

## Antitrust Law in the BRICS Countries: A Review and Critique

**Narender Kumar,**

University of Allahabad (Uttar Pradesh, India)

<https://doi.org/10.21684/2412-2343-2024-11-1-84-102>

**Abstract.** A growing trend shows that global economic power is shifting away from the United States and Europe and towards the BRICS nations. The BRICS nations are predicted to hold the dominant position in the world by 2050. The rapid development of these economies and their markets is also raising a serious concern for the national antitrust enforcement authorities of the BRICS countries in their respective jurisdictions. This study attempts to examine the effectiveness of antitrust law, with a special focus on new developing trends in each of the BRICS jurisdictions. In addition, the study examines the proposed changes and limitations of the Indian Competition (Amendment) Bill 2022. The study reveals that the national antitrust laws and their enforcement processes are not fully developed and in need of considerable changes. Furthermore, the study indicates that while the proposed Amendment Bill 2022 is a progressive step in the right direction, it fails to cover certain key areas of the digital era, requiring further modifications to anticipate future impacts of economic development. In conclusion, the author recommends some points for effective policy-making, along with their future implications.

**Keywords:** Antitrust Law; BRICS; Competition Law Enforcement; Competition (Amendment) Bill 2022; National Competition Law Authority.

**Recommended citation:** Narender Kumar, *Antitrust Law in the BRICS Countries: A Review and Critique*, 11(1) BRICS Law Journal 84–102 (2024).

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## Introduction

Brazil, Russia, India, China, and South Africa comprise the BRICS group of five major emerging nations.<sup>1</sup> The concept of BRIC was initially invented in 2001 by 'Goldman Sachs economist Jim O'Neill, and later the group became known as BRICS after South Africa merged in 2010.<sup>2</sup> This group of countries has one of the world's largest markets, with a combined market share of around \$25 trillion as of 2021, a little more than the United States.<sup>3</sup> Furthermore, these nations have been in the process of economic advancement since the 1990s, even though the group was officially founded in 2006, and the first official summit was held on 16 June 2009, in Yekaterinburg, Russia.<sup>4</sup> Today, the BRICS group collectively represents the world's fastest-growing economy, with approximately 41 percent of the world's population,

<sup>1</sup> Sebak K. Jana, *Sustainable Energy Development in Emerging Economies: A Study on BRICS*, in *Environmental Sustainability, Growth Trajectory and Gender: Contemporary Issues of Developing Economies* 23 (2022).

<sup>2</sup> Subikash Mookherjee & Ujjal P. Dutta, *The Issue of Sustainable Urbanization in BRICS Nations: An Impact-Analysis of Urban Energy Consumption and Carbon Emission*, in *Globalization, Income Distribution and Sustainable Development* 147 (2022).

<sup>3</sup> Statista, *Gross domestic product (GDP) of the BRICS countries from 2000 to 2027* (Dec. 4, 2023), available at <https://www.statista.com/statistics/254281/gdp-of-the-bric-countries/>.

<sup>4</sup> Andrew F. Cooper & Ramesh Thakur, *The BRICS in the New Global Economic Geography*, in *International Organization and Global Governance* 291 (2013).

and aims at fostering economic cooperation among emerging economies.<sup>5</sup> These economies are notable for their diverse economic structures, large populations, and growing international influence in global affairs<sup>6</sup> and have made significant contributions to the world in various fields such as politics, economics, and culture, and providing international stability and security for economic development. Despite the lack of a formal agreement, these nations communicate and interact regularly to ensure that each is promoting the best interests of its fellow members. In addition, considering their continuous growth and development, experts firmly predict that the financial systems of Brazil, Russia, India, and China will be among the most dominant in the world by 2050.

Furthermore, bearing in mind these countries' growing nature and progressive approach, many economists have even proposed broadening the BRICS group. This could prove beneficial to other developing economies, including Bangladesh, Egypt, Indonesia, Iran, Korea, Mexico, Nigeria, Pakistan, the Philippines, Turkey, and Vietnam, as well as Mexico and South Korea, which are considered prominent economies at the global level.<sup>7</sup> Moreover, China and Russia are always considered very significant economies with the other member nations following closely behind.<sup>8</sup> For instance, China ranked first and represented dramatic growth, followed by other group members in the Growth Environment Score (GES) and Research and Development (R&D).<sup>9</sup> Additionally, China's export shares have increased from 50 percent to 74 percent since 2020, with Russia, South Africa, and India following closely behind.<sup>10</sup> In 2017, the statistics evidenced that the percentage share of China's intra-trade in its international business was 10.61 percent, whereas India represented 19.32 percent.<sup>11</sup> The relationships of this group serve to facilitate the achievement of agreements on various issues, which could give rise to closer cooperation and stronger investments and trade ties among emerging economies that have shared sustained engagement

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<sup>5</sup> BRICS India 2021, *Evolution of BRICS* (Dec. 4, 2023), available at <https://brics2021.gov.in/about-brics>.

<sup>6</sup> Ziya Öniş & Mustafa Kutlay, *Rising Powers in a Changing Global Order: The Political Economy of Turkey in the Age of BRICS*, 34(8) Third World Q. 1409 (2013).

<sup>7</sup> Anthony J. Makin & Rashmi U. Arora, *How Solid Are the BRICS? An Economic Overview*, in *The Rise of the BRICS in the Global Political Economy* 11 (2014).

<sup>8</sup> Bruno S. Sergi, *Putin's and Russian-led Eurasian Economic Union: A Hybrid Half-Economics and Half-Political Janus Bifrons*, 9(1) J. Eurasian Stud. 52 (2018).

<sup>9</sup> Global Sherpa, *BRIC Countries-Background, Key Facts, News and Original Articles* (Dec. 4, 2023), available at <https://globalsherpa.org/bric-countries-brics/>.

<sup>10</sup> T.P. Bhat et al., *India and China in WTO Building Complementarities and Competitiveness in the External Trade Sector*, Planning Commission Government of India (Dec. 4, 2023), available at <https://www.niti.gov.in/planningcommission.gov.in/docs/reports>.

