

## ARTICLE

# The Competition Law Institutions in the BRICS Countries Need Better Enforcement Mechanisms

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**Abstract.** This study emphasizes the need for improved enforcement mechanisms within the competition law institutions of the BRICS countries, as these mechanisms play a vital role in ensuring fair competition and preventing anti-competitive behavior in their respective economies. The shifting trend of the digital market invites many challenges in the current enforcement mechanisms, particularly in India. For that purpose, a close examination of the institutional frameworks and enforcement mechanisms of competition law is required. This article starts with a brief introduction, highlighting the significance of the international competition law agenda and the BRICS countries. It also focuses on the evolution of institutional growth and the efforts undertaken by the respective national competition law authorities in the BRICS countries to improve their enforcement process not only during the COVID-19 pandemic but also to meet other upcoming challenges. Further, it examines whether these nations, including India, have adequately developed enforcement mechanisms or if they require more attention in order to effectively regulate. The results of this study reveal that the competition law agencies in BRICS have made tremendous efforts in this area, especially during the COVID-19 pandemic, and highlight a trending change in their enforcement mechanisms onto digital platforms. However, there are certain important areas where these nations need to improve their institutional framework, regulatory mechanisms, enforcement process, and other aspects. In the end, the author suggests some recommendations for policy-making and future implementations.

**Keywords:** BRICS; COVID-19; pandemic; competition law; enforcement mechanisms; antitrust; market dynamics; regulatory institutions.

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## 1. Introduction: The International Competition Law Agenda and the BRICS Countries

The idea of “BRIC”<sup>1</sup> (Brazil, Russia, India, and China) was first coined by economist “Goldman Sachs” in 2001 for the economic development of these emerging economies.<sup>2</sup> However, even prior to this, “the Doha Round of World Trade Organization” negotiations had a task agenda to predict the need for global competition laws, but the idea was postponed. Subsequently, due to its growing nature, South Africa also joined this group in 2009, and it became “BRICS.”<sup>3</sup> Today, this group represents

<sup>1</sup> Jensen, T.H., & Larsen, J.A.K. (2004). The BRIC Countries. *Danmarks National Bank Monetary Review*, 39(4), 39–54.

<sup>2</sup> O'Neill, J. (2001). *Building Better Global Economic BRICs*. Goldman Sachs. <https://www.goldmansachs.com/pdfs/insights/archive/archive-pdfs/build-better-brics.pdf>

<sup>3</sup> Thakur, R. (2014). How Representative Are BRICS? *Third World Quarterly*, 35(10), 1791–1808.

a significant contribution to the world population, GDP, global currency reserves, and world trade, accounting for approximately 40, 24, 40, and 16 percent, respectively.<sup>4</sup> These nations are ranked in the top ten major economies, with China in second place, India in fourth place, and Russia and Brazil in sixth and seventh places. Following the financial crisis of 2007, this group of nations contributed nearly half of the all-inclusive financial growth. This shows a shifting trend of the world economy towards the BRICS countries, which are also capturing major market shares at the global level. To further advance this achievement, recently, on November 17, 2020, Russia organized the 12<sup>th</sup> BRICS Summit with the theme “Global Stability, Shared Security, and Innovative Development” focusing on intra-BRICS cooperation and key global issues including multilateral structure reform, measures to mitigate the risk of the ongoing COVID-19 pandemic, counter-terrorism cooperation, trade, health, energy, and people-to-people exchanges.<sup>5</sup> Moreover, the upcoming 13<sup>th</sup> BRICS summit will be hosted by India for the third time, following 2012 and 2016, under the theme of “BRICS@15: Intra-BRICS Cooperation for Continuity, Consolidation, and Consensus” on the occasion of its 15th anniversary.<sup>6</sup> To support this initiative, the International Competition Conference (ICC) also offers a strong platform for emerging economies and emerging nations to share information for the analysis of competition law and policy. The rationale behind hosting the ICC is to provide an opportunity for the allocation of resources, ideas, and areas for potential collaboration and cooperation in the field of competition law. In November 2019, the 6<sup>th</sup> “BRICS ICC” under the theme “10 Years of Cooperation between the BRICS Competition Authorities: Results and Prospects” was organized by Russia, following Brazil, South Africa, India, and China.<sup>7</sup> As a result, the concepts of “universal proliferation” and “global convergence” more accurately characterize the emerging global environment of competition law regimes. With the rise of BRICS against this scenario as a global economic and political collaboration, China and South Africa also gained significant attention. The BRICS countries do not share the same language or any particular, common cultural, economic, political, or social history. Nonetheless, despite their differences, the significance of economic policies in such large, globalized economies has encouraged considerable collaboration and the sharing of experiences.<sup>8</sup>

<sup>4</sup> BRICS India. (2021). *Evolution of BRICS*. <https://brics2021.gov.in/about-brics>

<sup>5</sup> Ministry of External Affairs, Government of India. (2022). Mea: Statements: Press Releases. [https://www.mea.gov.in/press-releases.htm?51%2FPress\\_Releases](https://www.mea.gov.in/press-releases.htm?51%2FPress_Releases)

<sup>6</sup> Ministry of External Affairs, Government of India. (2021). *BRICS Acts as a Vital Pillar of Hope for This World Full of Political Challenges Safety Related Challenges and Economic Challenges*. BRICS India 2021. <https://brics202.gov.in/>

<sup>7</sup> BRICS India. (2021). *About BRICS*. <https://brics2021.gov.in/13th-summit>

<sup>8</sup> Svetlicinii, A., & Zhang, J.-J. (2017). The Competition Law Institutions in the BRICS Countries: Developing Better Institutional Models for the Protection of Market Competition. *Chinese Political Science Review*, 2, 85–100.

In addition, the national competition law authorities of the BRICS countries prohibit any agreement or concerted act with the effect of impeding competition by following the wording of Article 101(1) of the Treaty on European Union Functioning (TFEU); additionally, Article 103 of the TFEU addresses general prohibition on matters of a serious nature, such as price fixing.<sup>9</sup> However, even though legislators and authorities in the BRICS countries have made significant progress in areas such as cooperation, trade, banking, green investments etc., the antitrust enforcement process in the majority of these economies is still in its infancy.

### **1.1. Literature Review**

The significance of analyzing the experiences of the BRICS countries in competition law was first emphasized by American antitrust scholar William Kovacic, who said, They offer older and younger competition regimes a way to explore key issues about the institutional foundations for better functioning, the life cycle of competition regimes, and effective measurement.

While academics in antitrust law have primarily focused on the regional competition environments of the BRICS nations,<sup>10</sup> experts also have been examining the best practices in the BRICS countries to evaluate their enforcement process. These experts have noticed that the rapid growth of these countries invites numerous challenges in dealing with the digital market,<sup>11</sup> data protection, cryptocurrency, and artificial intelligence (AI), etc., all of which this group is ineffective in dealing with owing to their various stages of development.<sup>12</sup> While the BRICS group has made significant strides regarding the provision of effective governance systems in terms of competition enforcement, new competition law regimes, in general, have often received little attention. Additionally, experts have studied the institutional design and procedural strategies used by “National Competition Authorities” (NCA) around the world, like the Global Administrative Law (GAL) project. This was further led by a study of comparative analysis pertaining to antitrust legislation, formal schemes, due process, and the right to defense.<sup>13</sup> Furthermore, the transformation of competition law enforcement, institutional design, indicators for competition law and policy, cartelization, antitrust, compulsory licensing, etc., is also noted in an effort to meet upcoming challenges

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<sup>9</sup> Afrika, S.-L., & Bachmann, S.-D. (2011). Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Politics in South Africa, Brazil, and India – A Comparative Overview. *The International Lawyer*, 45(4), 975–1003.

