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REGULATING THE UNREGULATED: THE ADVENT OF FINTECH REGULATIONS AND THEIR IMPACTS ON EQUITY-BASED CROWDFUNDING

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The concept of equity-based crowdfunding (ECF) has become one of the latest innovative financing alternatives for startups and SMEs throughout the world during the last decade. This article aims to assess the revised crowdfunding directive of Turkey and its role in the development of the ecosystem. The concept of ECF is elucidated with its stakeholders, challenges, and solutions. Then the effect of the revised regulation is analyzed through a case study of the first active ECF platform in Turkey, Fonbulucu. Finally, the article discusses the potential improvements to the existing directive considering the practices of Fonbulucu.

Keywords: crowdfunding; regulation; investment; risk; equity-based crowdfunding; ECF platform; Fintech.

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Introduction

Hollywood star Tom Hanks's most iconic role might be Forrest Gump; an American comedy-drama film about a fictional story of a man, Forrest Gump.[1] In the movie, despite his low IQ – 75, – Forrest becomes rich thanks to his investment decision. He reveals his source of wealth as investing in a "fruit company," Apple Inc. After a while, he does not have to worry about money because he becomes a "gazillionaire." This is a dream outcome for all investors to catch the right startup at the right time, i.e. very early stage. Such an investment may bring ten times, 100 times, or even 1000 times return on investment according to the startup's future success. This might be one of the main logic behind equity-based crowdfunding in the eyes of investors, through which ordinary people can gain a very high return by investing in early-stage startups in a legally regulated way.

When we explore the term "crowdfunding," it has been broadly visible since the 2000s. It has become an innovative and alternative means of financing for small and medium-sized enterprises (SMEs) and startups, especially after the 2008 financial crisis.[2] Declining the availability of conventional financing opportunities after the crisis might be the main reason SMEs look for alternatives. Fund seekers see crowdfunding as a suitable alternative to traditional instruments during a crisis, although conventional investors usually look for safe-haven assets like gold or oil when there is high uncertainty in the market.[3] Although this inverse relationship, the crowdfunding sector has proliferated since that time. The annual market volume reached $40bn in loan-based, $7bn in donation-based, $1.5bn equity-based, and $1.25bn in reward-based crowdfunding in 2020.[4]

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1 Forrest Gump, IMDB (Jul. 20, 2023), available at https://www.imdb.com/title/tt0109830/?ref_=vp_vi_tt.

2 Krystallia Moysidou & J. Piet Hausberg, *In Crowdfunding We Trust: A Trust-Building Model in Lending Crowdfunding*, 58(3) J. Small Bus. Mgmt. 511 (2020).

3 Mustafa Disli et al., *In Search of Safe Haven Assets During COVID-19 Pandemic: An Empirical Analysis of Different Investor Types*, 58 Res. Int'l Bus. Fin. 101461 (2021).

4 Tania Ziegler et al., *The 2nd Global Alternative Finance Market Benchmarking Report* (2021).

Crowdfunding can be defined as raising a relatively small amount of funds from a large group of people – the crowd – as a donation or in exchange for equity, reward, or interest through digital platforms.[5] Thus, it could be classified into four categories: donation-based, reward-based, debt-based, and equity-based crowdfunding, as illustrated in Figure 1 below. Entrepreneurs can raise capital in exchange for equity through Equity-based crowdfunding – ECF. The Internet is crucial in developing the concept of ECF as it facilitates the mediatory roles of platforms between investors and entrepreneurs. Hence, the rapid increase of ECF can also be directly linked to technological advancement, especially in Internet connection, Web services, and fast, secure digital payment infrastructures. Technology-driven fintech solutions continuously disrupt the conventional financial system, which creates new opportunities and innovations for the development of ECF ecosystems.[6]

Figure 1: **Types of crowdfunding**

	Donation-based crowdfunding	**Lending-based crowdfunding**	**Reward-based crowdfunding**	**Equity-based crowdfunding**
Kinds of contributors	Philanthropists	Investors	Early customers	Partners
Expectations as a return	No expected return	Loan to be returned with interest	Receive a reward, probably the product	Share of all future profits

Adopted from Nuno Bento et al. 2019[7].

As a result of the growing demand for ECF, the need for a trusted and regulated ecosystem has emerged, and the U.S. is the first country which regulated the crowdfunding market in 2012, followed by the UK in 2014.[8] Interventions of governments have shaped crowd-based ecosystems because regulations set obligations and limits for ECF campaigns, investors, entrepreneurs and ECF platforms. Consequently, many academics see the impact of regulations as worth

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5 C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 21(6) Colum. Bus. L. Rev. 1081 (2012).