<sup>11</sup> Press Information Bureau, *Government of India Ministry of Commerce & Industry, Trade with BRICS Nations*, 4 December 2019 (Dec. 4, 2023), available at <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1594938>.

over the years.<sup>12</sup> In addition, the New Development Bank (hereinafter “NDB”) was created to raise funds for transport systems and projects for sustainable development in the BRICS and other developing nations.<sup>13</sup> This developing trend thus shows that economic strength is shifting from developed economies (i.e. the United States and Europe) to developing economies such as the BRICS countries and, furthermore, towards reestablishing global financial and economic stability.<sup>14</sup> However, the expansion of the BRICS countries also invites various challenges for the market as well as the various stakeholders in a competitive business environment.<sup>15</sup> This leads to the formation of markets of different kinds and varying sizes at both the national and international levels, where one particular state or a group of states may hold a dominant position and indulge in unfair business practices for economic benefits. Consequently, this rapid growth of the market and technology also presents various challenges before the national competition law authority.

### **Literature Review**

Research shows that the BRICS nations have witnessed substantial economic growth<sup>16</sup> and global governance over the last decade.<sup>17</sup> These nations contribute nearly 30 percent of aggregate global GDP in terms of purchasing power parity (PPP), which is one of the major factors driving the shift of global financial power from developed to new, emerging economies.<sup>18</sup> It is further evidenced that this group makes a significant contribution to global trade in terms of both imports and exports, with China holding the leading position.<sup>19</sup> There are also several myths surrounding this group: some predict its eventual demise, whereas others question its role and capacity to contribute meaningfully to global economic and financial governance, and still others believe that it is simply a public affairs experiment for

<sup>12</sup> Svetlana Gusarova, *Role of China in the Development of Trade and FDI Cooperation with BRICS Countries*, 57 China Econ. Rev. (Article 101271) (2019).

<sup>13</sup> Press Information Bureau, *Government of India, Ministry of Commerce & Industry, Trade with BRICS Nations*, 4 December 2019 (Dec. 4, 2023), available at <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1594>.

<sup>14</sup> Ritu Rani & Naresh Kumar, *Is There an Export – or Import – Led Growth in BRICS Countries? An Empirical Investigation*, 7(1) Jindal J. Bus Res. 13 (2018).

<sup>15</sup> Jaswant S. Saini & Naresh Kumar, *Issues Pertaining to Growth of Digital Economy: An Arduous Challenge Before CCI*, 20(35) J. Pub. Aff. (2020) (Dec. 4, 2023), available at <https://doi.org/10.1002/pa.2301>.

<sup>16</sup> Niall Duggan et al., *Symposium: ‘The BRICS, Global Governance, and Challenges for South–South Cooperation in a Post-Western World’*, 4(43) Int’l Pol. Sci. Rev. 469 (2021).

<sup>17</sup> Rajan Kumar & Biju Thomas, *BRICS in Global Governance: A Gradual but Steady Expansion*, 1(1) Governance & Pol. 100 (2022).

<sup>18</sup> Cooper & Thakur, *supra* note 4.

<sup>19</sup> Statista, *Export of Goods by the BRICS Countries from 2000 to 2020* (2022) (Dec. 4, 2023), available at <https://www.statista.com/statistics/254301/exports-of-the-bric-countries/>.

China, among other dominant narratives.<sup>20</sup> The market mechanism and institutional framework both play an important role in the expansion<sup>21</sup> and development of intra-BRICS cooperation and sustainable development.<sup>22</sup> In this present study, the author attempts to examine the existing antitrust laws in the BRICS countries with special reference to their upcoming challenges. Furthermore, it also reviews India's recent Competition (Amendment) Bill 2022 in order to assess its applicability to current issues such as data protection, cryptocurrency, AI, etc.

Antitrust laws have become a cornerstone of regulation in market economies.<sup>23</sup> Meanwhile, previous attempts to investigate the effects of antitrust laws have frequently been impeded by the absence of comprehensive mechanisms governing these laws over a long period. The modern-day competition legislation exhibits certain significant parallels to the *Statute of Monopolies of 1623* (England) and *Le Chapelier Law of 1791* (France).<sup>24</sup> After Canada adopted the Sherman Act in 1889, the United States of America enacted the same in 1890 in an effort to transform the approach to market regulation.<sup>25</sup> Over time, many changes were introduced to address market issues, and accordingly, each nation's jurisdiction amended its existing laws to afford a measure of the strength of its regulation. This approach resulted in the adoption of the competition law by 126 countries at the international level in an attempt to establish a better enforcement mechanism and a healthy business environment.<sup>26</sup>

## 1. Antitrust Law in India

Following the international standards of antitrust laws set by the European Union (EU), the United States, the United Kingdom, and other jurisdictions, India also introduced 'the Monopolies and Restrictive Trade Practices Act of 1969' (MRTP Act), which is one of the oldest antitrust laws among developing nations.<sup>27</sup> The

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<sup>20</sup> John M.N. Kubayi, *BRICS: Structural Power and the BRICS Bank as a Potentially Progressive Instrument for a Passive Revolution*, in *The Political Economy of Intra-BRICS Cooperation* 39 (2022).

<sup>21</sup> Zongyuan Z. Liu & Mihaela Papa, *Can BRICS De-dollarize the Global Financial System?*, *Elements in the Economics of Emerging Markets* (2022).

<sup>22</sup> Siphamandla Zondi et al., *Towards Deeper Intra-BRICS Cooperation: An Argument*, in *The Political Economy of Intra-BRICS Cooperation* 1 (2022).

<sup>23</sup> Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75(1) *Antitrust L.J.* 133 (2008).

<sup>24</sup> Anu Bradford & Adam S. Chilton, *Competition Law around the World from 1889 to 2010: The Competition Law Index*, 14(3) *J. of Competition L. & Econ.* 393 (2018).

<sup>25</sup> Vincent Geloso, *Collusion and Combines in Canada, 1880–1890*, 68(1) *Scandinavian Econ. Hist. Rev.* 66 (2020).

<sup>26</sup> Cooper & Thakur, *supra* note 4.

<sup>27</sup> Aditya Bhattacharjee et al., *Competition Law and Competition Policy in India: How the Competition Commission has Dealt with Anticompetitive Restraints by Government Entities*, 54 *Rev. Indus. Org.* 221 (2019).

rationale behind the adoption of this law is to follow the principles of 'social, economic, and political justice for every citizen of India' and prevent such unfair practices that impede a country's economic development. However, these socio-economic changes also necessitate a transformation of the current legal system.<sup>28</sup> After the Industrial Revolution (1991), a period when liberalization, privatization, and globalization took place, private companies got the right to enter the market and increased market size. Thus, it was a challenge for India to determine how to regulate the market and competitors' behaviour in the growing economy. As a result, the Government of India constituted the High-Level Committee (1999) to transform the existing laws, including the MRTP Act to better reflect the needs of the market. Finally, on the recommendation of this committee, the new Competition Act of 2002 was enacted, which grants companies the right to compete in the market and promotes fair competition for economic development.