<sup>10</sup> Emch, A., et al. (Eds.). (2012). *Competition Law in the BRICS Countries*. Wolters Kluwer. [https://yust.ru/img/uploaded/news/news\\_2012\\_11\\_15.pdf](https://yust.ru/img/uploaded/news/news_2012_11_15.pdf)

<sup>11</sup> Singh, J., & Kumar, N. (2020). Issues pertaining to growth of digital economy: An arduous challenge before CCI. *Journal of Public Affairs*, 20(4). <https://onlinelibrarywiley.com/doi/abs/10.1002/pa.2301>

<sup>12</sup> Kumar, N. (2022). A Critique of India's Regulatory Framework for Cryptocurrency and Competition Law. *International Journal of Law and Policy Review*, 11(2), 86–116.

<sup>13</sup> Trebilcock, M.J., & Iacobucci, E.M. (2002). Designing Competition Law Institutions. *World Competition*, 25(3), 361–394.

in the BRICS nations and other developing countries.<sup>14</sup> The group also has a wealth of experience in dealing with various social, economic, and political issues (as per the BRICS Mechanism Development Strategy Report, 2017) and digitalization, which have all emerged as major issues before the governing authorities of the BRICS countries. Recently, these authorities identified the vital role of competition policy and regulation in securing consumers' interests and helping companies during the COVID-19 pandemic, as well as optimally overcoming the pandemic's consequences of economic crises following the COVID-19 pandemic. The cooperation among the authorities of the BRICS member states and the exchange of developing competition policies are valued for their potential to revive economic sectors.<sup>15</sup> This has resulted in the extension of the "BRICS Memorandum of Understanding on Cooperation in the Area of Competition Law and Policy" for an indefinite duration. Furthermore, the importance of effective regulation of the excessive pricing of goods and services has been shown to ensure a competitive price for the consumer.<sup>16</sup> Moreover, the significance of intergovernmental relations in shaping the responses of the BRICS countries during this critical period is equally substantial.<sup>17</sup> It has been proved that mutual respect, cooperation, and balance of interest among the BRICS member countries have significantly helped in transforming the global economic status of the West with regard to this group.<sup>18</sup> This has consequently affected each nation's political and regulatory systems as well as the connection between their institutional framework and the associated environmental uncertainty,<sup>19</sup> necessitating a strong international financial system with global governance to deal with such issues.<sup>20</sup> Numerous studies exist on BRICS Competition Law, digital markets, data protection, cryptocurrency, artificial intelligence (AI), etc.; however, the author found that there is no study that focuses on the comparative analysis of the institutional framework, the enforcement

<sup>14</sup> Jenny, F., & Katsoulacos, Y. (Eds.). (2016). *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects*. Springer.

<sup>15</sup> Ninds Dir Itbp. *Standard Operating Procedure (SOP) BRICS System Design Document (CCI)*. [https://fitbir.nih.gov/sites/default/files/BRICS\\_Design\\_Document\\_SOP.pdf](https://fitbir.nih.gov/sites/default/files/BRICS_Design_Document_SOP.pdf)

<sup>16</sup> Boshoff, W.H. (2020, June). *South African competition policy on excessive pricing and its relation to price gouging during the Covid-19 disaster period*. <https://blogs.sun.ac.za/ccle/files/2020/06/merged.pdf>

<sup>17</sup> de Oliveira, P., et al. (2021). The role of intergovernmental relations in response to a wicked problem: An analysis of the COVID-19 crisis in the BRICS countries. *Revista de Administração Pública*, 55(1). <https://www.scielo.br/j/rap/a/GcWQGsn9QZwKHLHB8D6DgWf/>

<sup>18</sup> Konyshv, V., & Sergunin, A. (2022). Theoretical Perspectives on BRICS: What Kind of an International Institution Is It? In M. Lebedeva & V. Morozov (Eds.), *Turning Points of World Transformation: New Trends, Challenges and Actors* (pp. 101–115). Palgrave Macmillan.

<sup>19</sup> Hitt, M.A., et al. (2021). The (COVID-19) pandemic and the new world (dis)order. *Journal of World Business*, 56(4). <https://ideas.repec.org/a/eee/worbus/v56y2021i4s1090951621000225.html>

<sup>20</sup> Kubayi, J.M.N. (2022). BRICS, Structural Power and the BRICS Bank as a Potentially Progressive Instrument for a Passive Revolution. In S. Zondi (Ed.), *The Political Economy of Intra-BRICS Cooperation* (pp. 39–59). Palgrave Macmillan.

mechanism during the COVID-19 pandemic, and the forthcoming challenges, which are highly predicted to influence the enforcement agencies, particularly in India.

## **2. The Evolution of Competition Law Institutions in the BRICS Countries**

### **2.1. Brazil**

The Administrative Council for Economic Defense (CADE) is an autonomous body that reports to the Ministry of Justice and is based in Brasilia. Initially, it was in charge of observing the enterprise's economic supervision and accounting arrangements. Later, it was shaped by Law No. 4,137/62.<sup>21</sup> In order to improve its efficiency, this law established three sub-bodies in addition to CADE, namely the Secretariat for Economic Law (SDE) as a Ministry of Justice body and the Secretariat for Economic Monitoring (SEAE) as a Ministry of Finance body. As a result, the Brazilian Competition Defense System (SBDC) was changed into an autonomous agency reporting to the Ministry of Justice under the regime of Law No. 8,884/94. After considering various changes, the new Brazilian Competition Law (i.e. Law No. 12,529/11) came into effect in May 2012, having jurisdiction over the entire country and carrying out the legal duties assigned to it. The preamble also ensures healthy competition and preventive measures against economic disorder. This law is divided into nine titles and 128 articles, which are further separated into various chapters to cover all relevant aspects, including anti-competitive agreements, cartels, abuse of dominant position, mergers, and combinations, and are provided in Articles 36, 37, 38, Articles 31 to 35, and Articles 88 to 92, respectively. Currently, CADE is accountable for the instruction of executive measures concerning violations of the commercial order as well as the assessment of mergers under the new law.<sup>22</sup>

### **2.2. Russia**

The State Committee of the Russian Soviet Socialist Federative Republic for Antimonopoly Policy and Support, which preceded the Federal Antimonopoly Service (FAS), was formed on July 14, 1990. Subsequently, the committee of 150 members approved the resolution of New Economic Structures No. 344 on September 10, 1990, which called for an anti-monopoly policy. Finally, the FAS (as per the decree of the Russian government on December 25, 2014, No. 1489) was given the function of controlling the state defense order.<sup>23</sup> The existing antitrust law in Russia is Federal Law No. 135-FZ of July 26, which came into force on July 14, 2006. The preamble also ensures a common market free trade zone, freedom of economic activities, protection

<sup>21</sup> Barros, M.A.L.L. de. (2018). Brazilian Administrative Council for Economic Defense: An Approach from Sociology and History. *University of Bologna Law Review*, 2(2), 114–148.

<sup>22</sup> Podolny, J. (2009). The Buck Stops (and Starts) at Business School. *Harvard Business Review*, 87(6), 62–67.