6 Ahmet F. Aysan & Zhamal Nanaeva, *Fintech as a Financial Disruptor: A Bibliometric Analysis*, 1(4) FinTech 412 (2022).

7 Nuno Bento et al., *Crowdfunding for Sustainability Ventures*, 237 J. Clean. Prod. 117751 (2019).

8 Antonella F. Cicchiello, *Harmonizing the Crowdfunding Regulation in Europe: Need, Challenges, and Risks*, 32(6) J. Small Bus. Entrepreneurship 585 (2020).

investing in.[9] On the other hand, contrary to the U.S. and the UK, Turkey has lately regulated the field in 2019 and revised a final version on 27 October 2021 with the title of "Communique on Equity-Based Crowdfunding."[10] The policy implementation experience of Turkey might be beneficial to develop ECF policies for some east Balkan and Middle East countries, which share similar cultures and socio-economic conditions but haven't regulated the ECF market yet.

There were only eight licensed ECF platforms in Turkey when this paper was written. Although a few articles focus on the new Turkish ECF regulation and compare it with regulations of different countries, no paper concentrates on the practical impact of the new directive of Turkey. Hence, the effect of the regulation on the development of ECF needs to be explored to assess the impacts and to set examples for other developing countries. This paper aims to fill this gap by analyzing the theoretical aspects of ECF and its practical application in Turkey. The paper employs a case study methodology to discuss the effect of the directive on the first and the most active ECF platform of Turkey – Fonbulucu.

The findings from the case indicate that the regulation could be accepted as supportive as it fosters the ecosystem. After the release of the communique, eight players started to operate in the market, and the leading platform reached significant figures in a short time, which are positive indicators for an emergent crowdfunding ecosystem. However, the case study reveals some areas for improvement in the existing regulations, for which Fonbulucu tried to find practical solutions within the current legal framework. The first problem is that ECF investments need to be more liquid. Moreover, the insufficient post-funding monitoring mechanism places investors at entrepreneurs' mercy. Thus, policymakers should improve these deficiencies, regulating and allowing secondary markets for ECF investments and designing more effective post-funding audit mechanisms.

This paper begins with a brief literature review on ECF, explaining the concept, its stakeholders with challenges and possible solutions as responses to the newly introduced regulations. The following section discusses the revised Turkish directive to catalyze the adoption of the ECF and the objectives of the policymaker through a theoretical perspective. To explain the practical impact of the directive on the ecosystem, the paper goes on a case study of the leading ECF platform in Turkey, Fonbulucu. The paper's final section highlights the necessity for further improvements on the existing regulatory framework.

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[9] Kazem Mochkabadi & Christine K. Volkmann, *Equity Crowdfunding: A Systematic Review of the Literature*, 54(1) Small Bus. Econ. 75 (2020).

[10] Resmi Gazete: Tebliğ [The Government Gazette of the Republic of Turkey: Notification], 27 October 2021 (Jul. 20, 2023), available at https://www.resmigazete.gov.tr/eskiler/2021/10/20211027-3.htm.

1. The Concept of Equity-Based Crowdfunding and its Main Issues

Since the global financial crisis in 2008, crowdfunding has gained significant momentum.[11] The volume of equity-based crowdfunding grew from just £4 million in 2012 to £549 million in 2020 in the UK.[12] The global market volume of ECF reached £1520.4 million in 2020 with a 35% annual growth rate. Before ECF platforms, it was difficult for typical entrepreneurs to raise small investments from many people.[13] However, the advancement of the Internet has solved this problem with online payment systems and central securities depository systems. As a result, entrepreneurs can begin to reach a large group of potential investors through these platforms.[14]

The ECF mechanism generally has five actors: entrepreneurs, investors, the ECF platforms, supportive services providers, and regulatory bodies. Entrepreneurs are the first actors since their demand for capital raising starts the ECF process. The second group is the investor, who supplies the fund for entrepreneurs in exchange for shares. The third stakeholder is the platform operating as an intermediary, through which the first two groups can communicate and exchange funds and equities. In addition to these three main actors, there are other stakeholders in the ecosystem: supportive services providers and supervisory organizations. Supportive services are provided by central securities depositories and custodian & clearance houses, which keep the fund safe until the exchange of equities is transferred and record the ownership of equities. The last stakeholders of the ECF are regulatory and supervisory bodies.

