate effect of all these measures would no doubt result in an expedited procedure and encourage institutional arbitration in domestic cases to which the arbitration council and NDIAC will assist to their fullest.

In evaluations of a nation's arbitration regime, the analysis of its legislative and judicial pronouncements is not sufficient as the psychological perspective of its major stakeholders also plays a paramount role in determining its rate of success. Whereas in India, where almost no award goes unchallenged, and users spend years litigating to reap the fruit of their award, the users have developed a somewhat hostile perception which has negatively affected India's global position.

The relationship between curial law and institutional rules is of pivotal importance, as in case of inconsistency between the two, the curial law shall prevail. Thus, updating the curial law is another factor determining the success of a country as an international arbitration hub. Moreover, updated curial law enables the institutes to emulate the recent international trends as well as incorporate new innovative procedures without affecting the validity of the award. Even though India has recently amended its curial law, it still lacks in certain aspects when compared to the curial law of Singapore,

Hong Kong, or Malaysia. Such as, the narrow scope of the definition of "international commercial arbitration"; additional ground of patent illegality available in the recourse against domestic award; the bifurcated system of laws in the ACA which do not distinguish the law applicable to domestic and international arbitration; no express provision for an emergency arbitrator in ACA; neither is there any provision for the joinder of parties nor for the amalgamation/consolidation of cases between same parties; moreover, provisions pertaining to third-party funding are also not recognised within the curial law of India. Including such trends will assist India in escalating the inflow of international users.

The statistical analysis of the number of international arbitration cases undertaken by the leading institutes of Southeast Asia indicates that India at present could easily rival Malaysia but not Singapore and Hong Kong. Moreover, both India and Malaysia are struggling to attract international users to its centre and both India and Malaysia have made analogous changes to its strategies. Malaysia amended its curial law in 2018 to mirror the amended UNCITRAL Model Law, 2006. Moreover, Malaysia renamed its leading arbitration institute and India seems to follow a similar path.

Lastly, the establishment of NDIAC could provide India with a fresh start in the global arena of arbitration. The establishment of an institute is a mechanical process; the central aspect of any successful institute is its policies, rules, and initiatives. Looking at India's ability to provide cost-efficient facilities and specialised arbitrators in comparison to other developed nations in Southeast Asia, India could become the most preferred destination for international users provided it upgrades its curial law and institutional rules. Therefore, if India follows the well-tested road map of other successful jurisdictions such as Singapore and Hong Kong with some minor atonement keeping in mind its topography, legal regime, and customary practices, the days are not far when India would be an international hub of arbitration in Southeast Asia.

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CONTROL AND SUPERVISORY ACTIVITIES AS AN INSTITUTE OF ADMINISTRATIVE LAW

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This article discusses the currently relevant direction of the ongoing reform of the "regulatory guillotine." Specifically, the article focuses on the development of new trends in the regulation of control and supervisory activities. The reasons for the reform, its goals and objectives, as well as the results achieved, are analyzed. It is concluded that the key reason for the launch of the "regulatory guillotine" is the problem of redundancy and moral obsolescence of the regulatory framework. Furthermore, the current state of control and supervision activities carried out by the public authorities of the Russian Federation is characterized, trends are analyzed and the results of the ongoing reforms are summarized. One of the main problems in the implementation of the reform is corruption. Excessive bureaucratization of control and supervisory activities is highlighted as a key factor influencing the transition to electronic document management. In connection with the identified problems, the following potential areas for future research have been identified: the introduction and legitimization of electronic document management, the reduction of corruption, the impossibility of withdrawing from the reform of some departments, the identification of all kinds of threats and so on. In evaluating the effectiveness of the activities of control and supervisory bodies in foreign countries, the emphasis has shifted away from assessing the actual number of inspections, violations detected, fines and penalties imposed, open criminal cases, the amounts of illegally spent public funds returned to the budget, etc., and to assessing the "quantity" and the "quality" of the facts revealed and the events prevented in advance, which in one way or another contained a potential threat to the security of the state and society. It was thus implied that there was a risk of not achieving socially significant indicators (results), on

the basis of which society ultimately evaluates the activities of government bodies in general and the activities of control and supervisory bodies in particular.

Keywords: "regulatory guillotine"; reform; control and supervisory activities; electronic document management system; corruption; Russia.

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Introduction

Legislation plays an important role in ensuring the efficient and sustainable functioning of the economy; it is the basis for interaction between businesses, governments and civil society. Its role is to ensure the stable functioning of the economy while taking into account environmental, social and government factors. In fact, legislation is designed to guarantee trust in business and government, as well as mutual trust between the two, thus supporting the functioning of markets.

Legislation helps protect the rights and safety of consumers and citizens and ensures that goods and services are provided in the public interest. Inspections and monitoring of economic activity are, in this context, the main tools that promote the implementation and improvement of compliance with regulations and help ensure that economic activity does not endanger human and environmental safety.

Conducting effective checks also helps to build trust between stakeholders, which is essential for the proper functioning of the market. To this end, inspections and controls of economic activity should be based on adequate principles of risk management and risk mitigation, as well as the proportionality of risks.

The main principles of effective and efficient compliance audits are proper planning and a clear definition of the objects of inspection and control activities, as well as a high level of communication and coordination between the inspection bodies. In addition, a key element of the sustainable functioning of this system is the availability of open and accurate information and guidance for regulated entities (businesses and citizens), since the primary responsibility for compliance with regulatory requirements lies with the regulated entities. These key components of an audit oversight system will aid in the avoidance of illegal practices such as corruption and other dishonest practices. Thus, an adequate system of regulation and supervision will be of maximum benefit to enterprises and society as a whole.

On the contrary, an inadequate system of inspections and control over activities can result in direct and indirect monetary and non-monetary losses for states, enterprises and society. International experience shows that such a system creates unnecessary administrative barriers (and involves unnecessary costs) for enterprises, reduces turnover and investment and leads to corruption and abuse. Thus, an efficient system entails additional costs for its functioning, both on the part of the state (budget expenditures) and on the part of enterprises (compliance costs), while failing to achieve strategic goals and reducing the level of trust of enterprises and the public in government and legislation. Also, inadequate system of inspections and control creates corruption risks in Russia and other states.

1. Russia's Trends in the Development of Control and Supervision Activities Within the Framework of the "Regulatory Guillotine"

According to some estimates, the ongoing reform of control and supervisory activities covers up to two million mandatory requirements and 221 different types of control and supervisory activities. Thus, it follows that the "regulatory guillotine" encompasses nearly all types of control (supervision).[1]

The information provided by the Government of the Russian Federation indicates that there are 46 control and supervision departments that conduct up to 220 types of inspections at the federal level, 50 inspections at the regional level and 16 at the municipal level. More than 2 million requirements, of which more than 9,000 are from

[1] *Мартынов А.В.* Перспективы применения механизма «регуляторной гильотины» при реформировании контрольно-надзорной деятельности // Вестник Нижегородского университета им. Н.И. Лобачевского. 2019. № 5. С. 143–165 [Alexei V. Martynov, *Prospects for the Application of the Mechanism of 'Regulatory Guillotine' in the Reform of Control and Supervision Activities*, 5 Vestnik of Lobachevsky U. of Nizhni Novgorod 143 (2019)].

the Soviet era, contain prescriptions that are mandatory for businesses to follow, making it difficult to do business.[2]

This state of affairs creates a great number of difficulties in the business environment, which then raises the question of streamlining the system of social relations and reducing the number of legal acts that do not correspond to the realities of the world today.

The administrative reform of control and supervisory activities, he so-called "regulatory guillotine," carried out in the context of current world conditions, boils down to the abolition of irrelevant regulations in the field of supervision and control.[3]

The implementation of the reform of control and supervisory activities is based on the program "Reform of Control and Supervisory Activities," which was approved on 21 December 2016 by the Presidium of the Council under the President of the Russian Federation for Strategic Development and Priority Projects (the implementation period is until 2025).[4]

The "regulatory guillotine" mechanism, the first steps towards the launch of which were observed in 2015–2016, began to operate in full in 2019. The use of the regulatory guillotine mechanism became the basis for reforming the control and supervisory activities carried out by the federal executive authorities. The mechanism applies to the activities that are carried out by these bodies, including updating the regulatory framework, simplifying legislation for businesses and creating a more favorable atmosphere for entrepreneurship.

The need for reform of control and oversight was evident after 2010. Thus, in the Book of Complaints and Suggestions of Russian Business for 2014, emphasis was placed on the redundancy of the requirements of by-laws, namely industry and inter-sectoral rules, as well as on the inconsistency of norms and rules with modern technology.[5] In addition, requests to simplify the procedures for inspections and state control of activities were received on a regular basis from entrepreneurs operating in all constituent entities of the Russian Federation.