<sup>23</sup> Federal Antimonopoly Service of the Russian Federation. <http://en.fas.gov.ru/about/our-history.html>

of competition, and the efficient functioning of markets. The Act contains ten chapters and 54 articles in which key concepts like anti-competitive agreements, cartels, abuse of dominant position, and mergers and combinations are covered under Articles 11, 12, 14, 11, 10, Articles 26 to 35, and Articles 36 to 38, respectively. Furthermore, the provisions dealing with penalties are covered under chapters 8 and 9 of the Act.<sup>24</sup>

### 2.3. India

The relevance of the competitive market can be traced back to “Kautilya’s Artha-shastra,” which influenced the Indian Constitution by incorporating significant clauses, including the preamble, which emphasizes justice, i.e. social, economic, and political. In addition, Part IV (i.e. Directive Principles of State Policy) under Articles 38 and 39 (b) and (c) states that:

“(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

And Article 39 (b) (c) states that

“(b) That the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;”

The essence of its basic concept can also be seen in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, 1969) and the existing antitrust law (i.e. the Competition Act, 2002).<sup>25</sup> Due to the lack of certain provisions and inefficiency of the MRTP Act, 1969, an idea was initiated through “the Budget Speech of the Finance Minister” (1999–2000). It emphasized the need to shift from the MRTP Act to a New Competition Law (i.e. the Competition Act, 2002). Successively, it was enacted with certain objectives, including the constitution of the Competition Commission of India (CCI), prevention of “Appreciable Adverse Effect on Competition” (AAEC), promotion of competition, and freedom of trade and consumer protection.<sup>26</sup> This Act contains nine chapters and 66 sections to deal with the various dimensions of

<sup>24</sup> Federal Law No. 135-FZ of July, 26 2006 “On Protection of Competition”. WIPO. <https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru077en.pdf>

<sup>25</sup> Pandey, A., & Trichnopoly, Sh. (2019). Heavy Entry Barriers: A Boom or a Bane? An Examination of the Competition Law Policy in India in Light of the National Competition Policy, 2011. *Supremo Amicus*, 12, 10.

<sup>26</sup> Bhattacharjee, A., et al. (2019). Competition Law and Competition Policy in India: How the Competition Commission Has Dealt with Anticompetitive Restraints by Government Entities. *Review of Industrial Organizations*, 54, 221–250.

competition law. Sections 3, 4, 5, 6, and 49 include the important clauses about anti-competitive agreements, misuse of dominant positions, mergers and combinations, and competition advocacy.<sup>27</sup> The penalties are covered under sections 42 to 48 of Chapter 6 of the Act. Section 46 of the Act, and the Competition Commission of India (Lesser Penalty) Regulations, 2009 contains provisions dealing with the leniency program.<sup>28</sup> Moreover, due to the high growth of technology and recent trends in the market system, the Competition Law Review Committee was established by the Ministry of Corporate Affairs (MCA) to ensure effective implementation and meet the needs of strong economic fundamentals.<sup>29</sup> Subsequently, on October 31, 2018, this committee, which included distinguished authorities Dr. M.S. Sahoo, Dr. S. Chakravarthy, Prof. Aditya Bhattacharjee, and Dr. Harsha Vardhana Singh, started working with a working group on various issues, including regulatory structure, substantive issues, advocacy and advisory functions of the commission, new-age markets, big data, etc. This expert group took into consideration public comments, suggestions, and international practices before submitting the report of this study. The report is divided into ten chapters and four appendices.<sup>30</sup> As a result, a Competition (Amendment) Bill, 2020 was drafted to implement changes to the existing law for which public comments were also invited.<sup>31</sup> The key changes suggested by Bill 2022 include settlement and commitments; power to review jurisdiction and threshold; the definition of control; structural changes; enforcement functions; deal value threshold; the appointment of the DG; penalty for certain offences; etc.<sup>32</sup> all of which demonstrates the dynamic efforts taken by the concerned authorities.<sup>33</sup> Accordingly, it is incorporated in the Competition (Amendment) Act 2023; however, it appears that there are some areas where it still requires some modifications, such as data protection, cryptocurrency, the impact of BRICS expansion on the market and its conditions, artificial intelligence, and others.

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<sup>27</sup> Ninds Dir, *supra* note 15.

<sup>28</sup> Bhattacharjea et al., 2019.

<sup>29</sup> Ministry of Corporate Affairs, Government of India. (2019, July). *Report of Competition Law Review Committee*. <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

<sup>30</sup> *Id.*

<sup>31</sup> Competition Commission of India. (2020). *Invitation for Public Comments on the Competition (Amendment) Bill, 2020*. [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/bill.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/bill.pdf)

<sup>32</sup> AZB Partners. (2020, February 28). *Summary of the Key Changes in the (Draft) Competition (Amendment) Bill 2020*. <https://www.azbpartners.com/bank/summary-of-key-changes-in-the-competition-amendment-bill-2020/>

<sup>33</sup> Dhir, S., et al. (2022, August 19). *India: Competition Amendment Bill, 2022: Key Changes to the Competition Act, 2002*. Mondaq. <https://www.mondaq.com/Article/1223256>



## 2.4. China

The People's Republic of China has been designated a command economy rather than a market economy.<sup>34</sup> Due to economic changes in 1978 and 1992, the reform process was initiated in 1993 by amending the Constitution along with Article 15, which is focused on the socialist market economy. Since then, it has been working to alter itself into a republic with laws that are harmonious with the universal market in order to complete the experiment of forming such a market economy. In 1993, China enacted a law against unfair competition.<sup>35</sup> Following several discussions, it finally adopted the Anti-Monopoly Law (AML) on August 30, 2007, marking a significant milestone in enforcing competition law practices for the continued growth of the market economy.<sup>36</sup> All of the significant elements of a well-established antitrust law, such as the doctrine of domestic effect, consent decree, leniency program, exemptions for certain agreements, factors for determining the dominant position, and presumption regarding economic strength, etc. were also noted to have been incorporated into the creation of China's AML. The AML contains seven chapters and 58 articles, in which Article 1 under Chapter 1 focuses upon the purpose of this Act, including the prevention of unfair business practices and the protection of the consumer as well as the public interest.<sup>37</sup> It also eliminates such practices that are regarded as having adverse effects on competition in the domestic market.<sup>38</sup> Under chapters 2, 3, and 4, the Chinese AML primarily focuses on three areas, namely the prohibition of monopoly agreements, the abuse of dominant market positions, and merger and combination control. The first part deals with Article 13, which outlines the list of prohibited agreements that separate horizontal and vertical agreements. As a result, competing undertakings are prohibited from concluding agreements on the fixing or changing of product prices; restricting production; allocating markets; restricting the development of new technology; joint boycotting transactions; and some other agreements as determined by the AML enforcement agency. On the other hand, Article 14 focuses on vertical agreements, including resale price fixing, restrictions on resale price maintenance, as well as other agreements.<sup>39</sup> The list of exempted agreements is covered under Article 15 and Article 81(3)

<sup>34</sup> Leaf, M. (1998). Urban Planning and Urban Reality under Chinese Economic Reforms. *Journal of planning Education and Research*, 18(2), 145–153.

<sup>35</sup> Yu, T. (1993). An Anti-Unfair Competition Law without a Core: An Introductory Comparison between US Antitrust Law and the New Law of the People's Republic of China. *Indiana International and Competition Law Review*, 4, 315.

<sup>36</sup> Wang, X. (2008). Highlights of China's New Anti-Monopoly Law. *Antitrust Law Journal*, 75(1), 133–150.

