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INTERNATIONAL ARBITRATION ALERT

IN THIS
ISSUE

AN INTERNATIONAL ARBITRATION SYSTEM FOR
BRICS – IS IT AN IMPERATIVE FOR FURTHER
ECONOMIC COOPERATION

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AN INTERNATIONAL ARBITRATION SYSTEM FOR BRICS – IS IT AN IMPERATIVE FOR FURTHER ECONOMIC COOPERATION

On 15 and 16 October 2016 India will host the 8th BRICS Summit in Goa during its chairmanship of BRICS. The theme of India's BRICS chairmanship is Building Responsive, Inclusion and Collective Solutions with the following five pronged approaches:

- **Institution Building** to further deepen, sustain and institutionalise BRICS cooperation;
- **Implementation** of the decision from previous Summits;
- **Integrating** the existing cooperation mechanisms;
- **Innovation**, ie new cooperation mechanisms; and
- **Continuity**, ie, continuation of mutually agreed existing BRICS cooperation mechanisms.

As a lead-up to the 8th BRICS Summit, the Indian government and Indian business community has initiated a number of events within the spirit of the BRICS theme of India's chairmanship this year, one of which being the Conference on International Arbitration in BRICS: Challenges, Opportunities and Road Ahead on 27 August 2016. One of the purposes of the conference is to discuss and debate the need to establish an international arbitration mechanism for BRICS member states. BRICS brings together five major emerging economies or new industrial economies (South Africa again being the leading economy in Africa). As of 2015, the five BRICS nations comprise of approximately 43% of the world's population (over three billion people) with a combined nominal GDP of approximately US\$16 trillion which is equivalent to approximately 20% of the world's GDP and an estimated US\$4 trillion in combined foreign reserves. The bilateral relationship between the BRICS member states is found on a system of non-interference, equal treatment, mutual benefit and respect.

It appears obvious that an efficient and effective measure for the resolution of any commercial or investment dispute by investors or trading entities between the BRICS nations is imperative to encourage further economic activity and cooperation. But how and on what basis will such an international arbitration system be formed? Will it merely be an initiative to establish a commercial arbitral institution (which to some extent already exists in the form of the BRICS Dispute Resolution Shanghai Centre) to resolve international commercial disputes amongst member states (with no recourse against the state or state-owned entities from an investment protection perspective). Or is there a need for BRICS

member states to “formalise” trade and investment commitments through the conclusion of international trade and investment agreements (similar to the proposed Transatlantic Trade and Investment Partnership) providing, amongst others, for a dispute resolution mechanism for investors in the event of a breach of certain commitments by a BRICS member state. If it were the latter, how would such international investment agreements differ from existing bilateral investment agreements or regional investment agreements, which already provides protection to investors between certain BRICS member states?

In respect of South Africa, although no bilateral investment treaty exists with India and Brazil, any investors from India or Brazil (who have qualifying investments) will still receive protection for their investments in South Africa by virtue of the Southern Africa Development Community Protocol on Finance and Investment (SADC Protocol). However, South African investors to India or Brazil have no recourse against India or Brazil, in the event that a South African investment is adversely affected by regulatory measures implemented by those governments. There is also no uniformity of protection and recourse to international arbitration between existing bilateral investment treaties with South Africa and China or South Africa and Russia, including protection provided for by the SADC Protocol. Thus from an investment protection perspective there is a need for uniformity between BRICS member states to ensure that the protection derived by investors from each of the respective states received equal protection (ie investor-state arbitration for all or none for all) for their investments in any of the member states. Unequal protection creates disparity in respect of trade and investment between BRICS members, specifically the private sector participates.

Further, in developing an international dispute resolution mechanism, the need to “establish alternative international arbitration mechanisms” for BRICS has been emphasised. In that regard BRICS members will need to consider, whether the International Centre for the Settlement of Investment Disputes (ICSID) still serve the interest of emerging economies. If not, whether there is a need (similar to the establishment of the New Development Bank to rival the IMF or World Bank) to establish

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an investment dispute settlement institution which takes specific factors relevant to emerging economies into account when resolving investment disputes. Of the five BRICS member states, only China is a member of the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ICSID Convention), which established ICSID under the auspices of the World Bank. South Africa and the other BRICS members have indicated that they have no intention of joining or ratifying (Russian) the ICSID Convention. BRICS member states will need to consider whether the creation of an international arbitration mechanism alternative to the current global order should fundamentally include an investment dispute resolution mechanism and not merely an institution for the settlement of commercial disputes. The creation of such an institution similar to the New Development Bank must reflect the close relations between the BRICS countries, while providing a further instrument for increasing economic co-operation.

These are some of the considerations to be taken into account by BRICS member states when considering the establishment of an alternative to the current international arbitration mechanism. In our publication to follow on 25 August 2016, we will be consider whether the South China Sea arbitration award should have an impact on international arbitration in BRICS.

Follow Jackwell Feris for insightful updates on the discussions on international arbitration in BRICS on 27 August 2016 (and leading up to that date) during the Conference on International Arbitration in BRICS: Challenges, Opportunities and Road Ahead in India, New Delhi.

Jackwell Feris



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OUR INTERNATIONAL ARBITRATION TEAM

For more information about our International Arbitration sector and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com



Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com



Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com



Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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