In his annual messages to the Federal Assembly of the Russian Federation, the President of the Russian Federation regularly focuses on the need to: complete the

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[2] *Овчинникова В.А., Власова Е.Л.* О некоторых вопросах «регуляторной гильотины» в Российской Федерации // Мировая наука. 2021. № 5(50). С. 102–109 [V.A. Ovchinnikova & Elena L. Vlasova, *On Some Issues of the 'Regulatory Guillotine' in the Russian Federation*, 5(50) World Sci. 102 (2021)].

[3] Oleg V. Aleksandrov, *Regulatory Guillotines: International Experience in Removing Barriers to Business and Investment*, 1(17) Trade Pol'y 107, 108–9 (2019).

[4] Утвержден паспорт приоритетной программы «Реформа контрольной и надзорной деятельности» // Правительство России. 29 декабря 2016 г. [*The Passport of the Priority Program "Reform of Control and Supervision Activity" Was Approved*, Government of Russia, 29 December 2016] (Sept. 10, 2022), available at http://government.ru/news/25930.

[5] The Book of Complaints and Suggestions of Russian Business for 2014 is a Report of the Commissioner under the President of the Russian Federation for the Protection of the Rights of Entrepreneurs.

reform of control and supervision activities,[6] terminate from 1 January 2021 the validity of all currently existing regulations in the fields of control, supervision and departmental regional orders, letters and instructions; and, with the participation of the business community, update the regulatory framework, with the exception of only those documents that meet modern requirements, the rest to be handed over to the archive.[7]

The implementation of the tasks set by the President of the Russian Federation can be traced in the gradual invalidation of obsolete acts issued by the government bodies of the Russian Soviet Federative Socialist Republic (RSFSR) and the Union of Soviet Socialist Republics (USSR), as well as their individual provisions.[8] As a result, Russian legislation is being systematized within the framework of the regulatory guillotine mechanism, which, according to D.A. Medvedev, is one of the new emerging strategic long-term institutions and mechanisms of social and economic life.

According to A. Kudrin, the regulatory guillotine is

> not just the abolition of old instructions or their rewriting in new formats, this is the part of the work that needs to be done. The reform of control and oversight activities should have its own KPI: reducing the list of control functions of ministries and departments by half, and not just canceling or rewriting old instructions. In many areas, regulatory authorities should switch to notification analysis and monitoring through databases, that is, without any reporting, licensing procedures should analyze what is happening.[9]

According to A.V. Martynov, the goal of the regulatory guillotine is to "comprehensively update the mandatory requirements adopted before 2010, as well as to analyze the consequences that have occurred after the adoption of a significant set of regulatory legal acts, to achieve the set goals."[10]

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[6] Послание Президента Федеральному Собранию 15 января 2020 г. // Президент России [Message of the President of the Russian Federation to the Federal Assembly of 15 January 2020, President of Russia] (Sept. 10, 2022), available at http://kremlin.ru/events/president/news/62582.

[7] Послание Президента Федеральному Собранию 20 февраля 2019 г. // СПС «КонсультантПлюс» [Message of the President of the Russian Federation to the Federal Assembly of 20 February 2019, SPS "ConsultantPlus"] (Sept. 10, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_318543/.

[8] Свыше 450 актов советских госорганов признаны недействительными // Правительство России. 17 июня 2020 г. [*Over 450 Acts of Soviet Government Agencies Were Declared Invalid*, Government of Russia, 17 June 2020] (Sept. 10, 2022), available at http://government.ru/news/39884.

[9] *Шеншин В.М.* Применение механизма «регуляторной гильотины» при реформировании контрольно-надзорной деятельности Росгвардии // Вестник Нижегородского университета им. Н.И. Лобачевского. 2021. № 1. С. 178–186 [Victor M. Shenshin, *Application of the Mechanism of the 'Regulatory Guillotine' in the Reform of the Control and Supervisory Activities of the National Guard*, 1 Vestnik of Lobachevsky U. of Nizhni Novgorod 178 (2021)].

[10] Martynov 2019, at 144.

An analysis of Russian legislation allows us to conclude that the regulatory guillotine has several main goals. These goals include (a) the reduction of costs aimed at monitoring and eliminating rules that have lost their relevance; (b) holding consultations with interested business entities; (c) searching for the most optimal algorithm that will allow for quality control without violating the law; and (d) the organization and implementation of interdepartmental coordination and cooperation.[11]

The main goal of the regulatory guillotine is to update the regulatory framework in accordance with the realities of the world today. By launching this mechanism, the Government of the Russian Federation has set itself the task of creating a new legislative framework that will ensure the legality of enterprises in all areas of the economy while at the same time not creating artificial barriers and difficulties for the development of entrepreneurship.

The priority tasks carried out in the course of this reform are:

- development of a unified system for assessing the effectiveness and efficiency of control and supervision activities;
- prioritization of the risk-oriented approach in the implementation of state control;
- updating safety rules and quality standards in accordance with modern realities;
- development and implementation of an effective anti-corruption system in the field of state control and supervision;
- automation of control and supervisory activities.

It should be noted that the presence of a significant amount of outdated legal framework is the main reason for the reform of control and supervision activities. The reform of the control and supervisory activities of the Russian Federation was based on the mechanism of the regulatory guillotine because in order to introduce new, more efficient algorithms and rules, it became necessary to abolish outdated by-laws. Until 2019, the Government of the Russian Federation and committees under the various Ministries focused on the adoption of federal laws, losing sight of by-laws. Therefore, the results of the analysis conducted by the members of the working groups demonstrated that in almost all spheres of the economy there were regulatory legal acts that were first adopted in the days of the USSR, and then extended two or more times.

The regulatory framework, which is partly comprised of by-laws enacted prior to 1990, does not meet the needs of the modern economy and acts as an artificial barrier to the development of entrepreneurship. Experts, under the guidance of the Decree of the Government of the Russian Federation of 29 August 2018 No. 1026,[12]

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[11] Official website of the Reform of Control and Supervision Activities (Sept. 10, 2022), available at https://knd.ac.gov.ru/.

[12] Постановление Правительства Российской Федерации от 30 января 2015 г. № 83 «О проведении оценки фактического воздействия нормативных правовых актов, а также о внесении изменений в некоторые акты Правительства Российской Федерации» (вместе с «Правилами проведения оценки фактического воздействия нормативных правовых актов») // СПС «КонсультантПлюс»

identified 3,003 by-laws, including directives, instructions, inter-sectoral and sectoral rules and so forth, as redundant and obsolete.

The main reasons why these documents were deemed no longer relevant are as follows:

• non-suitability of instructions and requirements for technological processes utilizing modern technologies;

• the presence of requirements in by-laws developed in the Soviet era that cannot be fulfilled in light of modern realities;

• the presence of a large number of redundant and duplicative norms and rules in intersectoral and sectoral rules, instructions, etc.;

• the absence in the outdated regulatory framework of a number of norms, rules, and mechanisms that allow for the monitoring of the legality of commercial activities in certain sectors of the economy.[13]

The reform of control and supervisory activities affected 21 legislatures and 33 oversight bodies.[14] According to preliminary conclusions, the transportation sector has experienced the greatest number of large-scale changes. The Ministry of Transport of the Russian Federation repealed 800 obsolete legal acts and 85 new documents came into force to replace them. This decision allowed the management of transportation enterprises to plan operations in accordance with current standards while also saving up to 70 billion rubles.

Changes to the regulatory framework in the field of labor protection are no less significant. Thus, a number of changes to Section X of the Labor Code of the Russian Federation are planned, including updating the requirements for labor protection

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[Decree of the Government of the Russian Federation No. 83 of 30 January 2015. On the Assessment of the Actual Impact of Regulatory Legal Acts, as well as on Amendments to Certain Acts of the Government of the Russian Federation (together with the "Rules for Assessing the Actual Impact of Regulatory Legal Acts"), SPS "ConsultantPlus"] (Sept. 10, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_174824/.

[13] *Подколзина Е.А.* Реформирование контрольно-надзорной деятельности Российской Федерации как правовое решение проблемы избыточности и морального устаревания нормативно-правовой базы // Инновации. Наука. Образование. 2021. № 26. С. 723–727 [Elena A. Podkolzina, *Reforming the Control and Supervision Activities of the Russian Federation as a Legal Solution to the Problem of Redundancy and Moral Obsolescence of the Regulatory Framework*, 26 Innov. Sci. Educ. 723 (2021)].

[14] Перечень федеральных органов исполнительной власти, осуществляющих функции по нормативно-правовому регулированию в сферах осуществления государственного контроля (надзора), и федеральных органов исполнительной власти, осуществляющих контрольно-надзорные функции, участвующих в реализации механизма «регуляторной гильотины», видов федерального государственного контроля (надзора), осуществляемых федеральными органами исполнительной власти, на которые должен быть распространен механизм «регуляторной гильотины» (утв. Председателем Правительства Российской Федерации 4 июля 2019 г.) // Электронный фонд правовой и нормативно-технической документации [List of Federal Executive Bodies to Which the Mechanism of the "Regulatory Guillotine" Should Be Extended, approved by the Chairman of the Government of the Russian Federation on 4 July 2019, Electronic Fund of Legal and Normative-Technical Documentation] (Sept. 10, 2022), available at https://docs.cntd.ru/document/560596119.

specialists and approving a risk-based approach to organizing the safety of employees. The new rules and instructions governing labor protection issues were developed taking into account the application of a risk-based approach and are aimed at preventing the occurrence of accidents when using modern technological processes.