### **1.1. Constitutional Dimension**

Following independence, the preamble of the Indian Constitution was designed to reflect the main goals of the nation in terms of sovereignty, democracy, republicanism, socialism, and secularism, as well as ensuring social, economic, and political justice for all of its citizens. This places the responsibility of maintaining social order and promoting the social welfare of the people on the state. The almost same jurisprudence could also be noticed in notable political leader and activist, Dr. B.R. Ambedkar's vision in terms of concepts such as "Social Justice," "Human Welfare," "Freedom from Dominant Social Order," "Freedom from Inequality," and many more.<sup>29</sup> India has constantly prioritized the security of fundamental rights, as has been evidenced (for the most part) in its approach to economic progress.<sup>30</sup> The most important parts of the Indian Constitution in relation to social revolution are Parts III and IV, which contain the "Fundamental Rights" (hereinafter FRs) and "Directive Principles of State Policy" (hereinafter "DPSP").<sup>31</sup> These FRs provide some of the most basic and essential circumstances necessary for human development, and it is even believed that citizens cannot advance their personalities in the absence of these rights. For instance, Article 19(1)(g) ensures the freedom to practice any profession, and states that every citizen of the nation is free to engage in any profession, trade,

<sup>28</sup> Douglass C. North, *Economic Performance Through Time*, 84(3) *The Am. Econ. Rev.* 359 (1994).

<sup>29</sup> Kamal Kumar, *Indian Constitution: The Vision of B.R. Ambedkar*, 3(5) *Intellectual Resonance* 144 (2017).

<sup>30</sup> Pranjal Deekshit & Simran Sumbre, *After the Right to Water: Rethinking the State and Justice in Mumbai*, 46(4) *Int'l J. Urban & Regional Res.* 711 (2022).

<sup>31</sup> Jack A. Goldstone et al., *Introduction. Changing yet Persistent: Revolutions and Revolutionary Events*, in *Handbook of Revolutions in the 21<sup>st</sup> Century* 1 (2022).

or business of their choice.<sup>32</sup> Furthermore, it is established that this right is not absolute in nature but rather qualified or restrictive. This means that reasonable restrictions that are in the public interest may also be imposed under Article 19(6) as well as under List I of the Seventh Schedule of the Indian Constitution by the state and central Government.<sup>33/34</sup> Moreover, Part XIII, Articles 301 to 307 of the Indian Constitution, guarantees the freedoms of trade, commerce, and intercourse,<sup>35</sup> where Article 301 establishes the fundamental guidelines of trade and commerce and Articles 302 to 305 outline the limitations that are placed on trade.<sup>36</sup>

It is a well-known fact that India is neither fully federal nor fully unitary; it is referred to as quasi-federal. This implies that there are two levels of government, namely the State Government and the Central Government.<sup>37</sup> Here, it is important to note that the central government does not dominate the State, rather, only a few provisions can be handled by the Centre.<sup>38</sup> This concept is also expressed under Article 38 of the DPSP, which speaks about the State's duty to maintain the welfare of the people by protecting their social, economic, and political interests and Article 39(b)(c), which specifies that the State should direct its policy to ensure that the benefits of citizens, the allocation of material resources, and economic system operations do not result in the concentration of economic power that is to the detriment of the public purpose.<sup>39</sup> Furthermore, Article 47 emphasizes the State's duty to uplift the standard of living, nutrition level, and public health,<sup>40</sup> and when we look into the jurisprudence of all these provisions, a clear vision can be seen, i.e. economic growth, development, and welfare of the nation. Moreover, the same principles may also be discerned in the preamble of the new competition law of India, which highlights the importance of a competitive environment and consumer protection for achieving economic

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<sup>32</sup> O.P. Sharma, *Job Reservation in Indian Corporate Sector: Prospects and Challenges in Globalised Era*, 5 Indian J.L. & Just. 164 (2014).

<sup>33</sup> Arvind P. Datar, *Privilege, Police Power and 'Res Extra Commercium': Glaring Conceptual Errors*, 21(1) Nat'l L. Sch. of India Rev. 133 (2009).

<sup>34</sup> T.N. Rao, *Distribution of Legislative Powers in the Constitution of India*, 11(4) Indian J. Pol. Sci. 43 (1950).

<sup>35</sup> D.P. Derham, *Some Constitutional Problems Arising Under Part Xiii of the Indian Constitution*, 1(4) J. Indian L. Inst. 523 (1959).

<sup>36</sup> M. Ramaswamy, *Indian Constitutional Provisions Against Barriers to Trade and Commerce Examined in the Light of Australian and American Experience*, 2(2/3) J. Indian L. Inst. 321 (1960).

<sup>37</sup> A.K. Ghosal, *Federalism in the Indian Constitution*, 14(4) Indian J. Pol. Sci. 317 (1953).

<sup>38</sup> Ashutosh Varshney, *How has Indian Federalism Done?*, 1(1) Stud. in Indian Pol. 43 (2013).

<sup>39</sup> A. David Ambrose, *Directive Principles of State Policy and Distribution of Material Resources with Special Reference to Natural Resources – Recent Trends*, 55(1) J. Indian L. Inst. 1 (2013).