According to Mochkabadi & Volkmann,[15] the literature about ECF can be classified into five main research themes in terms of their focus: capital market perspective, entrepreneurial perspective, institutional perspective, investor perspective, and platform perspective. The studies of institutional perspective examine the impact of laws, comparison of the regulations, and the legal relationship between contracting parties. Most of the research within this perspective tries to analyze the impact of published regulations on all stakeholders.

Investment decisions are associated with financial risks; hence, such activities are well-regulated in most countries. Especially ECF investments are high-risk and high-return decisions because of the uncertainty of early-stage start-up projects. ECF can be summarized as buying private company equities by many people with

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11 Alan Tomczak & Alexander Brem, *A Conceptualized Investment Model of Crowdfunding*, 15(4) Venture Cap. 335 (2013).

12 Ziegler et al. 2021.

13 Jeremy C. Short et al., *Research on Crowdfunding: Reviewing the (Very Recent) Past and Celebrating the Present*, 41(2) Entrepreneurship Theory Pract. 149 (2017).

14 Swati Gupta et al., *Prioritising Crowdfunding Benefits: A Fuzzy-AHP Approach*, 57(1) Qual. Quant. 1 (2022).

15 Mochkabadi & Volkmann 2020.

or without qualifications to invest. This simple definition reveals three significant risks: information asymmetry, reliability of investors, and adverse selection. These are all related and, more specifically, refer to the following cases:

1. The risk of information asymmetry: ECF projects/ventures do not usually have publicly available and independently verified financial information and history, contrary to public companies. Generally, only the project/business information is presented during the fundraising campaign or available through social media.

2. Risk of non-qualified investors: Crowdfunding is based on "crowds," including qualified investors and ordinary people (unaccredited investors) with/without formal expertise or training in investment. They may be unable to evaluate the risk and make well-planned decisions on such high-risk, high-return opportunities.

3. Risk of adverse selection: Information asymmetry and unreliable investors can cause the issue of adverse selection. A startup which should not be funded might get funds through ECF. Moreover, some scholars argue that crowdfunding might not be the first choice of promising start-ups because if they can raise funds from Venture Capital Funds – VCs, – they would not use ECF.[16] These raise concerns about adverse selection.

There are also solutions to these problems in the ECF ecosystem. First of all, ECF platforms evaluate all applications and select competent projects. In other words, they act as gatekeepers and decide which ventures may receive funds. This pre-investment screening and evaluation process is usually structured and systematic. ECF platforms use their broad networks throughout this process, including business analysts, lawyers, finance professionals, accountants, experts, and professional investors.[17] Accordingly, the risk of adverse selection could be mitigated by the due diligence of ECF platforms at the beginning.

ECF platforms must also disclose all the critical information and news about the startups on their website. Therefore, platforms reduce information asymmetries since they preselect suitable projects and reveal important information about them.[18] Platforms have syndicated investor structures composed of qualified and "crowd" investors to reduce the risk of ordinary investors' incompetent decisions.[19] The platforms also facilitate transparency and communication between investors and allow qualified investors to lead others.[20] Finally, there are also some restrictions

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16 Michael B. Dorff, *The Siren Call of Equity Crowdfunding*, 39(3) J. Corp. L. 493 (2014).

17 Jonas Löher, *The Interaction of Equity Crowdfunding Platforms and Ventures: An Analysis of the Preselection Process*, 19(1–2) Venture Cap. 51 (2016).

18 Susanne Braun, *Deutsche Crowdinvesting-Portale: neue Geschäftsmodelle für KMU*, Lüneburger Beiträge zur Gründungsforschung, No. 11, Leuphana Universität (2015).

19 Ajay Agrawal et al., *Are Syndicates the Killer App of Equity Crowdfunding?*, 58(2) Cal. Mgmt. Rev. 111 (2016).

20 Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. Small & Emerging Bus. L. 57 (1998).

on the total amount of investment per year for each investor and each project. This is also a precaution against the total risk taken by the crowd investors.