Let us take note of the two main stages necessary in the process of reforming control and supervisory activities:

1. adoption of new requirements that will serve as the basis for technological development as well as comply with a risk-based approach;

2. introduction of new rules related to the conduct of control (supervision) operations.[15]

The implementation of the concept of "regulatory guillotine" is carried out in accordance with the "Roadmap"[16] and with the involvement of interested parties, such as business representatives, experts and scientists.

Paragraph 2 of the Roadmap directed the Ministry of Economic Development of the Russian Federation to develop a draft Federal Law titled "On Mandatory Requirements in the Russian Federation," which in 2020 acquired the status of a Federal Law and began to define the concept of a mandatory requirement and regulate the process of developing and adopting these requirements, set goals and the basic principles of their consolidation in legislation, so as to ensure the consolidation of the mechanism at the legislative level. In other words, all new rules, instructions, laws, regulations and annexes to laws must be checked for compliance with the norms of this act before consideration and approval.

In 2020, Federal Law No. 248-FZ of 31 July 2020 "On State Control (Supervision) and Municipal Control in the Russian Federation" was adopted, providing for nuances for improving this type of activity, which made it possible to create a system aimed at the qualitative regulation of control and supervisory activities and at the same time reduce the "pressure on business."

In order to reform the sphere of state control and supervision, in 2017 the implementation of the reform of control and supervision activities began. To implement the reform, 43 working groups were created, each specializing in the introduction of the regulatory guillotine mechanism in a particular industry.

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[15] Основные направления деятельности Правительства Российской Федерации на период до 2024 года (утв. Председателем Правительства Российской Федерации 29 сентября 2018 г.) [The Main Activities of the Government of the Russian Federation for the Period up to 2024, approved by the Chairman of the Government of the Russian Federation on 29 September 2018] (Sept. 10, 2022), available at https://docs.cntd.ru/document/554168464.

[16] План мероприятий («дорожная карта») по реализации механизма «регуляторной гильотины» (утв. Правительством Российской Федерации 29 мая 2019 г. № 4714п-П36) // СПС «КонсультантПлюс» [The Action Plan ("Roadmap") for the Implementation of the "Regulatory Guillotine" Mechanism, approved by the Chairman of the Government of the Russian Federation on 29 May 2019 No. 4714p-P36, SPS "ConsultantPlus"] (Sept. 10, 2022), available at https://www.consultant.ru/document/cons_doc_LAW_329301/.

Additionally, drafts of 447 acts were developed, designed to replace obsolete industry rules, instructions and resolutions that had lost their relevance.[17]

The essence of the work of the commission on deregulation, created under the Government of the Russian Federation, is to identify excessive norms, submit them for revocation, and require that the relevant departments that insist on their preservation provide evidence with specific numbers within 30–45 days regarding the need for these norms, should such a need suddenly arise.

Executive authorities at the federal level are making efforts aimed at establishing certain exceptions for them (for example, the Ministry of Internal Affairs of Russia, the Ministry of Emergency Situations of Russia, the Ministry of Health, the Ministry of Culture, the Ministry of Natural Resources, the Ministry of Industry and Trade, the Ministry of Construction, the Ministry of Transport, the Ministry of Labor and Rospotrebnadzor). Several departments asked to be released from the regulatory guillotine (such as the Ministry of Justice of Russia, the Ministry of Finance of Russia, the Russian Federal Security Service and the Federal Antimonopoly Service of the Russian Federation), justifying their requests by stating that businesses have no complaints about the checks they conduct. Such exceptions violate the logic and consistency of the ongoing reforms of control and supervision activities, which suggests that sooner or later the extension of the administrative reform to abolish normative legal acts at various levels that have lost their relevance will be extended. The reason for such an extension being granted will be the lack of sufficient time to conduct inspections at the regional and local levels. As part of the regulatory guillotine, the review of the federal legal framework was planned to be completed by 1 January 2021. Furthermore, it is planned to review the norms of the constituent entities of the Russian Federation by 2022 and municipal norms by 2023.

Turning to the difficulties of implementing the reform, we note that the main danger for the effective implementation of the mechanism of the "regulatory guillotine" is corruption in state authorities and local self-government. Corruption seriously hinders the normal functioning of all state structures, impedes the implementation of social transformations, impairs the efficiency of the national economy and causes anxiety and distrust in state institutions in Russian society,[18] including in the implementation of the regulatory guillotine mechanism. Even though the supervisory authorities have begun to apply other forms of supervision, it is impossible to take them into account with the existing reporting forms and, therefore, determine the degree of pressure on the business community. We also note that, "The relationship that has arisen in connection with the implementation

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[17] Official website of the Reform of Control and Supervision Activities (Sept. 10, 2022), available at https://knd.ac.gov.ru.

[18] *Шеншин В.М., Гордиенко У.Н.* Коррупция как угроза национальной безопасности // Право. Безопасность. Чрезвычайные ситуации. 2021. № 2(51). С. 27–33 [Victor M. Shenshin & U.N. Gordienko, *Corruption as a Threat to National Security*, 2(51) L. Safety Emerg. 27 (2021)].

of certain state powers by local self-government is legally regulated quite clearly; however, the established procedure is not always observed in fact."[19]

Some of the most frequently used new forms of control over the past two years have been raids, test purchases and cases initiated under the Code of Administrative Offenses of the Russian Federation. At the same time, official statistics do not provide for such forms of supervision in the approved forms, which leads to a distortion of the data presented on the pressure on small and medium-sized businesses.

Numerous redundant requirements have not been updated, but at the same time, administrative liability is provided for each offense.

Based on the foregoing, it can be summarized that there is a need to amend the Code of Administrative Offenses of the Russian Federation. Within the framework of the regulatory guillotine the number of articles and grounds for administrative offenses, the number of which has increased significantly in recent years, should be reduced.

Further introduction and legitimization of electronic document management are necessary for the effective implementation of the reform. Since excessive bureaucratization of control and supervisory activities is one of the key problems, a transition to electronic document management is planned as part of the reform. In the register of systemic problems in Russian businesses,[20] bureaucracy is defined as one of the artificial obstacles to commercial activity.

In 2020, departments (including ministries and committees) of digitalization and information development were created for the further implementation of electronic document management in all areas of state control and supervision in all constituent entities of the Russian Federation.

As a result, the question of substantiating and implementing the regulatory guillotine, which has previously not been singled out as a separate area for improving control and supervisory activities, is currently on the agenda.

The regulatory guillotine is, first of all, an inventory of a significant number of requirements that apply primarily to business, carried out in order to compare such requirements with modern realities. In the event that these requirements are still suitable, they will remain in effect; but, in the event that their suitability is no longer relevant, then the requirements will be revoked. This postulate underlies the decision of the Government of the Russian Federation to conduct a "regulatory guillotine."

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[19] *Немова Н.Ю., Григонис В.П.* Влияние конституционных норм на взаимоотношения органов государственной власти и местного самоуправления в Российской Федерации // Право. Безопасность. Чрезвычайные ситуации. 2021. № 3(52). С. 55 [Ninel Yu. Nemova & Valerius P. Grigonis, *Influence of Constitutional Norms on the Relationship Between Public Authorities and Local Self-Government in the Russian Federation*, 3(52) L. Safety. Emerg. 52, 55 (2021)].

[20] Register of systemic problems of Russian businesses 2019 on the official website of the Commissioner under the President of the Russian Federation for the Protection of the Rights of Entrepreneurs (Sept. 10, 2022), available at http://doklad.ombudsmanbiz.ru/doklad_2019.html.

The control and supervisory activities reform, which was announced in 2016 and launched in 2017, was implemented in 2019 and 2020 in accordance with the priority program passport.[21] In two years, regulatory legal acts that were no longer relevant were identified and revoked, in place of which new documents complying with the norms of the Federal Law of 31 July 2020 No. 247-FZ were approved.