<sup>40</sup> Vinay Kandpal, *Socio-Economic Development Through Self-Help Groups in Rural India – A Qualitative Study*, 14(5) Qualitative Res. in Finan. Mkts 621 (2022).

development.<sup>41</sup> In addition, the law focuses on the promotion and sustainability of the competition to maintain the quality and price level.<sup>42</sup> To further support this, a new concept known as “Appreciable Adverse Effect on Competition in India” (hereinafter “AAEC”) has been introduced to safeguard the economic benefits and promote a healthy business environment in the economy.<sup>43</sup> Here, we need to note that both the constitutional provisions and the competition law are complementary to each other, and without these guiding principles and objectives, it would be nearly impossible to achieve economic development and consumer welfare.<sup>44</sup>

### **1.2. The Competition Act 2002: A Bird’s Eye View**

In 2002, the Indian Parliament replaced the MRTP Act with the New Competition Act, 2002. Its primary objectives, as specified in the preamble of the Act, include “keeping in view of the economic development of the country ... to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade ...” The jurisprudence of this clearly shows that the business practices that have or are likely to have “AAEC” are strictly prohibited under this law. The essence of this law can be seen in its substantive, procedural, and institutional design. The substantive part of this law mainly focuses on four areas, namely sections 3, 4, 5, 6, and 49 of the Act (i.e. “Anti-Competitive Agreement” (ACA), “Abuse of Dominant Position” (ADP), “Merger and Acquisition” (M&A), and “Competition Advocacy” (CP)).<sup>45</sup> The leniency programme and competition policy also make a significant contribution.<sup>46</sup> The second part of this law provides an overview of the competition law enforcement process as initiated by the Competition Commission of India (hereinafter ‘CCI’) and the Director General (hereinafter “DG”) with the help of other enforcement officers. The Director General (in charge of investigations), the CMM, Delhi (which permits the DG to conduct an unannounced raid), the Tax Recovery Officer (in charge of the recovery of penalties imposed under the Act), the Civil Courts (in charge of executing the orders), the Competition Appellate Tribunal (in charge of hearing appeals), and the Central Government are also found to be involved in the enforcement of the

<sup>41</sup> Mohammad Reza et al., *The Dilemma of Partnership in the Perspective of Competition Law*, in Second International Conference on Public Policy, Social Computing and Development (ICOPOSDEV 2021) 176 (2022).

<sup>42</sup> HOD, M.S.L.B. & Upadhyay, M.A.A., *Going Green in Organization – A Study on the Eco-Friendly Initiatives towards Sustainable Development in India*, 1 Contem. Res. in Com. & Mgmt. 20 (2022).

<sup>43</sup> Anuja Paul, *Antitrust Laws in India & USA: A Comparative Analysis*, 5(2) Int’l J. L. Mgmt. & Human. 504 (2022).

<sup>44</sup> Sujit Choudhry, *Can Federalism Save India’s Constitutional Democracy?*, 4 Jus Cogens 69 (2022).

<sup>45</sup> Bhattacharjea et al., *supra* note 27.

<sup>46</sup> Steven Van Uytsel et al., *Leniency in Asian Competition Law* 67 (2022).



competition law (i.e. for policy directions).<sup>47</sup> Since financial assistance is provided by the Central Government, it is the responsibility of the CCI to submit its budget plan and financial report on time.<sup>48</sup> The enforcement authorities investigate and discourage companies that engage in anti-competitive behaviour, and if it requires it, levy fines on companies found to be engaging in such practices. The Commission is empowered with extraterritorial jurisdiction to ensure effective enforcement mechanisms. Decisions of the CCI can be appealed to the National Company Law Appellate Tribunal (NCLAT) established under section 410 of the Companies Act, 2013. A decision made by the Commission can be confirmed, modified, or overturned by the NCLAT. The NCLAT is also empowered to resolve compensation claims that may arise from the findings of the Commission. In terms of institutional design, the National Competition Law Authority (i.e. "NCA") of India (often abbreviated as "CCI") is made up of a chairperson and two to six commissioners appointed by the Central Government. At present, the Commission consists of two commissioners and one chairperson, a Secretary, nine divisions, three regional offices, and the offices of the DG and NCLAT.<sup>49</sup> The Commission was mainly established to enforce the competition law and carry out the functions as provided in the preamble and under section 18 of the Act.<sup>50</sup> Additionally, it provides recommendations on competition-related concerns to the government or statutory authority, as well as engages in competition advocacy to raise awareness of this law.<sup>51</sup>

### **1.3. The Competition (Amendment) Bill 2022**

The proposed Competition (Amendment) Bill 2022 (hereinafter "Bill 2022") aims to strengthen the existing competition law by implementing several changes. It facilitates the participation of competitors in a healthy and competitive business environment and thereby promotes fair competition in the market. It is claimed that consumers would be able to shop more freely without feeling taken advantage of by their providers as a result of these changes proposed in the Bill. Over the last decade, Indian markets have experienced tremendous growth, as well as a paradigm shift in how businesses are executed.<sup>52</sup> In light of this progress, the Government of India

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<sup>47</sup> Narender Kumar, *Leniency Regimes in BRICS Nations: Lessons for India*, 8(1) Int'l J. Pub. L. Pol'y 52–67 (2022).

<sup>48</sup> The Ministry of Corporate Affairs, GOI, *Competition Law Review Committee (Working Group)*, Regulatory Structure of the competition Law (2019) (Dec. 4, 2023), available at <https://ibbi.gov.in/uploads/resources/>.

<sup>49</sup> Competition Commission of India, *Institutional Framework* (2022) (Dec. 4, 2023), available at <https://www.cci.gov.in/contents/institutional-framework>.

<sup>50</sup> Björn Lundqvist, *An Access and Transfer Right to Data – from a Competition Law Perspective*, J. Antitrust Enforcement (2022) (Dec. 4, 2023), available at <https://doi.org/10.1093/jaenfo/jnac017>.

<sup>51</sup> Abhishek Bhasin & Nupur Agrawal, *Acquisitions in the Digital Sector from the Competition Commission of India's Point of View* (2022) (Dec. 4, 2023), available at <https://doi.org/10.2139/ssrn.4154832>.

<sup>52</sup> Ministry of Finance, *The Competition (Amendment) Bill, 2022* (2022) (Dec. 4, 2023), available at <https://prsindia.org/billtrack/the-competition-amendment-bill-2022>.