<sup>37</sup> Ministry of Commerce, People's Republic of China. (2007, August 30). *Anti-Monopoly Law of the People's Republic of China*. [https://www.icao.int/sustainability/Documents/Compendium\\_Fair\\_Competition\\_China/Anti-monopoly-Law\\_China.pdf](https://www.icao.int/sustainability/Documents/Compendium_Fair_Competition_China/Anti-monopoly-Law_China.pdf)

<sup>38</sup> Anti-Monopoly Law, China. WIPO. <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn099en.pdf>

<sup>39</sup> Bu, Q. (2015). China's Dual Enforcement System regarding Resale Price Maintenance Agreements. *World Competition*, 38(2), 235–252.

of the European Community Treaty (EC Treaty). The second section deals with Article 17 in Chapter 3, which outlines the prohibited practices relating to the abuse of dominant position. Additionally, paragraph 2 deals with regulations relating to dominant market positions held by business players. Article 18 lists the six factors that are used to determine a dominant market position while Article 19 focuses upon the presumption of holding a dominant market position based on market shares. The third part emphasizes mergers and acquisitions in which Article 20 defines transactions relating to mergers and combinations and also states that such transactions are required to be reported along with the required documents to the relevant authority under Articles 21 and 23 respectively. The reviewing process for such transactions is provided under Articles 25 and 26 of the Act. Further, the assessment factors are also provided under Articles 27 and 28, which places restrictions on such transactions if they restrict market competition. The provisions relating to national security are covered under Article 31.<sup>40</sup> And, chapters 5, 6, and 7 address the misuse of administrative power to remove competition, the examination of alleged anticompetitive conduct, and legitimate responsibilities. This act appears to be quite effective; however, due to the COVID-19 pandemic, various major social and economic changes have been witnessed, which have had a great impact on competition in the market. This has resulted in the Chinese government articulating some modifications in antitrust laws for the future, including draft amendments to the AML, guidelines pertaining to the automobile industry, intellectual property rights (IP), leniency provisions, commitments, platform regulations, and Active Pharmaceutical Ingredients (API). In addition, the State Administration for Market Regulation (SAMR) has provided antitrust acquiescence plans for companies to institute superficial compliance structures.<sup>41</sup> In 2021, it was also observed that the authorities once again focused upon eight major areas for the further “Strengthening of Antitrust Law Enforcement.”<sup>42</sup>

## 2.5. South Africa

South Africa was the first of the BRICS countries to create a national competition law system, namely the Regulation of Monopolistic Conditions Act, 1955.<sup>43</sup> Previously, the Board of Trade and Industry was accountable for examining misconduct, proposing solutions, and negotiating and overseeing enforcement. However, on the other hand, it lacked autonomous powers of inquiry and relief. Thereafter, the Minister of Trade and Industry was in charge of making the decisions, but its remedies were also limited (for

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<sup>40</sup> Wang, X. (2014). *The Evolution of China's Anti-Monopoly Law*. Edward Elgar Publishing.

<sup>41</sup> Zhang, A.H. (2022). Agility over Stability: China's Great Reversal in Regulating the Platform Economy. *Harvard International Law Journal*, 63(2), 1–60.

<sup>42</sup> Lexology. (2021, February 18). *Year 2020 in Review: A New Wave of China's Anti-Monopoly Law*. <https://www.lexology.com/library/detail.aspx?g=8d2de32e-1403-4058-bdc8-314966895495>

<sup>43</sup> Handler, M. (1976). The American Antitrust Experience and its Relationship to the Regulation of Monopolistic Conditions in South Africa. *Comparative and International Law Journal of Southern Africa*, 9(3), 336–345.

e.g., the authority to order a directive to withdraw from a precautionary arrangement). In 1979, the Maintenance and Promotion of Competition Act was passed, and it established the competition board, which was appointed by the Minister of Trade and Industry and had independent investigative powers. Further on, The Competition Act 89 of 1998, South Africa's third competition legislation,<sup>44</sup> was enacted in 1998 and subsequently updated in 2009. The Competition Commission, the Competition Tribunal, and the Competition Appeal Court were all named as its authorities actively involved in the enforcement process. The Competition Act 89 deals with the establishment of the competition commission, which is accountable for controlling unfair business practices in the market. The Act is divided into eight chapters by incorporating 84 sections and three schedules. The preamble also focuses on the responsibility and accountability of the commission and appellate tribunal by preventing restrictive practices, abuse of dominant position, and any merger-related transactions.<sup>45</sup> More recently, the Competition Amendment Act of 2018 came into existence to improve the determining factors for unfair practices, abuses of dominant position, price discrimination, strengthening the penalty systems, exclusion provisions, merger processes, and encouraging the growth of small and medium businesses, etc.<sup>46</sup>

### 3. The National Competition Law Authorities in the BRICS Countries

The national competition authorities are responsible for decision-making within their respective jurisdictions. To ensure their effectiveness, there are some unique models that have been identified, such as the bifurcated judicial model, the bifurcated agency model, and the integrated agency model. The first model mainly focuses on the investigative powers and compliance of the cases before courts, along with rights of appeal to appellate courts. The second model deals with investigative powers and is essential for passing regulation cases to the relevant expert competition adjudicative agencies with appellate rights. The third model highlights both exploratory and adjudicative purposes, with the right to plea to specific appellate authorities. In addition, the national competition enforcement institutional schemes are categorized based on numerous elements, such as independence, which empowers the "Stand-Alone Agency" to be distinguished from "Subsidiary Agency Models". The former aims mainly to establish a distinct identity that can ensure the adaption to changing conditions without the need to manage strategies through additional units inside the organization, while the latter focuses

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<sup>44</sup> Hartzenberg, T. (2005). Competition Policy and Practice in South Africa: Promoting Competition for Development. *New Journal of International Law and Business*, 26, 667.

<sup>45</sup> Competition Act No. 89 of 1998. Shepstone & Wylie. <https://www.wylie.co.za/wp-content/uploads/Competition-Act-No.-89-OF-1998.pdf>

<sup>46</sup> Contribution Tribunal, South Africa. Government Gazette: Republic of South Africa. <https://www.comptrib.co.za/Content/Documents/Competition>

upon a competition control body that is part of a larger organization.<sup>47</sup> Each doctrine and agency model plays an important role in the implementation of competition laws and policies for a healthy business environment. The significance of the NCA of each of the BRICS countries can be examined by referring to the institutional design and their respective capacity to deal with the enforcement process, as detailed in the subsequent paragraphs below.

The NCA of Brazil consists of the Administrative Tribunal for Economic Defense (including the President and Commissioners), the General Superintendence (including the Deputy Superintendent), and the Department of Economic Studies (including the Chief Economist), which make up CADE.<sup>48</sup> The CADE's Legal Office and the Management Office (including the Managing Director) also assist in achieving institutional objectives.<sup>49</sup> The President appoints the General Superintendent after approval from the Federal Senate for two years, and their removal also takes place at the request of the President as determined by law. In order to improve its economic strength, CADE, along with its mechanisms has access to a number of financial resources, including procedural fees, the remuneration for facilities, the capital generated by contributions and allowances, real estate and personal property, the sale of information records, the proceeds from tenders from the economic market, and any other additional revenue such as fines and penalty fees.

In Russia, the Federal Antimonopoly Service (FAS) was founded in May 2004 with a strong position since it combines the functions of a ministry and a service.<sup>50</sup> Its leader is appointed by a government decree and is accountable to the Prime Minister, the Deputy Prime Minister in charge of the subject area, and the entire government. As a high-ranking official, the FAS has the authority to comment on all proposed legislation and measures, as well as participate in policymaking. It also promotes and protects competition through its participative nature. Furthermore, this enforcement body has central offices as well as territorial branches, the latter of which are not readily influenced by local governments owing to their independence in terms of staff and funds. The FAS organization consists primarily of a head, deputy heads, and several divisions for fuel-energy control and supervision, transportation control and supervision, real estate control and supervision, local monopolies and communal services control and supervision, industry, and so on.<sup>51</sup> Along with 75 regional offices, the administration, legal, and information protection departments altogether play important roles.<sup>52</sup>

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<sup>47</sup> Jenny & Katsoulacos, 2016.