According to preliminary plans, the reform of control and supervision activities will be finally implemented by 2025. However, even at the initial stages, the "regulatory guillotine" made it possible to achieve significant results. The fact that the World Bank in its Doing Business 2020 report included Russia in the TOP-30 most promising countries for doing business is evidence that the reform is actually effective.[22]

2. Tasks Solved Within the Framework of Models of Regulatory and Supervisory Activity

The fundamental goal of regulation and control is to improve public welfare by eliminating or minimizing certain risks, including corruption risk. Within the framework of achieving this goal, there are three specific tasks of control systems and models that can be distinguished, none of which are mutually exclusive from one another:

Effective and efficient (in terms of profitability ratio) responses to the risks and threats associated with entrepreneurial activities

The main factor in achieving this goal is the planning and scheduling of inspections, taking into account the real risks to the integrity of human life, the preservation of the environment and wildlife, and health and safety. A risk-based approach legitimizes control activities in the eyes of enterprises and places inspection activities on a rational and "scientific" basis. Moreover, a risk-based approach typically makes it possible to spend the resources of regulatory authorities in a more rational and economical manner. The business register and the use of IT tools are key elements of the system to achieve this goal. The pursuit of efficiency frequently leads to the merging of control operations and (financial and human) resources. This goal can be achieved primarily by establishing control over the number, frequency and duration of inspections. In accordance with this guiding principle, a number of countries have

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[21] Паспорт приоритетной программы «Реформа контрольной и надзорной деятельности» в редакции протокола от 21 декабря 2016 г. № 12 // Правительство России [Passport of the Priority Program "Reform of Control and Supervisory Activities" – Annex to the Protocol of the Presidium of the Council under the President of the Russian Federation for Strategic Development and Priority Projects of 21 December 2016 No. 12 (as amended on 30 May 2017, Protocol No. 6), Government of Russia] (Sept. 10, 2022), available at http://government.ru/projects/selection/655/25930/.

[22] The World Bank's Doing Business 2020 Report is the 17th edition in the World Bank Group's annual publication series, *see* World Bank, *Doing Business 2020* (2020) (Sept. 10, 2022), available at https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf.

set a maximum number of days that an inspection can last for and have also limited the number of times the inspections can take place. However, both the duration and number of inspections can be significantly reduced through proper coordination between regulatory authorities and inspection activities (for example, through joint inspections), as well as through the pre-planning of inspections in accordance with the level of risk associated with the activity and organization being inspected.

Stimulation of economic growth and employment growth by reducing administrative barriers and costs of enterprises associated specifically with inspections and inspection activities (second important goal)

This approach is predicated on the following assumptions:

• informing and communicating with businesses to familiarize them with regulatory requirements and processes and procedures for verification and control;

• given that the purpose of audits is to assess compliance and risk levels, they are carried out in accordance with pre-designed checklists that guarantee equal treatment of enterprises and predictable results of audits;

• clear, simple and transparent procedures, tasks, duties, rights and responsibilities; checks are carefully coordinated, do not duplicate and do not contradict each other, even when carried out by different bodies;

• therefore, there is coordination between the various authorities and supervisory authorities.

• the confidentiality of commercial and secret information is maintained;

• Inspectors are trained in the use of checklists and have the technical and communication skills necessary to conduct inspections and follow up.

Ensuring transparency and accountability of public services and the rule of law, in particular ensuring the legal aspect of inspections and control of activities and appeal mechanisms (an intermediate goal that contributes to the achievement of two main goals)

In a number of countries (notably Spain, Croatia, and Bosnia and Herzegovina), the regulatory body has established the control system and all inspection activities within a clear, agreed-upon legal framework. As a result, in these countries, the inspection activities and procedures were based on a legal framework that was transparent and easy to comprehend, and at the same time, this framework ensured proper access to the judiciary. For the vast majority of cases, the laws prescribe processes and procedures and define in detail the rules relating to the duties of the inspector and the inspector. It should therefore come as no surprise that one of the main tasks of such laws is to combat corruption. For example, Romania, among other countries, has revised its internal control procedures in order to ensure compliance with the regulation by control and inspection bodies and to introduce mandatory checklists for inspections and mandatory documents recording inspections and follow-up activities in order to limit the freedom of action and opportunities for soliciting a bribe.

One of the means for achieving this goal is ensuring the transparency and accountability of inspections. This implies a clear definition of the areas of competence

of the supervisory authorities, as well as the role, rights and obligations of inspectors. Some governments have also stepped up external and internal audits of regulatory bodies. For example, some Latvian inspection bodies have established departments for internal audits.

In many cases, clearly defining the standards, rights, and responsibilities of inspectors and inspected organizations leads to a significant reduction in discretion, as well as setting precise compliance targets for businesses. This can be achieved through simple measures such as the introduction of official identification documents and verification orders. A valuable tool for reducing the risk of abuse of power is the legislating of the rights and obligations of inspectors and inspected organizations, as well as for the adoption of soft legal instruments such as codes of conduct (introduced in Romania, among other countries, for tax inspectors). In addition to "soft" measures, which rarely provide for sentencing mechanisms, in some countries, such as Latvia, supervisory authorities must follow mandatory procedures and principles governing inspections, tender and appeal procedures, and so forth. Codes of Practice are made available for review by inspectors and those being inspected by regulators, which improves understanding of the procedures by all stakeholders and therefore enhances accountability and compliance.

Guidelines and checklists are important tools for ensuring the transparency and accountability of audits. They ensure that inspections comply with all regulatory requirements and prevent abuse of power by inspectors. In a number of countries, regulations require the maintenance of so-called "inspection logs," which allow public authorities to keep an official record of provisional measures imposed by inspectors after an inspection and to control the frequency with which such inspections are carried out.

Also, modern technologies, in particular electronic document management system have proven their great importance for optimizing control and supervisory activities and reducing the risks of corruption. Obviously, electronic document management system allows to quickly and efficiently monitor the activities of regulatory authorities and to respond to violations.

3. Experience in the Use of Governmental and Non-Governmental Forms of Control[23]

3.1. Review of the Negative International Experience in Russia and Europe

Opacity of the control system

It should be noted that a lack of transparency can lead to a number of problems, the majority of which are commonly related to abuse of power and other forms of

[23] *See* Florentin Blanc, *Inspection Reforms: Why, How, and with What Results*, OECD (2012) (Sept. 10, 2022), available at https://www.oecd.org/regreform/Inspection%20reforms%20-%20web%20-F.%20Blanc.pdf.

corruption. First, opacity allows individuals who are not authorized by the responsible oversight bodies to carry out inspections. In this capacity, government officials who do not have inspection powers can act as inspectors; as can persons who are in no way associated with the supervisory authority; as well as inspectors who are retired or do not have a valid inspection order. Secondly, and this is especially typical for the countries of Eastern Europe, "real" inspectors conduct far more inspections than those prescribed by the responsible control body. In general, it has been noted in numerous instances that inspectors do not produce documents at the start of an inspection, even in situations where national law requires it. This is a systemic problem, especially noticeable, among other countries, in Italy. It is rooted in a lack of transparency in the oversight system, coupled with a general fear of inspectors who represent the oversight body and have the authority to impose penalties. Above mentioned electronic document management system ensures transparency of the control system.

Excessive number of inspections: burden on businesses and partially or completely duplicative inspections associated with insufficient risk orientation and proportionality of risks, as well as the desire to constantly inspect or monitor all areas of activity

In situations where, without a preliminary analysis of the existing state of affairs, new legal acts are introduced and consequently, new areas of competence are also delineated as well as new institutions responsible for inspections and control are appointed, there is a risk that inspections will partially or completely duplicate each other. In reality, in order to enhance their authority and expand their scope and influence, compliance authorities frequently interpret regulations broadly, extending their competence to areas related to them. As a result, this leads to a situation where different inspection bodies carry out inspections on the same issues, which leads to partial or complete duplication of inspections. This situation entails significant public and private costs (because often decisions to create a new control body or a new area of responsibility are made without a preliminary cost-benefit analysis), not to mention a significant administrative burden. Insufficiently effective coordination between the various regulatory authorities is inextricably linked to a lack of clearly defined areas of authority and competence. Moreover, this can also lead to the emergence of areas of activity not covered by inspections (the planning and conduct of inspections for which no supervisory body is entrusted), which, in turn, leads to inefficient regulation and supervision. Redundant inspections also increase corruption risks.

Inspections that do not address public welfare and risk mitigation goals

Often, inspection bodies are created as a result of public discussion of a specific situation that public opinion or opposition qualifies as a problem. This occurs without a preliminary analysis of current performance and such fundamental issues as cost-benefit ratio, as well as without an analysis of the existing institutions to which such a duty could be entrusted and without defining the immediate purpose of the

institution being created in terms of the public good and risks. Both above aspects can ultimately be reduced to a single goal: minimizing or reducing risks, protects the public interest and serves the same purpose as promoting public welfare.