appointed the Competition Law Review Committee (hereinafter “CLRC”) to examine and suggest changes to the Act. As a consequence, it has been recommended that a corporate environment that is encouraged and based on trust be established.<sup>53</sup> Accordingly, the Minister of State for Corporate Affairs introduced this Bill in the Lok Sabha (on 5 August 2022), and it was later referred to the Standing Committee (on 17 August 2022). It proposes changes at three levels, namely the substantive, procedural, and institutional frameworks, in order to reshape the existing law with a special focus on upcoming challenges. This Bill seeks to amend several important provisions, some of which are examined in this study. It seeks to amend and widen the scope of certain definitions, including “enterprise,” “person,” “public financial institution,” “relevant product market,” “group,” “control,” etc., in order to provide more transparency. It adds a new provision on “commitment” under section 2 which shall be executed as per section 48B of the Act and also extends the scope and definition of the important provisions, including ACA, ADP, and M&A.<sup>54</sup> The application and scope of section 3 are enhanced by incorporating the parties facilitating such agreements. It broadens the jurisprudence of section 4 by inserting the words “condition and price” in the explanation, which not only serves to restrict dominant position holders from abusing their economic power but also appears to be beneficial for the other small players in the market. It proposes a threshold limit (i.e. “global deal value” exceeding Rs. 2000 crores require authorization from CCI) and a “trust-based approach” for the approval of mergers and acquisitions (M&A). Here, it is important to note that the deal value is currently not only based upon the tangible assets but also considers the intelligible assets like data, consumer demand, supply chain network effect, and many other factors. The “Local Nexus Criteria” is also based upon similar factors. Moreover, it is found that the concerned authority consistently encourages the quick approval of merger filings, which has resulted in the approval process time being reduced to around 17 working days. This is simply due to the fact that the authority believes the details filed by the stakeholders on time are accurate, since any other suppressing or false information will only attract an aggregative or heavy penalty in addition to the other consequences under the proposed bill.<sup>55</sup> In general, the Commission formerly took 210 days to approve any combination and 30 days to form a *prima facie* opinion as per the Act, 2002, which has now been reduced and fixed at 150 days for approval and 20 days for making a *prima facie* opinion from the receipt of the notice. This

<sup>53</sup> Press Information Bureau, Government of India, Ministry of Corporate Affairs, *Government Constitutes Competition Law Review Committee to Review the Competition Act*, 30 September 2018 (Dec. 4, 2023), available at <https://pib.gov.in/newsite/PrintRelease.aspx?relid=183835>.

<sup>54</sup> Ankit Srivastva & G.S. Bajpai, *The Competition (Amendment) Bill, 2022*, The Hindu, 24 August 2022 (Dec. 4, 2023), available at <https://www.thehindu.com/news/the-competition-amendment-bill-2022/article65805919.ece>.

<sup>55</sup> Youtube, *Decoding Competition Amendment Bill with Ashok Kumar Gupta of CCI | Big Deal | Exclusive* (Dec. 4, 2023), available at <https://www.youtube.com/watch?v=TApjdSIFvas>.

demonstrates a rapid transformation, which is likely to create numerous opportunities for competitors that are able to obtain approval from the authority in the shortest time possible. The Bill also recommends a limitation period of three years for the filing of information and states that it shall not be extended. However, if, after considering the facts and circumstances, the Commission determines that the matter is urgent and important, it may consider it beyond the stated period. Moreover, other key features of this Bill include the appointment of the DG by the Commission with prior approval from the central government under section 16, increasing the penalty from 1 crore to 3 crores, offering benefits under the leniency programme, empowering the DG, allowing the Commission to receive financial assistance, etc. These are some of the features that make the Competition Bill special and unique with regard to transforming the enforcement mechanism.<sup>56</sup>

#### **1.4. Rationale Behind Bill 2022**

India, being an important member of the BRICS group, plays an important role not only in the realm of business but also in formulating policies for the welfare of the people.<sup>57</sup> During its participation in the 14<sup>th</sup> BRICS Summit, held on 23–24 June 2022, it expressed progressive and cooperative strategies for dealing with social and economic challenges, including technology, MSMEs, development partnerships, startups, and many more.<sup>58</sup> The rapid developments and transformations in several such domains give rise to numerous challenges for the National Competition Law Authority in India, particularly regarding the digital market, e-commerce, data protection, cryptocurrency, etc. Thus, taking these issues into account, the government introduced the Competition Bill in 2022 in an effort to improve the efficiency and enforceability of the existing competition law. Furthermore, technology, AI, acquisition issues, completed transactions without informing the Commission, hub and spoke cartels, cryptocurrency investment, and many other issues require new legislation or appropriate modifications to the existing law.<sup>59</sup>

#### **1.5. Limitations of the Bill 2022**

So far, it has been noted that this bill has initiated many progressive changes at the substantive, procedural, and institutional levels. However, at the same time, this

<sup>56</sup> Ministry of Corporate Affairs, *The Competition (Amendment) Bill, 2022*, MCA-E Book 28 July 2022 (Dec. 4, 2023), available at [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185\\_2022\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf).

<sup>57</sup> Ministry of External Affairs, Government of India, *BRICS Joint Statement on Strengthening and Reforming the Multilateral System*, 1 June 2021 (Dec. 4, 2023), available at [https://www.mea.gov.in/bilateral-documents.htm?dtl/33888/BRICS\\_Joint\\_Statement\\_on\\_Strengthening\\_and\\_Reforming\\_the\\_Multilateral\\_System](https://www.mea.gov.in/bilateral-documents.htm?dtl/33888/BRICS_Joint_Statement_on_Strengthening_and_Reforming_the_Multilateral_System).

<sup>58</sup> Prime Minister's Office, *PM Participates in the 14<sup>th</sup> BRICS Summit*, 24 June 2022 (Dec. 4, 2023), available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1836853>.

<sup>59</sup> Saini & Kumar 2020.

study identifies some key areas where more improvement is required. The Bill gives the Commission and DG considerable power, which is beneficial in a great many ways, but it also has the potential of being abused or undermining the effectiveness of the implementation of rules. This is evidenced by the fact that the majority of decisions have been remanded, reversed, or revised by the appellate court. As a result, rather than simply increasing power, the quality of rational decision-making should be promoted.<sup>60</sup> The proposed limitations on online platforms appear to be very light, which may draw a significant number of international corporations and affect the interests of small-scale competing companies and investor scale in India. Furthermore, the proposed additional threshold limit (i.e. "Global Deal Value exceeding Rs. 2000 crores") appears more beneficial for foreign competitors because the value of the rupee in comparison to the dollar is quite low, and it is most likely to attract international investors to the Indian market. This may have a major impact on the economy and pose a high risk to small businesses. The application of this deal-value threshold is relevant to the interactions of new and emerging enterprises.<sup>61</sup> The valuation of a target firm may differ from that of an acquirer firm due to differences in financial indicators, changing securities prices, etc. Several experts working in this field also believe that such time constraints may result in the invalidation, re-filing, or even lapse of approvals. Moreover, besides the assets or turnover, there are certain factors such as users, growth, data, and network effect that are viewed as means of gaining a significant market position. It is noticed that not every transaction exceeding Rs. 2000 crores is required to be notified because the new market valuation is heavily influenced by intangible factors such as data, network effect, users, source of supply, and so on. The "Local Nexus Criteria" are also based on similar market-facing factors. It is found that the CCI does not describe or frame these variables in conformance with dynamic market circumstances.<sup>62</sup> Additionally, it appears that the regulation concerning these terms is not fully defined or is still in its progressive stage. Furthermore, the bill mentions receiving funds from "other sources," but the nature, categories, types, and grounds for this purpose are not defined in the bill, demonstrating its reliance on other agencies. This puts limits on the independence of the authority. Indian enforcement agencies or facilitators require greater transparency, and the regulator can implement the European strategy of the twin test on facilitators to address this issue.<sup>63</sup> The proposed legislation expanded the scope of "party," but it is still unclear if a person making