Competition among ECF platforms should be beneficial to develop a more efficient ecosystem with optimal disclosure requirements, increasing transparency and decreasing information asymmetries.[21] However, regulations and supervision are still crucial for the ECF ecosystem as the market alone may not protect its stability and effectiveness.[22] Regulation can be seen as the most important precaution for potential risks like asymmetric information and adverse selection problems.[23] As a result, the design of regulations to balance the support of the development of ECF is academically worth exploring.[24]

2. The ECF Regulations

Countries having developed ECF ecosystems, like the U.S. and the UK, have developed specific regulations for ECF.[25] Other countries prefer to follow their current laws regulating financial intermediation, with minor adjustments according to crowdfunding requirements.[26] In some countries, ECF is not defined at all, and the only legal way to raise funds from the crowd is allowed in a very bureaucratic way, similar to an initial public offering within a stock exchange under the capital markets law like it was the case in Turkey before 2019.

The term crowdfunding was first defined in the legislative documents with the amendment of the Capital Market Law of Turkey in 2017.[27] Through this law, The Capital Markets Board of Turkey (SPK) has been authorized to pass a secondary regulation for the framework of execution and supervisory rules, although there is no specification for the execution of the crowdfunding.[28] Based on this authorization, SPK published the Communique on Equity-Based Crowdfunding on 3 October 2019,

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21 Oliver Mäschle, *Which Information Should Entrepreneurs on German Crowdinvesting-Platforms Disclose?*, Thünen-Series of Applied Economic Theory – Working Paper, No. 127, Universität Rostock (2012).

22 Lars Hornuf & Armin Schwienbacher, *Should Securities Regulation Promote Equity Crowdfunding?*, 49(3) Small Bus. Econ. 579 (2017).

23 Emily Lee, *Equity Crowdfunding in Hong Kong: Potential, Challenges and Investor Protection*, 19(2) J. Corp. L. Stud. 277 (2019).

24 Cicchiello 2020.

25 Garry A. Gabison, *Equity Crowdfunding: All Regulated but Not Equal*, 13(3) DePaul Bus. & Com. L.J. 359 (2014).

26 Cicchiello 2020.

27 Resmi Gazete: Kanun [The Government Gazette of the Republic of Turkey: Law], 5 December 2017 (Jul. 20, 2023), available at https://www.resmigazete.gov.tr/eskiler/2017/12/20171205-12.htm.

28 Safa Yildiran & Monzer Kahf, *Kitle Fonlama Platformlarına Yönelik Türkiye ve BAE'deki Yasal Düzenlemelerin Karşılaştırılması* [*Comparison of Legal Regulations in Turkey and UAE Regarding Crowdfunding Platforms*], 7(2) İslam Ekonomisi ve Finansı Dergisi 201 (2021).

prohibiting debt-based and real estate crowdfunding in Turkey.[29] Donation-based and reward-based crowdfunding are specifically mentioned in the communique and excluded from the regulation. But still, these two "unregulated" crowdfunding types must be utilized following the existing general law and relevant regulations such as anti-money laundering regulations while accepting payments. The regulation was revised on 27 October 2021, and debt-based crowdfunding has been allowed, while crowdfunding activities for real estate are still prohibited.[30]

The ultimate aim of the regulation might be to protect unaccredited investors against a risky investment decision in a startup project. The regulatory body prepared obligatory precautions in the directive to achieve this goal. As a simplification, we suggest grouping these measures into four main pillars, as shortly explained below:

1. Against the risk of information asymmetry: Entrepreneurs must share, and ECF platforms must publish all important documents and news about projects on specific campaign web pages, which must be kept updated at least five years after the successful funding round. These documents should include the project's business plan, market research, entrepreneurs' backgrounds, financial estimations and the budget plan, and a statement of purpose to clarify how the budget will be spent. The platform must provide a digital channel through which investors can communicate with the project's founders.

2. Against the risk of adverse selection: The directive asks ECF platforms to establish an investment committee with professionals having specific qualifications. The committee must carefully evaluate all pre-selected applications with information sheets and feasibility reports. Then the committee decides whether to allow them to go through a crowdfunding round on the platform. All projects must be either technology-based or have a high-scale production potential. The committee's decision is final, and they have limited responsibility for their evaluation, coupled with entrepreneurs giving the information.

3. Against the risks associated with unqualified investors: The directive has specific investor protection mechanisms, such as limitations for investors and startups. Unqualified investors have an investment budget of up to 68,100 Turkish Lira per year to invest in ECF projects. However, they can invest up to 272,400 Lira if they prove that this amount is equal to or lower than 10% of their annual income. All startup projects can raise funds for a maximum of two times a year and up to 20,000,000 Lira per year. These upper limits are set probably to restrict the burden of

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[29] Adem Anbar, *Girişimcinin Finansmanında Alternatif Bir Yöntem: Kitlesel Fonlama* [*An Alternative Method for Entrepreneur Financing: Crowdfunding*], 88 Muhasebe ve Finansman Dergisi 237 (2020).