Lack of coordination within the model of national and local authorities

In a number of countries, enforcement of key regulations is predominantly the responsibility of local authorities operating in parallel with national agencies that either have exclusive competence in these areas of control or instruct local authorities to ensure consistent and uniform enforcement of significant regulations. These national agencies have the authority to allocate resources and also have departments that specialize in various technical aspects of audits. The quality of local inspections may suffer from a lack of resources in some regions, while other regions may have an excess of resources. In addition, the unclear division of responsibilities between central and regional/local authorities can also lead to insufficient coordination and information exchange across institutions, as well as to partial or complete duplication of checks. In such cases, the problem arises because the decision on areas of control was not the result of careful analysis. Regardless of the reasons for the occurrence, the consequences of such a decision frequently lead to confusion and misunderstandings among business entities (and the regulatory authorities themselves) about which institution is responsible for carrying out inspections in specific areas. Obviously, the development of an electronic document management system will help solve this problem.

Lack of professionalism

Recruitment guidelines, qualification testing process and procedures, training inspectors in key skills for conducting inspections, promoting compliance and reducing risks associated with economic activities, as well as inspector appraisal (and performance evaluation of inspection bodies) may not be clearly defined or may be developed inconsistently and without uniformity. It is very important to define the basic skills and techniques needed for all the different types of spheres of control. In addition, it is also critical to strengthen relationships with inspectees and reduce the burden placed on businesses.

Inadequate performance management

Typically, this results in unnecessary and unjustified unreasonable checks being conducted or an excessively high number of penalties being imposed, both of which are considered acceptable outcomes (or even one of the goals of the control system). The comparative study showed that a large number of inspections not only does not guarantee a higher level of compliance with the relevant regulations, but also is not a more effective means of protecting the public interest (which is equally applicable to punishments).

Use of audits as a source of government revenue (related to the previous point)

Enforcement is also complicated when there is a conflict between the protection of the public good and the generation of revenue (considered one of the purposes of

the government control structure). Problems arise if revenue generation is prioritized, resulting in oversight errors. This leads to significant abuse in the system, increase of corruption risks and a drop in efficiency and legitimacy. In order to prevent such conflicts of interest, it is critical to provide clear mandates and ensure that regulators act in strict accordance with their strategic goal of protecting the public interest and minimizing risk.

Disproportionate penalties and lack of proportionate and flexible accounting

If the punishment is seen as an insufficient deterrent, some of those who have been inspected may continue to violate the requirements they have already violated even after the punishment is imposed. On the other hand, excessively harsh penalties that are disproportionate to the offense are also not cost-effective; they undermine the legitimacy of government actions, promote corruption and generate resistance to audits and enforcement (resulting in lower compliance rates). According to the principle of proportionate and flexible consideration of the degree of risk, the response of control authorities to a violation that qualifies as "serious" and has the potential of violating the integrity or well-being of a person or other public interests or rights should be more severe than the response to less serious violations that do not represent an immediate threat. Therefore, the range of possible penalties should be sufficiently broad to ensure, on the one hand, a differentiated approach to different practices and, on the other hand, the effectiveness of punishment as a deterrent.

Lack of measures aimed at encouraging compliance with regulatory requirements, such as coaching, consulting, etc.

Raising compliance and reducing risks is unlikely unless inspection bodies encourage compliance (by issuing manuals, checklists or other types of information and advice in print or oral form and by improving their relationships with inspected persons). This is frequently observed, especially when the primary objective of the regulatory authorities is to generate revenue.

Inadequate compensation and career prospects

This frequently results in the departure of valuable employees (professionals, qualified and educated personnel) from institutions, while those who continue to work in this system do so for unscrupulous reasons (because they are not qualified enough to find another job or have committed corrupt acts) or remain in the service for the abuse of power).

Lack of real appeal mechanisms

In cases where the law or regulations do not provide opportunities for appeal, or when the conditions for filing a petition for legal protection are difficult to meet, or where it is known that there are no opportunities for appeal, trust in public institutions in general is reduced (especially in control bodies, inspectors and courts).

Lack of punishment of inspectors for inappropriate behavior

The lack of effective and dissuasive penalties for inspectors acting contrary to the law or professional ethics leads to a lack of trust in the compliance system among

those being inspected, as well as an increase in the number of opportunities for abuse of power and corruption.

Improper influence

"Enforcement of regulatory requirements must be independent of political influence" (Principle 7, OECD [2014]). In some instances, even when control staff is protected from political interference by law or regulation, senior staff are nonetheless subject to political influence (for example, if they are replaced as part of a political transition). In addition, inspection bodies may be directly influenced by ministries, which also risks changing some of their priorities as a result of political decisions.

3.2. Review of the Positive International Experience in Russia and Europe

Transparency of the regulatory framework, procedures and structures

Transparency is a key element of adequate enforcement of the regulations governing inspections. This principle also applies to the legal framework (for example, the UK Code of Regulatory and Supervisory Authorities;[24] Decree Law No. 5/2012 (the so-called "Italian Simplification Decree"[25]), adopted by the Italian government in 2012, which governs the delegation of government powers to implement reforms), to the procedures and practices related to verification activities, as well as to the structures, their areas of authority and responsibilities. Transparency, among other valuable benefits, helps to avoid misunderstandings on the part of those being inspected as well as the abuse of power. Effective electronic document management system promotes transparency of the regulatory framework, procedures and structures

Prevention of partial and full duplication, increase in efficiency

Often, there are an excessive number of bodies responsible for conducting inspections and exercising control, which leads to partial and complete duplication of inspections and waste of material and human resources. Consequently, this situation is associated with a significant administrative burden on business entities and unnecessary government spending. The European Union (EU) Member States that have already carried out reforms frequently considered institutional reform their top priority. These states attempted, on the one hand, to reduce the number of agencies while consolidating their functions and, on the other hand, to clearly define the areas of competence of each of the agencies. As long as the guiding principles of reform are adhered to, any of the models listed above will assist in dealing with this task, subject to the principles of reform. However, successful examples of consolidation show that it is necessary to conduct a preliminary analysis in order to diagnose the current situation. Moreover, it is also important that the process incorporate the development of fundamental legislation and coordinating

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[24] Regulator's Code (Sept. 10, 2022), available at https://www.gov.uk.

[25] Decree-Law No. 5/2012 (the so-called "Italian Simplification Decree") [Decreto Semplifica Italia] (Sept. 10, 2022), available at https://www.funzionepubblica.gov.it.

mechanisms, as well as a readiness to reform the structure. In addition, preventing partial or total duplication and improving the effectiveness of the control system also require improved communication and coordination between national (central) and regional or local structures, as well as a systematic and effective exchange of information between agencies and coordination in the planning of inspections.

Risk-based regulation

Risk-based regulation is very important because it contributes to the achievement of public policy goals through the effectiveness of targeted inspections of organizations or enterprises whose activities are associated with the highest risks. Such regulation allows for a more rational use of public resources by identifying priority industries or targets for inspections, in relation to which tighter control is required; it also reduces the burden on economic operators. Additionally, risk-based regulation offers approaches and tools for resolving specific issues, problems and situations based on a response that is proportionate to the risk.

First and foremost, the main objective of risk-based regulation is to reduce the possibility of a negative impact on public welfare (taking into account available resources). Risk-based regulation promotes rational data-driven selectivity, which can aid in the allocation of government resources in a more efficient and effective manner.

Secondly, it is fundamentally important to target the system of inspections (and in particular the procedures for inspections) based on the risks associated with the relevant economic activity and which may affect the integrity and safety of consumers, the surrounding community and society as a whole. There are a number of advantages to adhering to this principle, including the following:

• the system of checks becomes justifiable;

• the process appears more rational from the point of view of those being inspected;

• risk-based planning ensures a more cost-effective utilization of resources (both material and human);

• a risk-based approach, if applied thoughtfully and effectively, can increase the credibility of high-risk economic operators as they are proven to meet higher standards.

For this development to be effective, it is necessary to put in place and use accurate data about economic operators (for example, a suitable registry of legal entities) and IT tools.

Thirdly, less stringent or more flexible requirements for low-risk economic entities will reduce their costs. Since the vast majority of economic operators are associated with low risks, reducing the burden on them will contribute to a net reduction in the burden on the scale of the national economy.

Sharing information on planning inspections to ensure coordination (in particular between national and local authorities

International experience shows that effective information sharing helps reduce administrative burden, improve planning and ensure cost effectiveness. However, this is possible only if there is a common information system or database in place as well as a consolidation of information on all of the objects that are subject to control.

According to a report that was prepared by the OECD in 2012,[26] the information system should ideally be based on a database containing data on at least the following items: a list of all economic operators and institutions; indicators of risk factors for each organization; a list of all checks conducted; a list of test results; an automatically calculated rating of the risks associated with the activities of each economic entity or organization; and an automatically generated list of necessary checks and their schedule.

While interesting results and positive experiences have been achieved in some cases,[27] more complex systems are rare. However, despite obstacles such as the difficulty of connecting existing information systems to each other, the costs of implementing an information system, confidentiality issues and so forth, the critical importance of IT tools that ensure the sharing of information by inspection bodies makes them a key element of a rational and effective audit system.