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<sup>60</sup> Bhattacharjea et al., *supra* note 27.

<sup>61</sup> Viplav Agrawal, *Deal Value Threshold for Combinations*, The CBCL BLOG, 10 August 2022 (Dec. 4, 2023), available at <https://cbcl.nliu.ac.in/guest-posts/deal-value-threshold-for-combinations/>.

<sup>62</sup> The Competition (Amendment) Act 2022, *supra* note 56.

<sup>63</sup> Leigh M. Davison & Debra Johnson, *An Exploration of the Evolution of the EU's Twin-track Approach to the Achievement of its International Competition Policy Goals*, 36(1) *Liverpool L. Rev.* 73 (2015).

bitcoin investments is protected by the definition or not. However, India is a major cryptocurrency investor; hence, this oversight cannot be ignored. Besides, the bill does not address or is found to be ineffective in dealing with data protection, artificial intelligence (AI), and BRICS expansion, all of which need to be addressed.

## **2. Antitrust Law in the BRICS Nations: A Bird's Eye View of Brazil, Russia, China, and South Africa**

Antitrust law is an area of competition law that deals with the regulation of anti-competitive behaviour such as unfair business practices, big company mergers, price fixing, and monopolies. In this section, we will discuss the antitrust laws in Brazil, Russia, China, and South Africa to provide an overview of how these countries approach this sort of regulation.<sup>64</sup> In recent years, cooperation among these countries has blossomed.<sup>65</sup> Consequently, this necessitates the establishment of a fair and equitable trading environment.<sup>66</sup> However, as the international trade system continues to evolve, new challenges emerge that could be tackled through regional cooperation. Due to the fact that these countries frequently engage in fierce competition, it is necessary that they set up an effective enforcement mechanism. Antitrust law is one area where they might want to work together and follow the principles as suggested through the Sherman Act, 1890<sup>67</sup> and Article 101 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") for regulating cartel activity.<sup>68</sup> In fact, for that purpose, the national enforcement agencies have attempted to track cartel activities and make new policies from time to time. Since 2006, when this group came into existence, various summits, meetings, and conferences have taken place to meet the aforementioned challenges relating to the competitive market.<sup>69</sup> Hence, it is very important to revise and analyse the effectiveness of the existing antitrust laws in these economies.<sup>70</sup>

<sup>64</sup> Alexandr Svetlicinii & Juan-Juan Zhang, *The Competition Law Institutions in the BRICS Countries: Developing Better Institutional Models for the Protection of Market Competition*, 2(1) Chinese Pol. Sci. Rev. 85 (2017).

<sup>65</sup> Michael Kahn, *Prospects for Cooperation in Science, Technology and Innovation among BRICS Members*, in BRICS and Global Governance 168 (2018).

<sup>66</sup> Ming Liu, *BRICS Development: A Long Way to a Powerful Economic Club and New International Organization*, 29(3) Pac. Rev. 443 (2016).

<sup>67</sup> George J. Stigler, *The Origin of the Sherman Act*, 14(1) J. Legal Stud. 1 (1985).

<sup>68</sup> Barbara Baarsma & Nicole Rosenboom, *A Veritable Tower of Babel: On the Confusion between the Legal and Economic Interpretations of Article 101(3) of the Treaty on the Functioning of the European Union*, 11(2–3) Eur. Competition J. 402 (2015).

<sup>69</sup> Ramesh Thakur, *How Representative are BRICS?*, 35(10) Third World Q. 1791 (2014).

<sup>70</sup> Robert Marten et al., *An Assessment of Progress towards Universal Health Coverage in Brazil, Russia, India, China, and South Africa (BRICS)*, 384(9960) Lancet 2164 (2014).

### 2.1. Brazil

In Brazil, the antitrust law has been codified into four different pieces of legislation: the Statute on Competition (Law No. 12,529/2011),<sup>71</sup> the Consumer Protection Code of 2002 (Law No. 8078/1990),<sup>72</sup> the Consumer Protection Law of 2004 (Law No. 1087/2008), and the Civil Code, specifically Articles 932-A and 934-B. In particular, Law 12,529/2011, which repealed previous legislation such as Law 7308/1949, created a new national antitrust council with greater regulatory powers than before.<sup>73</sup> The Brazilian antitrust law is a set of rules and regulations that the government has designed to help regulate the market. The main goal of this law is to protect consumers from monopolies and unfair trade practices. It was created in 1990 to protect consumers from monopolies and unfair trade practices and later revised by the National Economic Council to promote fair competition in all markets as well as consumer protection. This law aims to regulate the market by establishing a set of guidelines that should be followed by all economic agents that have an impact on the market, whether they are companies or individuals. It is a complex piece of legislation that has been revised several times since its enactment, and the current version was passed in July 2012, once again incorporating several changes to the previous version. This law can be divided into two parts: general provisions and specific provisions. The general provisions are found in Article 1–XIII, and they are very broad in scope, while specific provisions are found in Article 1–XII. Furthermore, in numerous regulatory domains, cartel practices are considered an offense, leading to various liabilities and making it exceedingly difficult to navigate these spheres for all parties involved. Over the last decade, the Administrative Council for Economic Defense (CADE) has increased its litigation of cartels and developed more assertive inquiry techniques, which is largely attributable to the establishment of multiple bid-rigging studies.<sup>74</sup> The system is relatively young, but it has been built on the foundations of other legal systems, such as those in Europe or the United States. The Administrative Council for Economic Defense, which has its head office and constitutional formation in the Brazilian city of Brasilia, Federal District, is the executive branch of the Brazilian government body in charge of examining and analysing the country's competitiveness advantages, as well as facilitating and encouraging a high-performance culture in Brazil. It is an independent authority that reports to the Ministry of Justice. Moreover, this agency has statutory authority over the entire national territory and continues to

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<sup>71</sup> A.P. Martinez, *Abuse of Dominance: The Third Wave of Brazil's Antitrust Enforcement*, 9 Competition L. Int'l 169 (2013).