[30] Resmi Gazete: Yönetmelik [The Government Gazette of the Republic of Turkey: Regulation], 21 December 2021 (Jul. 20, 2023), available at https://www.resmigazete.gov.tr/eskiler/2021/12/20211229-6.htm#:~:text=MADDE%209%20%E2%80%93%20(1)%20Dijital,Kurul%20bu%20tutar%C4%B1%20art%C4%B1rmaya%20yetkilidir.

financial risks on investors. The Ministry of Treasury and Finance of Turkey updates these limits each year. Moreover, all projects must have at least 5% of their ECF round investment from qualified investors, who are accepted to be able to evaluate the projects and risks more accurately than the unqualified investors. Hence, if they invest in a project, the risk for the crowd might be acceptable, as well.

4. Against the risk of misconduct after the funding campaign: Turkish regulation rules that all funds must be kept under the settlement and custody bank throughout the fundraising campaign. Only if the targeted investment amount is achieved, and the founders issue the equities for ECF investors; the fund can be released to a bank account of the project. Otherwise, the investment amount must be paid back to investors without deduction. Insufficient capital might risk the overall plans for startups, so it can be seen as another layer of protection for investors. Besides, these startups must be audited by an independent and licensed audit company at specific times. The projects, which raise more than 1,000,000 Turkish Lira, must be audited each year about whether their spending is appropriate to their budget plans and proposal. These financial reports are published on the same campaign web page annually.

The directive could be accepted as supportive as it includes incentives to facilitate the development of the nascent ECF ecosystem in Turkey. For instance, it allows ECF platforms to outsource needed services, such as digital infrastructure and accountancy could be hired from third parties. The initial capital requirement for getting a license as an ECF platform is 1,000,000 Turkish Lira, which is significantly lower than the initial capital requirement of establishing a digital bank, which is 1,000,000,000 Turkish Lira.[31] Additionally, this capital requirement is set at 500,000 Turkish Lira for the first two years. However, the directive also has an obvious obstacle for crowd investors. The ECF process takes three to five months from investing to getting equities for investors. During this long process, the directive doesn't rule out any interest payments for the investment funds waiting for the end of the ECF process. These gainless months create an opportunity cost for investors. The cost could be enormous, especially during high-inflationary times.

According to Cicchiello et al.,[32] the regulations specifically addressing the ECF can be classified into two categories either restrictive or non-restrictive. In this context, the regulation in Turkey might be categorized as restrictive or over-proactive for the following reasons. The communique specifies that only technology and production-based projects can utilize ECF. It defines strict financial limits for the annual investment budgets, has a very conservative approach to settlements and prohibits the specific type of domains from ECF, such as real estate or service sectors.

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[31] The Government Gazette of the Republic of Turkey: Regulation, *supra* note 30.

[32] Antonella F. Cicchiello et al., *Entrepreneurial Dynamics and Investor-Oriented Approaches for Regulating the Equity-Based Crowdfunding*, 10(2) J. Entrepreneurship Pub. Pol'y 235 (2021).

3. Fonbulucu: The First Active ECF Platform in Turkey

When this article was written, six of eight licensed platforms were already active and had started operations to raise capital through ECF. These active platforms were Fonbulucu, Efonla, Startup Burada, Fongogo, Basefunder and Fonangels, whose parent companies are listed as ECF providers.[33] The leading platform, Fonbulucu is a brand of Global Kitle Fonlama Platformu A.Ş. – a joint stock company, – it started as a reward-based crowdfunding platform in 2016. SPK granted the ECF license for Fonbulucu on 8 April 2021, and since then, the platform has helped start-ups to raise funds for their projects.[34]

It launched the first equity crowdfunding campaign in the country for a biotechnology startup, PromoSEED, in May 2021 and successfully raised 250,000 Turkish Lira.[35] 17 months after this first campaign, Fonbulucu has received applications from 3,005 different startup projects demanding 1,974,418,019 Turkish Lira (approximately $106,200,038)[36] until 10 October 2022. The demand for ECF boomed, and it can be said that the platform has started an ECF trend in Turkey. Projects from a wide range of sectors – from agriculture to high-tech robotics, applied for fundraising, similar to "Let's blockchain it!" hype of recent years.[37] The platform shared insightful information about its performance on ECF. According to the platform[38] it launched 57 ECF campaigns, of which 42 were successful, six were unsuccessful, and nine were still open for investment as of 10 October 2022. These projects have raised 140,666,131 Turkish Lira – approximately $7,566,152, – and the platform has had 30,089 members as crowdfunding investors. None of the other platforms achieved to complete more than five crowdfunding campaigns until October 2022. Hence, the practical implications of the regulation should be analyzed through Fonbulucu because of its leading role in the Turkish ecosystem.