The Inspection View system was introduced in the Netherlands in 2010 after a two-year pilot phase. This system, the main purpose of which is to enable the exchange of information based on an advanced information architecture, provides data sharing among various inspection bodies that have access to information on inspections and compliance with certain economic operators or organizations. "Inspection View" provides some degree of centralization of data on economic operators (in particular, information about previous inspections, such as inspection results), thereby giving each inspector a complete picture of a particular object.

Although it does not replace other means of data consolidation used by national authorities, the Inspection View system promotes cooperation among authorities (about five). However, regional inspectorates also have access to this application and use it in specific cases where general control is especially needed. The information contained in the Inspection View system should be used when planning inspections in accordance with a risk-based approach in order to create a more effective system of inspections. Additionally, this system helps to prevent both partial and complete duplication of checks. Using the system in conjunction with another IT tool, "Company Dossier," has proven to reduce the administrative burden on companies. The "Company Dossier" system, developed by the business community and the Ministry

[26] Blanc, *supra* note 23, at 78.

[27] Italy's "Unified Inspection Register" and the inspection management system introduced in Bosnia and Herzegovina (Republika Srpska) are discussed more fully in section (d) of the report.

of Economy in 2011, is used by economic entities that can enter data on their activities obtained within the framework of self-regulation into it and make it available for viewing by regulatory authorities (the latter get access to information only when economic operators make their profile information in the system available to them). These two tools, when used together, help inspectorates and inspectors focus on the most problematic issues and results achieved. Moreover, they contribute to the establishment or reinforcement of trust in regulatory and supervisory authorities, which has a positive impact on compliance with regulatory requirements.[28]

Professionalism

Professionalism must underlie any verification activity. This includes both technical knowledge in the relevant areas as well as general knowledge related to the conduct of audits (operational guidance, compliance promotion, ethical behavior, risk management, etc.).

Adequate performance management

Performance management should reflect, on the one hand, the general goals of inspection activities (risk reduction, protection of public interests) and, on the other hand, specific goals for each of the areas of control. It is on this basis that the goals and objectives of inspections (and inspectors) should be determined, specifically, the intended result should be positive achievements in the field of compliance and safety, and not a large number of inspections and punishments. The high (and increasing) number of sentencing cases appears to be a particularly difficult situation, as it indicates a low (and declining) level of compliance; in other words, such a situation cannot be understood as a "good result" of the inspectorate.

Preventing the use of audits as a source of income

The control system should not be aimed at generating income but at minimizing risks, protecting the public good, and protecting rights. Income generation should be excluded from the list of objectives of the control authorities, as this may contradict the above important fundamental objectives.

Role and limits of penalties and liability in terms of effective enforcement of regulations

Studies and articles highlight several questions on this issue. First, overly harsh penalties for violations that are considered minor (based on the level of risk involved) are associated with high costs for business entities, create conditions for abuse of power and do not provide a satisfactory level of trust in government bodies. In addition, penalties that do not take into account the amount of profits made or losses

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[28] Information provided on the following websites: the portal of all central government inspectorates of the Netherlands [Gateway to all central government inspectorates of the Netherlands], English version (Sept. 10, 2022), available at https://www.rijksinspecties.nl, and the program website for Environmental Information Exchange PIM [Programma Informatie-uitwisseling Milieuhandhaving] (Sept. 10, 2022), available at http://www.informatieuitwisselingmilieu.nl.

incurred as a result of a violation[29] are unlikely to prevent subsequent violations. Second, inadequate enforcement of business liability provisions leads to insufficient penalties and insufficient compensation for victims.

Thus, it is advisable to establish adequate penalties for minor violations and criminal violations, as well as a reliable mechanism for the implementation of responsibility, in the regulatory framework. So, it can prevent abuse and corruption.

At the same time, punishments alone cannot achieve compliance with regulatory requirements. Indeed, deterrence as a factor in incentivizing compliance has been proven to have a number of serious limitations.

Firstly, the effect of sentencing is mediated by the values of the inspected: the deterrent effect is stronger in the case of auditees who are initially set to comply with regulatory requirements and weaker in the case of auditees who are not set to comply with the regulatory requirements.

Secondly, in practice, strong deterrence results in significant financial costs and restrictions on personal and economic freedom, which therefore makes it difficult to achieve in most cases.

Thirdly, procedural legitimacy is frequently violated when attempts at deterrence are perceived as excessive interference by targets of control (non-periodic visits and inspections, penalties imposed without taking into account risks, requirements that restrict economic initiative too much, etc.), which has a negative effect on a major driver of compliance incentives.

Since research and experience show that deterrence is a weak incentive to comply with regulations, while legitimacy and values are, on the contrary, much stronger, the focus of verification activities should not be on deterrence through the imposition of penalties but on encouraging compliance in positive ways, such as through trust, recommendations, instructions and constructive cooperation. Punishments should be seen as a backup tool to be applied in cases of continued irresponsible behavior, against business entities committing truly criminal acts and so on.

Instruction and information

Encouragement of compliance, as opposed to enforcement and sanctions, is considered one of the most effective ways to improve the performance of enforcement agencies for the benefit of society. It has been found that, on the one hand, small and medium enterprises (SMEs) frequently do not know what to expect from inspector visits (and therefore are afraid of inspectors and may react hostilely to inspections), and on the other hand, SMEs are usually unaware of the regulatory requirements applicable to their activities as well as how to comply with them.

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[29] In this sense, as noted in the 2005 Hampton Review (Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, HM Treasury (March 2005) (Sept. 10, 2022), available at https://www.regulation.org.uk/library/2005_hampton_report.pdf), "Administrative sanctions do not take into account the economic assessment of the violation, and it is often more profitable for an economic operator to pay a fine than to comply with the requirements."

It has been determined that providing the inspectors with clear instructions and practical advice has proven effective and beneficial in many cases. In fact, they help improve compliance (and provide assurance that compliant targets are safe) and reduce the risks that economic activity poses to user safety, the environment among other things. In the United Kingdom, the food safety management program known as "Safer Food, Better Business" has successfully helped companies comply with regulations and reduce food safety risk. Additionally, in Lithuania, the mandatory use of checklists during inspections (ensuring that inspectors focus on what matters most) has helped to improve relations between inspectors and inspectors and to define clearer requirements, leading to better compliance.

Compensation and career prospects

It is necessary to develop a salary scale that is in accordance with clear and transparent criteria such as qualifications, continuing education, seniority and labor productivity (the number of checks carried out or punishments imposed cannot be used as performance criteria). Government officials need to be provided career opportunities based on pre-established criteria based on oversight objectives (risk minimization, compliance promotion and public welfare).

Reliable appeal mechanisms

Inspectees must be given clear information about their rights and obligations during inspections. In particular, they should be made aware of how they can challenge and appeal the findings of inspectors and report cases of abuse of power, if any. Therefore, the legal and regulatory environment should reflect such rights and obligations and guarantee the independence and effectiveness of courts or other appellate bodies. Public authorities must also make public any new interpretations adopted by the courts. This ensures that the inspectors have access to information about their rights and obligations and understand them, as well as the possibility of successfully challenging the relevant decision.

Prevention of undue influence

Best practices and international experience shows that maintaining the independence of control bodies from political forces is a key element of an efficient and effective control system. However, the executive may legitimately determine which risks are prioritized and which actions (and therefore which controls) need to be strengthened and supported with additional resources, provided that the decision is made in accordance with a risk-based approach to planning and does not lead to the so-called "risk-adjustment reflex17." In the majority of countries, control bodies are either directly or indirectly subordinate to ministries. This is, for example, typical of the Netherlands, where the heads of control bodies are appointed by ministers and, as a result, are accountable to them on an equal basis with parliament; in Bosnia and Herzegovina (Republika Srpska), the head of the state inspectorate and management are appointed by the full composition of the Cabinet of Ministers and are accountable to it, thereby excluding the direct influence of individual ministers.

4. Features of the Implementation of State Control over the Entrepreneurial Activities in Europe, USA and Canada

In the process of the functioning of modern business entities state control plays a significant role, one that aims at regulating the various aspects of the process, while at the same time taking into account the need to protect the rights of business entities.

Due to the variety of approaches, conceptual provisions and legislative regulation of state control of entrepreneurial activity, foreign countries have accumulated a wealth of practical experience in regulation in this area which can be used in Russia.

Therefore, it seems quite relevant to study state control over the implementation of entrepreneurial activities in foreign countries, which was the purpose of this article.

Due to the proximity of the legal systems of Russia and the majority of European countries within the framework of the Romano-Germanic legal family, it is advisable to first consider the state control of entrepreneurial activity and its legislative regulation in the countries of the European Union.

In practice, if a business activity has been authorized in one EU Member State of the European Union, no further authorization is required in another Member State. In light of this, the role of cooperation among the supervisory authorities of the Member States is constantly growing.

Supervisory authorities conclude cooperation agreements and exchange information with foreign supervisory authorities or international organizations established by them. In the course of such international cooperation, the supervisory authority may release data and information received from foreign supervisory authorities in order to evaluate applications for the establishment and operation of various organizations and to verify the content of authorizations and supervisory decisions, particularly measures and sanctions.