<sup>72</sup> Claudia L. Marques & R.A.C. Pfeiffer, *Dissemination of Consumer Law and Policy in Brazil: The Impact of EU Law*, 45(1) J. Consumer Pol'y 27 (2022).

<sup>73</sup> Juliana O. Domingues & Eduardo M. Gaban, *The Effectiveness of Competition Law Sanctions: Brazil*, in *The Cambridge Handbook of Competition Law Sanctions* 335 (2022).

<sup>74</sup> Denise Junqueira & Renato Duarte Franco de Moraes, *Brazil: Anti-Cartel Enforcement* (Oct. 19, 2020) (Dec. 4, 2023), available at <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/brazil-anti-cartel-enforcement>.

carry out the legal functions established by “Law No 12.529/2011.”<sup>75</sup> This law aims to safeguard competitive rivalry and sets forth protective methods and punishments for infringements against the economic order.

## **2.2. Russia**

In Russia, the Competition Law is a federal law that regulates the entire market. It was signed on 26 July 2006 and came into force on 1 January 2007.<sup>76</sup> This law sets out the basic provisions governing the protection of competition and prohibits agreements, decisions, and other measures aimed at creating or strengthening the monopoly position, as well as agreements, decisions, and other undertakings that are aimed at eliminating or restricting competition.<sup>77</sup> It establishes several prohibitions for commercial organizations, such as joining into agreements with competitors with the aim of eliminating or restricting competition; participating in cartels; limiting production; limiting access to goods markets through discriminatory measures; limiting access to services markets through discriminatory measures; and imposing conditions that restrict access to goods markets or services markets for participants in these markets. It is designed to regulate economic activities and ensure fair competition in the Russian market. This regulation applies to all natural and legal persons engaged in production, trade, or the provision of services. The document is based on the European Union’s Directive No. 82/2005 of 15 March 2005, and has been amended a number of times: firstly, by Federal Law No. 55-FZ dated 27 December 2007; secondly, by Federal Law No. 225-FZ dated 18 November 2008; and thirdly, by Federal Law No. 227-FZ dated 29 December 2008. It seeks to promote free and fair competition by preventing organizations from creating monopolies or engaging in other practices that would limit open markets. It also aims to ensure that there are no restrictions on production, trade, or prices except those required by law.<sup>78</sup> According to this law, activities can only be deemed illegal if they have an objective and clearly defined harmful effect on the market’s level of competition, and if these effects are substantial. Here, the Federal Antitrust Authority (hereinafter “FAS”) and 85 territorial divisions are accountable for its application. FAS is a federal executive body in charge of enacting regulatory acts and monitoring and controlling the constitutional protection of fair competition in the goods and financial services markets, as well as the operations of free markets.

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<sup>75</sup> Administrative Council for Economic Defense (CADE) (Dec. 4, 2023), available at <https://www.gov.br/cade/en/>.

<sup>76</sup> Svetlana Avdasheva et al., *Does Judicial Effort Matter for Quality? Evidence from Antitrust Proceedings in Russian Commercial Courts*, 53(3) European J.L. Econ. 425 (2022).

<sup>77</sup> Anastasia Cheredova & Ilya Bochinin, *Russian Federation: Russian Antitrust Laws-Sanctions Impact*, Mondaq, 21 June 2022 (Dec. 4, 2023), available at <https://www.mondaq.com/russianfederation/antitrust-eu-competition-/1204030/russian-antitrust-laws-sanctions-impact>.

<sup>78</sup> OECD, *Competition Law and Policy in the Russian Federation* (2013) (Dec. 4, 2023), available at <https://www.oecd.org/daf/competition/CompetitionLawandPolicyintheRussianFederation.pdf>.



### 2.3. China

Since China joined the World Trade Organization in 2001, its economy has grown rapidly, making it the second-largest economy in the world.<sup>79</sup> With this growth, there has been an increased focus on competition law and policy. The Chinese competition law regime is governed by the Anti-Monopoly Law of the People's Republic of China (hereinafter "AML"), which was enacted in 2008 and went into effect in 2009.<sup>80</sup> The AML applies to all economic activity within China, including foreign-owned companies.<sup>81</sup> It prohibits three types of anticompetitive conduct, namely monopoly agreements, abuse of market dominance, and mergers and acquisitions that would result in a monopoly. It also contains provisions on antitrust enforcement, investigations, and remedies. The main enforcement agency for antitrust matters in China is the State Administration for Industry and Commerce (hereinafter "SAIC")<sup>82</sup> which is empowered to investigate and penalize companies that engage in anticompetitive conduct. The SAIC can impose fines of up to 10 percent of a company's annual sales for violating the regulations of the AML.<sup>83</sup> In 2018, the SAIC merged with the State Administration for Market Regulation (hereinafter "SAMR"), a newly created agency that is responsible for comprehensive regulation and incorporated registering of market entities. Its functions include monitoring unfair business practices and overseeing market quality management under the newly amended Act, which came into force on 1 August 2022.<sup>84</sup> The amendments allow for some significant changes, such as prohibiting the use of certain advanced technologies to engage in anti-competitive behaviour, increasing the maximum sanctions for contraventions, and limiting abuse by the regulatory framework. Additionally, it is worth noting that shortly after this revised Act was passed, the SAMR also released six sets of provisions with the goal of improving the Act's enforcement process.<sup>85</sup>

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<sup>79</sup> Anran Luo et al., *Explanations of the Political Gridlock behind International Circular Economy: Waste Ban Narratives in the China-EU Cooperation*, *Ambio* 1 (2022).

<sup>80</sup> Feng Zhao, *An Issue Neglected in the Revision of China's Anti-Monopoly Law: How to Connect with the Anti-Unfair Competition Law?*, 1(1) *Sci. L.J.* 38 (2022).