<sup>48</sup> Administrative Council for Economic Defense – CADE. Govt.br. <https://www.gov.br/cade/en/access-to-information/about-us>

<sup>49</sup> CADE: Structure. Govt.br. <http://en.cade.gov.br/about-us/structure>

<sup>50</sup> Organizational Structure of the FAS, Russian Federation. APECCP. <https://www.apecp.org.tw/htdocs/doc/Russia/Organization/ruorg01.html>

<sup>51</sup> *Id.*

<sup>52</sup> Federal Antimonopoly Service of Russia. <http://en.fas.gov.ru/>

The NCA of India (i.e. the CCI) consists of a chairperson and other (two to six) commissioners who are appointed by the Central Government. Since the financial assistance comes from the Central Government, the CCI is accountable for sending its budget plan and financial report to this governing body as required. Furthermore, the enforcement of competition law is also dependent upon various other authorities, including the Director General (DG) (who is in charge of investigations), the Chief Metropolitan Magistrate (CMM) (who authorizes the DG to conduct unannounced raids), the Tax Recovery Officer (responsible for the recovery of penalties imposed under the Act), the Civil Courts (tasked with the execution of orders), the Competition Appellate Tribunal (which hears appeals), and the Central Government (who provides policy directions). Therefore, the necessity to execute collectively is entirely to prevent the creation of India as an anti-competitive country.<sup>53</sup>

In China, the National People's Congress appoints the heads of the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC) who are all tasked with overseeing the various competition regulations.<sup>54</sup> The MOFCOM is in charge of assessing mergers and acquisitions (M&A) as well as other forms of potential market concentrations. It has the authority to approve or disapprove these transactions, with or without conditions. The NDRC is in charge of regulating behavioral pricing, which includes company pricing practices inquiries, price-related elements of monopoly agreements, and companies' misuse of dominant market positions to set or regulate prices. The SAIC is in charge of investigating monopolistic practices that are not related to prices, such as monopoly deals, violations of market power, and monopoly control.<sup>55</sup> In addition, the State Administration for Market Regulation (SAMR) oversees the merger notifications while the Anti-Monopoly Bureau (AMB) is responsible for the regulatory review of mergers. Furthermore, the Provincial Market Regulation Department (PMRD) is responsible for investigating cartels, abuses of market dominance, and governmental monopoly behavior.<sup>56</sup>

In South Africa, the Competition Commission is autonomous and subject to the constitution under the Act (i.e. the Competition Act, No. 89 of 1998). To achieve the specified objectives, the commission is primarily funded by a variety of sources, including funds from the parliament, fees payable to the commission, income derived from investments, and funds received from various other sources. The Commission is one of three independent legislative agencies created to regulate market

<sup>53</sup> Basant, R., & Morris, S. (2000). Competition Policy in India: Issues for a Globalising Economy. *Economic and Political Weekly*, 35(31), 2735–2747.

<sup>54</sup> Svetlicinii & Zhang, 2017.

<sup>55</sup> The US China Business Council. (2014). *Competition Policy and Enforcement in China*. <https://www.uschina.org/reports/competition-policy-and-enforcement-china>

<sup>56</sup> Global Legal Group. (2020). *Merger Control 2021: Laws and Regulations: China: ICLG International Comparative Legal Guides International Business Reports*. <https://iclg.com/practice-areas/merger-control-laws-and-regulations/china>

competition under the Competition Act, No. 89 of 1998. The Competition Tribunal and the Competition Appeal Court (CAC) are the other bodies that play a significant role in enforcement mechanisms. Furthermore, the commission and tribunal are administratively responsible to the Economic Development Department (EDD), whereas the CAC is part of the judiciary; each of these entities acts independently of the other and of the state.<sup>57</sup>

#### **4. The National Competition Law Enforcement Process in BRICS Countries: A Bird's Eye View**

This study on the National Competition Law Enforcement Processes in the BRICS countries examines how the antitrust and competition law enforcement mechanisms work in each of their jurisdictions.<sup>58</sup> The study discusses the similarities and differences between the countries' procedures and what companies can expect if they are facing antitrust investigations in any of the five nations.

In Brazil, the Brazilian National Competition Law Enforcement Agency (CADE) is the administrative body responsible for enforcing the country's competition laws. CADE is a part of the Ministry of Justice and is headquartered in Brasília.<sup>59</sup> The agency is responsible for investigating and prosecuting anticompetitive practices, such as price-fixing, bid-rigging, and market allocation agreements. It has the power to impose fines on companies and individuals found to violate the competition laws. Its investigative process is conducted in two stages, namely the initial investigation and the formal investigation. The initial investigation is conducted by CADE's Secretariat General, which gathers information and evidence to determine whether there are sufficient grounds to open a formal investigation. If the Secretariat General finds enough evidence of wrongdoing, it will open a formal investigation and refer the case to CADE's Tribunal for adjudication. The formal investigation is conducted by CADE's specialized chamber, which is composed of seven members: three from CADE's Tribunal, two from the Ministry of Justice, and two from the Ministry of Economics. This specialized chamber examines the evidence, hears testimony from witnesses, and makes a final determination about whether or not there has been a violation of the law.

In Russia, the competition law enforcement process is conducted by the Federal Antimonopoly Service.<sup>60</sup> It is responsible for investigating and prosecuting violations

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<sup>57</sup> National Government of South Africa. (2019). *Overview of the Competition Commission of South Africa*. <https://www.compcom.co.za/about-us-2/>

<sup>58</sup> Golovanova, S., & Pontual Ribeiro, E. (2021). Multisided Platform Analysis and Competition Law Enforcement Practice in BRICS Countries. *Journal of Competition Law & Economics*, 18(3), 730–769.

<sup>59</sup> Todorov, F.R., & Filho, M.M.T. (2012). History of Competition Policy in Brazil: 1930–2010. *The Antitrust Bulletin*, 57(2), 207–257.

<sup>60</sup> Avdasheva, S., et al. (2019). The Role of Judicial Review in Developing Evidentiary Standards: The Example of Market Analysis in Russian Competition Law Enforcement. *International Review of Law and Economics*, 58, 101–114.

of the Russian competition law. It has a wide range of investigatory powers, including the authority to conduct on-site inspections, mandate the submission of documents, and interview witnesses. Its investigations are often initiated in response to complaints filed by businesses or individuals. Complaints can also be filed anonymously, and there is no fee for filing a complaint. Once a complaint is filed, the FAS decides whether to open an investigation or not. If the FAS decides to open an investigation, it notifies the parties involved and allows them to present their side of the story.<sup>61</sup> It then gathers evidence and analyzes it to determine whether there has been a violation of the competition law. If it finds that a violation has occurred, it will issue a decision ordering the parties to cease the illegal conduct and may impose fines. The decisions taken by the FAS can be appealed to an appellate court. The Russian process is effectively designed to protect businesses and consumers from unfair competition practices, if you believe you have been the victim of unfair competition.

The National Competition Law Enforcement Process in India entails the government's involvement in investigating and penalizing companies that engage in anti-competitive practices.<sup>62</sup> The process is overseen by the Competition Commission of India, which is the country's primary competition authority.<sup>63</sup> The CCI is empowered to investigate complaints of anti-competitive behavior and can impose fines on companies found to be engaging in such behavior. It can also order companies to cease their anti-competitive practices. In addition to complaints filed with the CCI, the Indian government may also commence an investigation on its own initiative. Investigations by the CCI are conducted by a team of investigators, who gather evidence and interview witnesses. The team then presents its findings to the CCI, which decides whether or not to take action against the company. If the CCI finds that a company has engaged in anti-competitive behavior, it can impose a fine of up to ten percent of the company's turnover.<sup>64</sup> Similar to Russia, the CCI's decisions can be appealed to the National Company Law Appellate Tribunal.<sup>65</sup> The appellate tribunal can confirm, modify, or set aside the decision taken by the commission.<sup>66</sup>

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<sup>61</sup> Avdasheva, S., et al. (2016). Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews. In Jenny & Katsoulacos, 2016 (pp. 263–287).