In Germany, state control of business is carried out on the basis of sectoral legislation and a number of special laws of the states and the federation. Thus, in 1970, the state of Hessen passed a law on state control of business that sought to ensure the protection of legal entities when such control was carried out by state bodies, rural municipalities and local entities.

This law established a Commissioner for the Protection of Companies to enforce its provisions, and it also ensured the Commissioner's independence in carrying out those duties, which included ensuring that the law's provisions were followed.[30]

In Sweden, Act 1973 No. 289 regulates the activities of the supervisory bodies that enforce the law,[31] which are empowered with inspection, regulatory and procedural

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[30] Vasily I. Oleinik, *Legal Regulation of State Control of Entrepreneurial Activity*, 5 Admin. L. & Proc. 37 (2018).

[31] G.G. Sidorova, *On the Issue of Improving the State Control of Entrepreneurial Activity*, 3 Legal Sci. & L. Enforcement Prac. 61 (2018).

powers to enforce judicial sanctions. The tight controls provided for in Swedish regulations have earned Sweden the label of a "hetero-control model." However, some of its provisions had to be amended by adopting a system of notification and registration, which is always the responsibility of the national control authority. This legislation is characterized by its focus on protection in the regulation of the actions of control bodies, the imposition of certain restrictions on preliminary and subsequent verification, etc.

In France, the main basis for state control of entrepreneurial activity is sectoral legislation, including EU directives, the Civil Code and the Customs Code, which is consolidated with Community legislation, the Commercial Code, the General Tax Code, the Monetary and Financial Code and the Labor Code.

As with Swedish and German law, French law provides for a supervisory body, the National Commission as the entity responsible for its application, to receive the claims of those negatively affected by the law and endows it with regulatory powers, the exercise of which guarantees statutory durability.[32]

In Spain, the law on state control of business regulates the actions of public law bodies as a means of control, and the law establishes the Federal Commissioner as the body designed to ensure state control.

On the other hand, when it comes to the control of non-public organizations, important amendments are introduced to the law regarding the body that is allowed to exercise its powers *ex officio* and take corrective measures in the event of the detection of technical or organizational violations.

In Romania, the Parliament adopted Law CXXIV of 2007 on State Supervision (HFSA), which established the procedure for supervision, because more and more companies, including banks and investment companies, whose activities overlap with companies providing financial, insurance and investment services, are concentrated in several groups of companies.

Thus, integrated control has become much more effective.

Also of interest are the experiences of the United States and Canada with state control of entrepreneurial activity. In the United States, industry laws play a major role in regulating state control of business, although certain aspects of state control regulation are established in an explanatory memorandum providing for the protection of companies audited by federal structures and agencies.

The main regulatory bodies in the United States are:

- Federal Trade Commission;
- Antimonopoly Office of the Ministry of Justice;
- Securities and Exchange Commission – U.S. Customs Service;
- Bureau of Industry and Security (BIS);
- Ministry of Commerce;

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[32] E.S. Stepanov, *State Control of Business in the European Union*, 5 Bus. L.J. 94 (2019).

• Environmental Protection Agency (EPA);
• Federal Communications Commission (FCC).

In Canada, the regulation of government control of business is established in sectoral laws and in the 1957 Act, which provides that there is no administrative appeal against the decision of the supervisory authority. Supervisory decisions can only be challenged in court; thus, the Minister of Finance, acting within the scope of his legal supervision, cannot review or overrule supervisory decisions. The claim for compensation for damages caused by the decisions of the supervisor in connection with the supervisor's decisions taken in the exercise of official powers may be enforced only if the decision or omission by the supervisor is unlawful and harm has been caused to the claimant.

Supervisory authorities, while maintaining banking and securities secrecy, treasury secrecy, insurance secrecy and business secrecy, have the right to protect all or part of their decisions in order to protect money and capital market participants, investors, depositors, insured persons or members of the treasury.

Supervisory authorities regularly publish a list of issued licenses as well as a list of foreign supervisory authorities with which cooperation agreements have been concluded on the basis of mutual recognition.

Supervisory authorities have the right to express their opinion in the preparation of legislation relating to the financial system and supervised institutions and persons and make proposals for the creation of such legislation.

Conclusion

Thus, in the majority of the countries, including Russia, around the world, there is no specialized law under state control on the protection of the rights of business entities or businesses; only a small number of countries have laws addressing state control of businesses. As a result, to a greater extent, regulation in this area is carried out through sectoral legislation regulating control over parties of various state bodies on different types of entrepreneurial activity.

An analysis of the effectiveness of the activities of the control and supervisory bodies of different countries, Russia included, revealed the growing role of control at various levels of government. Currently, in economically developed countries, a fairly diverse system of control and supervisory bodies has developed and is in operation. The organization of this system and the functions it performs are determined not only by the form of government, national traditions and characteristics but also by the general principles of work of control and supervisory bodies that have been developed over many years of practice for the international exchange of experiences.

In general, a study of the experiences of foreign countries has shown that the control and supervisory systems of nearly all countries are highly efficient and effective in their work, despite the rather large number of employees and the wide

variety of functions and control measures implemented by these bodies. The reasons and grounds for high performance are, first of all, legally established guarantees for the independence of the activities of control and supervisory bodies and, accordingly, the inability to put pressure on their activities. In addition, the rigidly established term of office for the heads of the control and supervisory bodies allow them to lead the entrusted departments for several parliamentary terms and, at the same time, severely limits the tenure of the head in the leading position of the control and supervisory body. For example, this term is 15 years in the United States, 12 years in Austria and 10 years in Canada. At the same time, the costs for the maintenance and functioning of the control and supervisory bodies themselves are approved in the parliaments of the countries by a separate estimate.

Furthermore, the analysis revealed that the reforms of the control and supervisory sphere in foreign countries, which were carried out in order to increase the effectiveness of the activities of control and supervisory bodies, were accompanied by the completion of the following interrelated tasks:

• establishment of mandatory rules of conduct for the subjects of control and supervision activities;

• improvement of controls over compliance with established rules;

• identification and evaluation of the facts surrounding violations as well as tightening measures of responsibility;

• development of measures aimed at stimulating compliance with established rules.

The emphasis that is placed on evaluating the effectiveness of the activities of control and supervisory bodies in different countries, Russia included, has shifted from assessing the actual number of inspections, violations detected, fines and penalties imposed, open criminal cases, the amounts of illegally spent public funds returned to the budget and so forth, to assessing the "quantity" and the "quality" of the facts revealed and events that were prevented in advance, which in one way or another posed a potential threat to the safety of the state as well as the society. Thus, it was implied that there was a risk of not reaching socially meaningful indicators (results), according to which society eventually evaluates the actions of government agencies in general and the actions of control and supervisory agencies in particular.

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BOOK REVIEW NOTES

NEW IMPULSES FOR THE DEVELOPMENT OF THE SHANGHAI COOPERATION ORGANIZATION: AN ACADEMIC VIEW[1]

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Introduction

In recent decades, the international order has been transforming into a multipolar format. Current changes in world politics require the application of new approaches and the adoption of contemporary measures by states in order to make it possible

[1] Reviewed book: Sergey Marochkin & Yury Bezborodov (eds.), *The Shanghai Cooperation Organization: Exploring New Horizons* (2022).

to deal with the new global challenges. International organizations are the principal players in this process. The Shanghai Cooperation Organization (SCO) is one of the most rapidly developing centers of the multipolar world. Therefore, the future of this organization justly attracts the attention of researchers and politicians.

The book under review is called *The Shanghai Cooperation Organization: Exploring New Horizons*, and it is devoted to this organization in its entirety, examining and analyzing the SCO's significance as a political, economic and security institution in Eurasia. It is presented by two renowned editors, Sergey Marochkin (Professor, JSD (Doctor of Juridical Sciences in legal theory and in public international law); Head, Centre for International and Comparative Legal Studies, University of Tyumen; Honored Jurist of the Russian Federation; and Member, European Society of International Law, Russia) and Yury Bezborodov (Professor, JSD (Doctor of Juridical Sciences), Ural State Law University and Ural Federal University, Ekaterinburg, Russia). This book constitutes a thoughtful analysis of the SCO's current state as well as its future prospects.

1. Methodology and Relevance of the Book

The authors set an ambitious goal for themselves, which was to not consider this organization statically, as a given or a "monument." The team of researchers took an evolutionary approach to analyzing the current state of international legal regulation of the organization, its institutions and mechanisms of interaction. In other words, the main methodological arrangement of the study involved examining the SCO from the perspective of its development. Thus, the authors discussed the features of the emergence of this organization, assessed its current functioning and outlined potential development prospects.