<sup>81</sup> Dermot Cahill & Jing Wang, *Addressing Legitimacy Concerns in Antitrust Private Litigation Involving China's State-Owned Enterprises*, 45(1) *World Competition* 75 (2022).

<sup>82</sup> F. Chen, *How to Set Up a Branch and Points to Note*, in *Essential Knowledge and Legal Practices for Establishing and Operating Companies in China* 355 (2022).

<sup>83</sup> Jian Li & Liyang Hou, *Compulsory v. Voluntary Merger Notification Mechanism: Implications of China's Enforcement for Young Competition Jurisdictions*, 45(3) *World Competition* 413 (2022).

<sup>84</sup> Guangyao Xu & Adrian Emch, *The Amendment of China's Anti-Monopoly Law*, *CPI Antitrust Chronicle* August II (2022) (Dec. 4, 2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4205447](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205447).

<sup>85</sup> *What Has Changed in China's Amended Anti-Monopoly Law?*, *China Briefing*, 11 July 2022 (Dec. 4, 2023), available at <https://www.china-briefing.com/news/what-has-changed-in-chinas-amended-anti-monopoly-law>.



## 2.4. South Africa

In South Africa, competition law is governed by the Competition Act of 1998, which seeks to promote and maintain healthy competition in the economy by prohibiting restrictive business practices. The Competition Commission, constituted under the Competition Act, is the supervisory body responsible for investigating and prosecuting complaints of antitrust violations and has been empowered to issue interim orders restricting any act or practice. It can impose fines of up to 10 percent of a company's annual turnover for antitrust violations. The Act applies to all private companies that have been granted monopoly status by the government, but it does not apply to state-owned enterprises or activities undertaken according to government policy. Nevertheless, the act has been effective in promoting fair competition and deterring anticompetitive behaviour.<sup>86</sup> It prohibits agreements, decisions, specifications, and practices that have the objective or result of preventing, restricting, or distorting competition. Furthermore, it is also proven that South Africa is continuously making efforts to improve its competition policy enforcement, especially after the COVID-19 pandemic.<sup>87</sup>

After analysing the antitrust laws of the BRICS nations, it is evident that the BRICS group has been making efforts to improve efficiency and enforceability by incorporating provisions covering almost all significant areas concerning the competitive environment into the antitrust laws enacted in each of their respective jurisdictions. However, it is also observed that there are still some areas for which the law is not fully developed or at the working stage. Furthermore, the growing market size, investment scale, number of competitors, consumer market, and profit are only expected to increase and invite numerous other challenges before the competition law enforcement agencies at the international level. These challenges may involve dealing with the uniform application of law in this jurisdiction, determining the definition of the relevant market, setting up an enforcement process, regulating digital platforms, managing data protection network effects, assessing deal value, and more. In order to overcome such impending hurdles, it is crucial for the BRICS nations to have a "common antitrust law" that could deal with all such issues. Thus, the competition law framework in these countries is still evolving and is not yet fully developed, which has led to the emergence of various challenges.<sup>88</sup>

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<sup>86</sup> South African Government, *Competition Act 89 of 1998* (2022) (Dec. 4, 2023), available at <https://www.gov.za/documents/competition-act>.

<sup>87</sup> Lerisha Naidu et al., *Rapid Development of Competition Law across Africa*, Bizcommunity, 11 May 2022 (Dec. 4, 2023), available at <https://www.bizcommunity.com/Article/196/739/227737.html>.

<sup>88</sup> Svetlana Golovanova & Eduardo P. Ribeiro, *Multisided Platform Analysis and Competition Law Enforcement Practice in BRICS Countries*, 18(3) J. Competition L. & Econ. 730 (2022).

### 3. Challenges Before the National Competition Law Authority

The study shows that each of the five BRICS nations, particularly India, is making progressive steps toward improving their enforcement mechanisms, but at the same time, it is also observed that no one country has fully developed its antitrust law, and in fact, they are still at the progressive stage. Furthermore, a number of challenges that are common to all BRICS jurisdictions necessitate the careful development and definition of certain concepts. These challenges include threshold limits (deal value-based), data regulation, data security, big data, substantial business operations, factors determining “local nexus criteria” (such as the “number of users,” the “number of contracts,” the “aggregate amount of payment received,” etc.), enforcement mechanisms, dependency over other agencies, cryptocurrency, BRICS expansion, etc. It is further observed that enforcement mechanisms, institutional frameworks, jurisdictions, awareness programmes, new competition policies, resources, technical expertise officials, common payment systems, etc. have emerged as serious challenges for these jurisdictions. Hence, lawmakers should revisit or rethink these issues in order to promote effective economic development.

### Conclusion

The present study reveals that the BRICS countries are shifting towards becoming the world’s leading economies.<sup>89</sup> However, due to the rapid expansion of the digital market and advancements in technology, the National Competition Law Enforcement Authority<sup>90</sup> has failed or been ineffective in dealing with some areas, particularly those related to data protection, BRICS expansion, cryptocurrency, AI, and many more. It is found that they are making progressive efforts to cover these gaps, but the existing law is either not fully developed or unregulated on such issues. In India, the current proposed Bill (i.e. the Competition (Amendment) Bill 2022) appears to be quite effective, but still, the above-mentioned issues are neither completely defined nor regulated in the law. Hence, it is necessary to revisit or rethink both micro and macro factors before modifying the existing competition law and policy. Moreover, before enacting a “common antitrust law,” the social, economic, political, and cultural condition of each BRICS jurisdiction should be examined deeply, which may involve incorporating a new model for substantive law, enforcement mechanism, and institutional framework similar to that of the World Trade Organization.<sup>91</sup> It is also critical to establish an expert agency to deal with and regulate new challenges such as big data, cryptocurrency, AI, and BRICS expansion on a national and international

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<sup>89</sup> Van Uytsel et al. 2022, at 354.

<sup>90</sup> Golovanova & Ribeiro 2022.

<sup>91</sup> David Palmeter et al., *Dispute Settlement in the World Trade Organization* (2022).

level. For that purpose, it is also necessary to put together a team of experts in the fields of international law, technology, language, etc.

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### Information about the author

**Narender Kumar (Uttar Pradesh, India)** – Assistant Professor, Department of Law, Central University of Allahabad (Senate House Campus, University Road, Old Katra, Prayagraj (Allahabad), Uttar Pradesh, 211002, India; e-mail: narenderarya86@gmail.com).