<sup>62</sup> Malhotra, D. (2012, January). *Study on Government Procurement*. Competition Commission of India. <https://sps.iitd.ac.in/PDF/SGP.pdf>

<sup>63</sup> Parsheera, S. (2018). Challenges of Competition and Regulation in the Telecom Sector. *Economic & Political Weekly*, 53(38), 45–52.

<sup>64</sup> Majumdar, P.K. (2014). Penalising Anti-Competitive Agreements and Abuse of Dominance. *NUJS Law Review*, 7(3–4), 225.

<sup>65</sup> Sultania, N., & Jain, P. (2020). COMPAT to NCLAT: Aftermath of the Merger. *Supremo Amicus*, 15, 222.

<sup>66</sup> Singh, M. (2022). Licensing of SEPs in an Implementer-Oriented Economy: Challenges from an Indian Perspective. In Singh, M. *Standard-Setting Organisations' IPR Policies: Intellectual Property and Competition Issues* (pp. 159–184). Springer.



The National Competition Law of China (NCL) was enacted in 2007<sup>67</sup> and came into effect on August 1, 2008. The NCL is the first comprehensive competition law in China and prohibits anticompetitive agreements, abuse of market dominance, and monopolistic practices. It also regulates mergers and acquisitions that may affect competition in the relevant markets. The National Development and Reform Commission (NDRC) is the primary antitrust enforcement agency in China.<sup>68</sup> The State Administration for Industry and Commerce (SAIC) is another important antitrust enforcement agency in China.<sup>69</sup> The two agencies share concurrent jurisdiction over antitrust matters. The NDRC and the SAIC have been actively enforcing the NCL since its inception.<sup>70</sup> They have imposed heavy fines on companies found to violate the NCL and have taken various other corrective actions such as ordering companies to cease their illegal conduct or divest assets or both. The NDRC has a dedicated Antitrust Enforcement Bureau, which is responsible for investigating and prosecuting antitrust violations. The SAIC also has an Antitrust Enforcement Bureau, which is responsible for investigating and prosecuting antitrust violations. Both agencies have issued numerous decisions against companies found to violate the NCL.

In South Africa, competition law is primarily enforced by the Competition Commission and Competition Tribunal, which prohibits various forms of anti-competitive conduct, including price fixing, market division, bid rigging, and abuse of dominant market position. In addition, the National Competition Law (NCL) is responsible for investigating and prosecuting cartel conduct.<sup>71</sup> The NCL is led by the Competition Commission, which is an independent statutory body responsible for investigating complaints, conducting hearings, and imposing sanctions.<sup>72</sup> The NCL process is enforced by the Competition Tribunal, which hears appeals from decisions made by the Commission. The NCL has been successful in prosecuting several high-profile cartel cases in recent years. These cases have involved cartels in a variety of industries,

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<sup>67</sup> Ross, L., & Ratliff, J. (2007, September 5). *China Enacts National Competition Law*. WilmerHale. <https://www.wilmerhale.com/en/insights/publications/china-enacts-national-competition-law-september-5-2007>

<sup>68</sup> Conventus Law. (2016, March 26). *China's National Development and Reform Commission Signals Three Major Trends in Anti-Monopoly Law Enforcement in Latest Penalty Decisions*. <https://conventuslaw.com/report/chinas-national-development-and-reform-commission/>

<sup>69</sup> Wanglu, N. (2009). Antitrust Enforcement by the Administration for Industry and Commerce in China. *Competition Law International*, 5, 30.

<sup>70</sup> Weinert, L. (2021). International Cooperation in Merger Cases. In C. Jones & L. Weinert (Eds.), *EU Competition Law Volume II: Mergers and Acquisitions* (pp. 1491–1514). Edward Elgar Publishing. <https://www.elgaronline.com/view/edcoll/9781802203455/9781802203455.00047.xml>

<sup>71</sup> Galloway, J. (2007). The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy. *European Competition Law Review*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1767865](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767865)

<sup>72</sup> The Competition Commission South Africa. (2019). Our Role. <https://www.compcom.co.za/about-us-2/>



including construction, banking, and telecommunications.<sup>73</sup> The NCL has also been working to increase its cooperation with competition authorities in other countries, including the United States and the European Union.

#### **4.1. Enforcement Process during the COVID-19 Pandemic**

The BRICS competition law authorities have witnessed the tremendous impact of the COVID-19 epidemic on all elements of global economic stability, particularly in emerging nations. Furthermore, the governing bodies of these nations recognize the critical role of competition policy and enforcement in safeguarding consumer interests, assisting companies during the COVID-19 pandemic, and successfully managing the effects of post-pandemic financial problems. In order to increase transparency, the authorities agreed to join forces in resuming economic sectors and raising awareness about social and economic challenges. This resulted in the execution of a memorandum of understanding to affirm their desire to cooperate in these exceptional circumstances and to exchange intelligence and policies relating to competition enforcement.<sup>74</sup> It is noticed that the unforeseen disruptions induced by the COVID-19 calamity, as well as the measures taken to prevent the pandemic's spread, have had an impact on the functioning of various markets.<sup>75</sup> In the last decade, competition authorities around the world have had to adjust their enforcement strategies not just to the challenges of running their businesses but also to the difficulties of enforcing their regulations in an era of continued economic growth.<sup>76</sup> As a result, competition regulators have had to develop new ways of acting and thinking to respond to a variety of difficulties. Many of these changes have the potential to exacerbate problems that competition authorities were already dealing with before the pandemic, such as rising market concentration, the rapid expansion of digital platforms, protectionism, consumer vulnerability, and the public's understandable lack of trust in markets.<sup>77</sup> The BRICS competition law authorities have also analyzed the differences during COVID-19 and taken some significant measures to meet these challenges.<sup>78</sup>

<sup>73</sup> Boshoff, W.H. (2021). South African Competition Policy on Excessive Pricing and its Relation to Price Gouging During the COVID-19 Disaster Period. *South African Journal of Economics*, 89(1), 112–140.

<sup>74</sup> Competition Commission of India. (2022). *Statement of the BRICS Competition Authorities on COVID-19*. <https://www.cci.gov.in/public/events/International%20Cooperation/details/19>

<sup>75</sup> WIPO. (2022). *The Impact of the COVID-19 Pandemic on Creative Industries, Cultural Institutions, Education and Research*. [https://www.wipo.int/edocs/mdocs/copyright/en/wipo\\_cr\\_covid\\_19\\_ge\\_22/wipo\\_cr\\_covid\\_19\\_ge\\_22\\_study.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_covid_19_ge_22/wipo_cr_covid_19_ge_22_study.pdf)

<sup>76</sup> Jenny, F. (2020). Competition Law Enforcement and the COVID-19 Crisis: Business as (Un)usual. *SSRN*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3606214](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606214)

<sup>77</sup> Watson, J. (2020). *The Challenge of Covid-19 for Competition Authorities*. International Bar Association. <https://www.ibanet.org/article/9dc34aa3-cb52-4f2f-b110-11413a42306e>

<sup>78</sup> United Nations Conference on Trade and Development. (2022, July). *Rethinking competition law enforcement: Lessons learned from the pandemic, particularly in socially important markets – Challenges and opportunities for an effective response during the pandemic and economic recovery in the post-pandemic period*. [https://unctad.org/system/files/official-document/ciclpd63\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd63_en.pdf)