After reading the book, I would say with confidence that the ambitious goal set by the authors has been achieved. The research team was successful in demonstrating that the SCO has the potential for development in the future. The authors acknowledge that there are some design flaws that have the potential to become obstacles to the development of the organization; nonetheless, they believe these challenges are surmountable. The SCO was created to strengthen stability and security on the territory of its member states, as well as combat terrorism, separatism, extremism and drug trafficking. The authors emphasize the inevitable and rather natural transition of this organization from the above-mentioned issues to the handling of problems in the social and economic spheres. In particular, areas such as transport, energy, labor migration, healthcare and education are of special interest. According to the team of researchers involved in the study, the future of the SCO depends on whether the organization will be capable of self-renewal, self-criticism and self-improvement. However, on the basis of their study of the organization's prior experiences, the results of the work done by other international organizations and

the discoveries of the professional expert community, they are convinced that the SCO can continue to develop and improve its efficiency in all areas of its activity.

A few words ought to be also mentioned concerning the evolution of the topic. The SCO attracts the attention of researchers in various fields of knowledge. The main role in the process of studying this organization is played by representatives of political science. However, the book under review differs from purely political research by the fact that representatives of various branches of knowledge and scientific directions took part in its preparation.

Additionally, in some studies, the problems of the SCO were examined through the prism of its member states' individual relationships. This book successfully overcomes this research limitation since the majority of the chapters of the study were written by representatives of different member states of the SCO. Such an approach allows the reader's attention not to be focused solely on the bilateral relations of individual states but covers the entire range of interstate communications in a particular area within the organization.

Furthermore, a sufficient number of works are devoted to the external influence and interaction of the SCO with other international organizations such as NATO, BRICS, CSTO and the European Union. The book under consideration, however, was created using a different approach. The authors set an objective not to compare the SCO with other similar organizations but instead to analyze the evolution of its development and trace a special path in the formation of its institutions and mechanisms.

At present, there is much discussion about the prospects for the SCO's evolution. Researchers draw attention to the fact that this organization was created primarily for law-enforcement purposes. However, during the course of its existence, the social and economic potential of this organization became more apparent. Some scientists believe that the SCO should remain a political and law-enforcement alliance, while other researchers defend the view that the organization is capable of achieving greater results. This monograph lies right in line with this discussion and provides the author's noteworthy view of the problem voiced. Thus, the present study differs from previously published works on this issue and makes a significant contribution to the development of ideas concerning the SCO.

2. Structure and Content of the Book

The structure of the book is well elaborated and shows a clear methodology. The book is organized into three parts: in the first part, the authors outline the basis for the formation of the SCO; in the second part, they consider the existing areas of cooperation within the organization and in the third part, they model the prospects for its development. The book uses well-defined terminology. Footnotes and bibliographic references are designed accurately and professionally.

Almost every chapter of the book is structured according to a general scheme. Each chapter has an introduction and conclusion, in which the authors state the specific goal of the chapter and evaluate its achievement accordingly. When a chapter is devoted to a certain area of cooperation, it is necessary to single out the following fragments in it: the legal basis for the functioning of a particular area of cooperation, the national legislation of the member states of the organization in this sphere, institutional mechanisms within the organization and possible scenarios for the future development of these areas.

In Part I of the book, contributing authors *Olga Porshneva, Mirzokhid Rakhimov and Sergey Razinkov* discuss the historical and legal foundations for the formation and institutional development of the organization. *Marat Sarsembayev and Yury Bezborodov*, the editors of the book, analyze the international legal background and aspects of intercommunication among the SCO member states. They arrive at the conclusion that the interaction among the SCO states is based on respect, diversity of cultures, civilizations and religions, as well as the desire for joint development and equal relations. Furthermore, while discussing the issue of the SCO's security cooperation, *Ekaterina Mikhaylenko, Aigerim Ospanova and Maria Lagutina* emphasize that the organization follows the non-interference policy and establishes a global terrorism governance regime. They are convinced that the SCO format is attractive to potential members because the organization is not a true military institution but constitutes a platform for discussions as well. *Aslan Abashidze and Ksenia Lyabakh* note the SCO's achievements in countering extremism, but they also point out that the existing formats of relations within its framework cannot yet fully guarantee an adequate counteraction to the growing challenges and threats posed by extremist groups.

In Part II, *Oleg Vinnichenko, Elena Gladun and Zhumabek Busurmanov* analyze the convergence of Western and Asian legal values from the SCO's perspective. They come to the conclusion that the Western concept of human rights shall be supplemented within the SCO in accordance with different historic and legal values, traditions and ideas about human rights. *Olga Bogatyreva and Aida Orozobekova* discuss the current situation as well as the development features of the humanitarian cooperation within the organization. They suppose that the key objective of such cooperation is intercultural dialogue and the building of trust between people belonging to different civilizational paradigms. *Larisa Zaitseva and Kubanychbek Ramankulov* suggest opportunities for convergence of member states' labor legislation. They argue that the most realistic approach in this sphere is the implementation of the most important International Labour Organization (ILO) conventions and the coordination of countries' positions on priority areas for ratifying certain agreements. *Tatyana Luzina and Amangeldy Khamzin* stress the urgent need for the development, harmonization and unification of the SCO regulatory framework on labor migration and *Zhanat Kulzhabayeva and Assem Oinarova* address international legal forms of interaction between the SCO and the Eurasian Economic Union (EAEU).

In Part III, the authors explore the prospects for the development of the organization in specific areas and indicate the legal grounds, obstacles, opportunities and legal means suitable for this purpose. Consequently, in the chapters that follow, *Olga Arkhipova and Andrey Chukreyev* pay special attention to economic interaction, *Meng Qihong and Gong Nan* analyze cooperation in the field of energy; *Zhanna Iskakova and Amanulla Mukhamedjanov* discuss the SCO's cooperation in the transport sphere and logistic assistance to the states of the Central Asia region; *Qin Tianbao and Alexander Solntsev* discover challenges of environmental protection within the SCO territory and finally, *Kartikeya Dwivedi and Amika Bawa* examine the basis for a strategic partnership of the SCO with India.

It is interesting to note that the introduction and conclusion of this book have also been replaced by two chapters. The first of these is devoted to the development of the Eurasian space through regional cooperation. In this chapter, the authors outline the methodology and present an overview of the contents of all the chapters. The sixteenth chapter, devoted to considerations about the effectiveness of the SCO effectively summarizes the study. Thus, the book is well structured, sustained in a single style and on the basis of a single methodology. The mentioned approach to the composition of the text makes this book a valuable resource for researchers as the results obtained do not resemble a descriptive narrative but represent a modern and rather successful scientific research.

3. Book Advantages

Speaking about the advantages of the book, first of all, I would like to emphasize the team of authors themselves. Studies in international law and international relations tend to have a "national" character. Often, a particular author's viewpoint on the world community and the relationships that exist within it may be inspired not by objectively viewing a developing situation but by other factors. These factors include the scientific traditions existing in the author's state of residence, as well as the author's historical, cultural and social background. In such circumstances, one's view of the problem may turn out to be one-sided or even tendentious. The research team that worked on this book was successfully able to overcome this problem. Scientists from Russia, Kazakhstan, China, India and Kyrgyzstan participated in the composition of the book. The majority of the book's chapters were written jointly in collaboration with authors from various countries, which makes the conclusions presented in the book objective. Moreover, many authors represent the member states of the SCO, so their conclusions are not third-party observations but constitute an inside look at the organization.

In carrying out research with a large team of scientists, there is always the risk of getting a fragmented result, when it feels like particular parts of the book were written by different people. The research group for this book was successfully able

to cope with this issue. The book uses unified approaches to the layout of chapters, the presentation of the material and the argumentation of the theses stated by the authors. This approach makes the text a single whole.

In addition, I would like to positively note the complex nature of this book. Sometimes, such an assessment of a book as having a 'complex character' is perceived negatively in the scientific community since behind this definition there may be emptiness, unresolved individual problems and failure to achieve the objectives set by the team of authors. However, this is not the case for the research in question. The complex nature of the book is determined, firstly, by the fact that the SCO has been studied from the moment of its inception to the present, with the authors elucidating possible prospects for the development of this organization. Secondly, the complex nature ensures that the authors consider individual areas of cooperation between states under the auspices of the organization. The combination of these two ideas yields a unique result – the reader gets a comprehensive picture of how the organization functions, the historical reasons for its formation and the prospects for the further development of this cooperation.

Another positive feature of this study is that it is not limited to one area of knowledge. Researchers from the various fields of study, including law, history, political science and international relations, were involved in the work on the book. This approach made it possible to analyze the SCO in an interdisciplinary manner.

Conclusion

The publication under review can serve as a "handbook" for legal scientists and other professionals associated with the SCO. It will be helpful for researchers in various fields of knowledge and can be utilized, on the one hand, as a starting point for scientific developments and, on the other hand, as a tool for demonstrating new interdisciplinary approaches to assessing the activities of different international organizations.

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