In Brazil, CADE issued a resolution on April 1, 2020, regarding virtual judgment sessions or “online judgments” during the COVID-19 pandemic, which was subsequently approved by the tribunal.<sup>79</sup> Accordingly, virtual sessions would be conducted in a virtual format in the case of a “*force majeure*” circumstance by following an electronic setup through data security. The arguments would be presented in oral form by sending media files to the tribunal during a virtual session, and they would also be made publicly available. The authorities were keenly aware of the likelihood of critical situations arising, particularly in matters relating to mergers and combinations. A little later, on April 14, 2020, CADE expressed its support to the International Competition Network (ICN), i.e. the “ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic.” Additionally, it is noted that the ICN stressed the accessibility of goods at competitive worth along with consumer welfare. It also expressed its view that the competitors should engage in “co-operation” to ensure the optimal availability of resources to the public at large. The international groups also emphasized the importance of “joint efforts” of all competition law authorities in order to better deal with the pandemic and other upcoming issues. Moreover, the ICN focused on competition advocacy so as to raise awareness among the stakeholders relating to such issues.<sup>80</sup>

The Government of the Russian Federation has taken all necessary measures to control the COVID-19 situation and economic growth.<sup>81</sup> It monitors all activities of retail and other competitors to ensure competitive prices in the market. Controlling the prices of necessary goods, including food, pharmaceuticals, and medical purposes, is required to be maintained. Since 23 March 2020, the FAS has been regularly monitoring the supply of necessary foodstuffs, and on 27 March 2020, the head of FAS highlighted all of the measures taken by the authorities for the food, medical, and petroleum markets. Additionally, consumers were given the option to submit complaints about any unfair activity relating to excessive pricing, shortage of goods, etc. to the central office. The FAS also changed its operational work strategy during the COVID-19 pandemic by temporarily suspending all appointments and inspections, except in cases of abuses of law related to the safety of health and life of citizens. It temporarily postponed all necessary deadlines and considered the cases relating to anti-monopoly and administrative violations through video

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<sup>79</sup> International Bar Association. (2020, October). *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months*. <https://www.ibanet.org/article/BD404CE3-3886-48A8-98F6-38EAACCD5F53>

<sup>80</sup> Govt.br. (2020, April 28). *CADE expresses support to the ICN document on competition during the COVID-19 pandemic*. <https://www.gov.br/cade/en/matters/news/cade-expresses-support-to-the-icn-document-on-competition-during-the-covid-19-pandemic>

<sup>81</sup> The World Bank. (2021, December 1). *Amidst Strong Economic Rebound in Russia, Risks Stemming from COVID-19 and Inflation Build, Says World Bank Report*. <https://www.worldbank.org/en/news/press-release/2021/12/01/amidst-strong-economic-rebound-in-russia-risks-stemming-from-covid-19-and-inflation-build-says-world-bank-report>

conferences (i.e. online mode). Furthermore, it designated the COVID-19 pandemic as a “*force majeure*” (as per part 5.1 of Art. 3 which allows for procurement due to *force majeure* circumstances etc.) and accepted bidding through an electronic platform. Another major step towards ensuring competition through law enforcement was the receiving and handling of complaints using online methods (including video conferencing, drop-in mailbox, working remotely, etc.). To support all of these goals, a “UNCTAD Webinar” was also organized in June 2020, with the theme “Competition Policy in Times of COVID-19: Is There a Role for International Cooperation?”<sup>82</sup>

On April 19, 2020, the CCI in India issued an advisory to bridge the demand and supply gap during this pandemic. It deemed certain activities as permissible, including the limited coordination of activities by means of sharing data and time to ensure the optimal availability of resources. It allowed joint ventures to help the government in this unprecedented situation and promoted efficiency in production, distribution, supply, etc. In addition, coordinating certain activities was also restricted if they could potentially lead to cartels in terms of price, market, quota, etc. The commission also announced measures for electronic filings under the “Green Channel,” an automatic approval route for certain combinations. The commission made it clear that it was actively monitoring the market and related activities to safeguard consumer interests and create a competitive environment. Furthermore, section 54 of the Competition Act, 2002 empowered the state to exempt some categories of businesses under this law. These exemptions are mainly provided when it is necessary for the public interest and the welfare of the state. It is also noted that during this pandemic, the Government of India proactively revised the schedule of the Essential Commodities Act, 1955 to include sanitizers and masks in the list. This shows the continuous efforts made by the commission and the government to ensure the availability of goods and services at a competitive price.<sup>83</sup>

In China, the State Administration for Market Regulation delivered a notification on antitrust enforcement and highlighted some of its applied inferences, including the “Sustained Acceptance of Online Merger Matters,” “Fast-Track Review,” “Exception of Certain Supportive Agreements,” “Stepped-Up Enforcement against Antitrust Violations,” “Efficient Support for Reasonable Competition Evaluation” and “Active Supervision on Antitrust Acquiescence of Industries” etc. Additionally, it is noticed that SAMR shall continue its “Online Merger Filings” through online mode, video conference, call, or by roping mail to the “Anti-Monopoly Bureau.” The SAMR is proactively making efforts by clearing unconditional merger cases (approximately totaling 71 cases) and also establishing a “Green Channel” to facilitate work resumption and merger filings. Furthermore, exceptions to certain agreements for technological advancement,

<sup>82</sup> Competition and Consumer Protection. UNCTAD. <https://unctad.org/Topic/Competition-and-Consumer-Protection>

<sup>83</sup> Khaitan & Co. (2020, May 1). *India: COVID-19 Not A Blanket Safe Harbour Defence: Competition Act of India*. Mondaq. <https://www.mondaq.com/india/operational-impacts-and-strategy/925990/covid-19-not-a-blanket-safe-Harbour-defence-competition-act-of-India>

increased efficiency, and public welfare are being considered, which are still under the preview of Article 15 of the AML. The provisional rules on the prohibition against monopoly agreements provide particular issues that need to be considered when shaping immunity, including the precise method, consequence, and causation. Filing complaints about violations of AML were encouraged so that a competitive environment could be maintained for consumer welfare. In addition, SAMR offered the option to initiate antitrust investigations for dominance exemptions to both companies and individuals.<sup>84</sup>

In South Africa, the National Coronavirus Command Council (NCCC) was empowered to enforce lockdown and ensured compliance with “NCCC” protocols for optimum use of human resources. When it was seen that the competitors were increasing the prices of essential goods, including sanitizers and masks, etc., the Ministry of Trade and Industry confirmed that eleven companies were being investigated for violations, and those found guilty will face administrative penalties. The NCC also made special provisions to fulfill the requirements for filing a complaint, including the “Notice of Motion” and “Affidavit” through the “Consumer and Customer Protection Regulations” before the tribunal. The respondent was required to answer within 72 hours, after which the hearing would be initiated through electronic mode (i.e. video or audio proceedings). The respondent could also file an appeal before the “Competition Appeal Court,” and the commission, through a consent agreement, would conclude the final settlement. This consent order would be confirmed by the tribunal without hearing any evidence.<sup>85</sup>

## **5. Why the BRICS Nations Need an Effective Enforcement Mechanism for the National Competition Law at the Global Level**

The BRICS countries need to improve their competition law enforcement mechanisms in order to effectively compete with developed economies. The bloc has made great strides in recent years, but there is still room for improvement. By working together to strengthen their antitrust laws and enforcement, the BRICS countries can create a level playing field that will benefit businesses and consumers alike. There is no question that these economies have been increasingly important in the global economy over the past decade. This has been accompanied by a growing need for better competition law enforcement mechanisms within the bloc. However,

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<sup>84</sup> Herbert Smith Free Hills. (2020, April 23). *China's SAMR Continues Focus on Pharma Sector amid Covid-19 Outbreak Fining API Distributors over RMB 300m for Abuse of Dominance*. <https://www.herbert-smithfreehills.com/notes/crt/2020-04/chinas-samr-continues-focus-on-pharma-sector-amid-covid-19-outbreak-fining-api-distributors-over-rmb300m-for-abuse-of-dominance>

<sup>85</sup> Muller, J., & Lodolo, G. (2020, April 7). *South Africa Competition Tribunal: Regulations Published to Expedite COVID-19 Excessive and Unfair Pricing Complaint Referrals*. African Antitrust & Competition Law. <https://africanantitrust.com/2020/04/07/south-africa-competition-tribunal-regulations-published-to-expedite-covid-19-excessive-and-unfair-pricing-complaint-referrals/>

the existing mechanisms are not adequate to deal with the challenges posed by the increasing economic integration of the BRICS economies.

While the establishment of a supranational competition authority would be a major step forward, it is not the only measure that needs to be taken. The national competition authorities of the BRICS countries also need to be strengthened. This can be done by providing them with greater resources and independence and by ensuring that they are properly coordinated with each other. It is evidenced that these nations have been working together since 2006 to promote economic growth and development. One area where the group has been seeking to improve cooperation is in the enforcement of competition law. The benefits of improved competition law enforcement are clear. Stronger enforcement helps to level the playing field for businesses, ensuring that fair competition can flourish and that consumers can enjoy the benefits of lower prices and greater choice.

Several challenges need to be addressed in order to improve the competition law enforcement process within the BRICS nations. These include ensuring that national competition authorities have the necessary resources and powers to effectively investigate and prosecute antitrust cases; addressing cross-border issues, such as how to deal with companies that operate in multiple BRICS countries; encouraging greater cooperation between national competition authorities, including sharing information and best practices; and raising awareness of competition law among businesses and consumers. Although this group has made some progress in addressing these challenges, more needs to be done. By working together, this group of countries can create a stronger framework for enforcing competition law. A key focus has been on creating better coordination between the national competition authorities (NCAs) of the member countries.

One way to improve coordination is to develop a more formalized system for information sharing and cooperation. The BRICS bloc has been working on a Memorandum of Understanding that would set out rules and procedures for NCAs to follow when cooperating. The MoU is still in the draft stage, but it is hoped that it will be finalized and signed by all member countries soon. Another way to improve competition law enforcement in the BRICS bloc is to establish a joint task force or working group that would work on specific cases or investigations. This would allow member countries to pool resources and expertise and to better target companies that are harming competition in the bloc. The BRICS bloc has made some progress on all of these fronts; nevertheless, more needs to be done to truly improve competition law enforcement in the bloc. The most obvious way to improve competition law enforcement in the BRICS context is to establish a dedicated supranational competition authority. Such an authority would have the necessary expertise and resources to effectively investigate and prosecute antitrust violations. It would also be able to provide much-needed guidance on how best to apply competition law principles in a cross-border context.

## Conclusion and Suggestions

The BRICS countries are experiencing rapid economic growth, and it is predicted that by 2050 they will hold a dominant position at the global level. It exposes that it is continuously making efforts to create a healthy competitive environment by taking innovative measures during critical times. During the COVID-19 pandemic, this group initiated advanced measures including "online judgment sessions," "force majeure provisions," "joint efforts," "green channel," "sustained acceptance of online merger matters," "fast-track review," "exception of certain supportive agreements," "stepped-up enforcement against antitrust violations," "efficient support for reasonable competition evaluation," "active supervision on antitrust acquiescence of industries," and "online merger filings." This shows the swift transformation of their enforcement mechanisms onto digital platforms.

On the other hand, it is also found that due to rapid e-commerce growth, the market size, consumer demand, and competition have likewise significantly increased, thereby inviting many issues that are of serious concern to stakeholders, particularly regarding AI, cryptocurrency, data protection, and BRICS expansion, along with many others. In addition, while the expansion of BRICS seems beneficial for their economies, it also raises some serious questions, such as how to measure the size of the market on the digital platforms, how to ensure data safety, how to identify factors to determine dominance at the global level, how to develop an institutional framework and enforcement mechanism at their respective jurisdiction, and many more. The work is currently in its developmental stage, yet there is neither any fully developed institutional framework nor any common legislation to deal with these issues at the international level.

This study reveals that the antitrust laws and law enforcement processes in the BRICS nations are either not fully developed or are ineffective and require various changes to be able to meet upcoming issues, especially relating to the digital market. It is found that currently there is no uniform legislation or common law that could deal with such problems at the international level. The respective economies are making efforts and working hard to introduce some changes in their existing laws, but they are still in the progressive stages and are not yet concluded. Hence, in order to address these issues of the competitive market, the BRICS nations need to work jointly on establishing an effective enforcement mechanism. In this regard, the author proposes some recommendations for policy formulation and future implementations as outlined below.

1. Need to Develop a Common Competition Law and Policy at the Global Level: Given the rapid growth of the market and expansion of this group, there should be a common, standardized legislation and common policies akin to those of the World Trade Organization at the universal level so as to improve the effectiveness of the enforcement process.

2. Body of Experts: It is also noticed that the establishment of such a common law requires a body of experts, including specialists in international law and technology.

The reason for having an expert in international law is to properly examine and assess the application and execution of the intended laws, whereas having expertise in technology is essential to ensure that the measures proposed are adequate to meet the current challenges relating to the digital market.

3. Law Negotiation: Before finalizing the law, the lawmaker should ensure rational participation and equal opportunities for each economy at the initial stage, as each state has its domestic law, policies, and enforcement system, regardless of whether it is a developing or developed country. This shall ensure the fairness and effectiveness of that law.

4. Need to Execute a Bilateral Treaty: The nature of legal documents also plays a significant role in determining the liability and accountability of any party. Therefore, the BRICS member states should formulate a common framework for a "Bilateral Treaty" rather than focus solely on the execution of an agreement only. This shall enhance the responsibility and accountability of each member state.

5. Dispute Settlement Mechanism: A "dispute settlement mechanism" and an "alternative dispute resolution system" should be established for the respective member states and legal entities on a digital platform. This should be established at both national and international levels. In addition, the consumers should be afforded the means and options of communicating with the authority at minimum cost and time.

6. Consumer Privacy: The lawmaker should develop an innovative mechanism and include "some specific clause" for the competitors to abide by when they interact with consumers to ensure the privacy of their information. In addition, if they circulate such information further without the consumer's consent then they should be liable accordingly. In short, the strict liability of the competitors should be established.

7. Time-Bound Enforcement Process: The BRICS group should ensure a time-bound enforcement process for improving the efficiency and compliance of law at the global level.

8. Autonomy of the Competition Law Authority: This authority must not be dependent upon the internal or external bodies or agencies for any financial support.

9. Overburdened Workload: It is also observed that the authorities are often overburdened. Hence, an "online dispute settlement mechanism" along with appropriate staff members should be developed.

10. Appropriate Amendments or Modifications of Law: There is no doubt that many countries are already proactively making efforts to deal with all such upcoming issues; however, these efforts have either failed or proved ineffective in covering certain major areas, due to which their overall effectiveness could not be enhanced. Like in India, the Competition Amendment Bill of 2022 has addressed various points, but even so, regulations relating to AI and data protection have still not been effectively addressed.<sup>86</sup> Thus, regular and timely amendments and modifications to the law should be an essential provision incorporated in the standardized framework.

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<sup>86</sup> Dhir et al., 2022.



11. **Blockchain Technology Challenges:** The author also noted that the BRICS nations have not fully developed the systems necessary to deal with cryptocurrency and are still in the working stage and unregulated. For example, even in India, the Competition Amendment Bill of 2022 does not cover the nature and status of participants in blockchain technology, and this technology remains unregulated. In addition, it is not clear whether the investors' participation in this technology constitutes an agreement or whether these participants are covered under the definitions of "person" and "enterprise". How then, can we measure the relevance of the market with special reference to cryptocurrency? Many such issues remain to be answered by the competent authority in order to ensure the effective enforcement of competition law in India.

In the end, the BRICS nations have a joint responsibility to develop a common and effective competition law enforcement mechanism at the global level, and the governments of these countries should start by incorporating the necessary changes into their existing laws to meet upcoming issues.

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