As the authorized regulator, The Capital Markets Board of Turkey (SPK) released the first version of the regulation in 2019, which allowed ECF platforms to apply for a license and begin to operate in Turkey. The SPK continuously collects feedback from the ecosystem and reviews the legal framework, and as a result, the directive was updated in

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33 Listeye Alınan Platformlar [Listed Platforms], Sermaye Piyasası Kurulu (SPK) (Jul. 20, 2023), available at https://spk.gov.tr/sirketler/kitle-fonlama-platformlari/listeye-alinan-platformlar.

34 Hakkımızda [About Us], Fonbulucu (Jul. 20, 2023), available at https://invest.fonbulucu.com/sayfa/Hakkimizda-5?b=0#:~:text=fonbulucu.com%20platformları%2C%20Anadolu'yaymak%20amacıyla%202016%20yılında%20kuruldu.

35 Kampanya Hakkında [About the Campaign], Fonbulucu (Jul. 20, 2023), available at https://invest.fonbulucu.com/kampanya/99DWG4.

36 The calculation is based on the currency exchange rates of the Central Bank of the Republic of Turkey, 1 USD = 18,5915 Turkish lira (Jul. 20, 2023), available at https://www.tcmb.gov.tr/kurlar/kurlar_tr.html.

37 Ahmet F. Aysan, *Blockchain-Based Solutions in Achieving SDGs after COVID-19*, 7(2) J. Open Innovation: Tech. Mkt. Complex. 151 (2021).

38 Fonbulucu Invest (Jul. 20, 2023), available at https://invest.fonbulucu.com/.

2021. However, Fonbulucu has developed its practical applications and "use cases" since the beginning. These actions can be classified into three groups discussed below.

3.1. Practical Responses Against Information Asymmetry

Following the regulation, Fonbulucu has formed departments and its organization chart, as illustrated below in Figure 2. The investment committee acts as the gatekeeper through which the projects can be accepted by the platform for ECF campaigns. This is the first step to mitigating information asymmetry and protecting unaccredited investors. Besides this, Fonbulucu has started its venture capital fund – ReINVeS Ventures – which also invests in some projects, and these investments are publicly announced during the campaign. VC investments and announcements can be seen as a vehicle to enhance trust or signal, unqualified investors, for investing in such projects because VCs usually invest in a startup after a detailed due diligence process. However, these VC investments of Fonbulucu might aim to make incompetent funding campaigns successful because the ECF platform does not prefer to have many incomplete or failed funding campaigns.

Figure 2: The organization chart of Fonbulucu

Adopted from the website of Fonbulucu[39].

[39] Organizasyon Şeması [Organization Chart], Fonbulucu Invest (Jul. 20, 2023), available at https://invest.fonbulucu.com/sayfa/organizasyon-semasi-21?b=0.

3.2. Solutions Against the Lack of Exit Options and Liquidity on Existing Regulation

The current legal structure does not allow a secondary market for trading equities held by crowd-funding investors. This makes such investments very illiquid. Moreover, early-stage startups usually do not pay dividends, so investors must wait to exit until either an initial public offering or an acquisition. To answer this necessity, Fonbulucu has taken two steps. The platform tries to open a communication website on which investors can communicate and agree on buying or selling equities from each other, which is not prohibited by the directive. But all transactions must be done manually by investors through the systems of the Central Securities Depository (Central Registry Agency). The second solution of Fonbulucu could be its VC fund, through which qualified investors can convert their investments into cash relatively easily.

On the other hand, policymakers can solve this problem by opening a well-regulated secondary market for ECF startups under a stock exchange, such as the Istanbul Stock Exchange, or each ECF platform can operate its secondary market. The first scenario can be more trustworthy among investors, while the latter solution can be more profitable for platform owners. Moreover, another question might be whether already-funded startups by VCs would be allowed to list their equities on such a secondary market.

3.3. The Practical Approach of Fonbulucu for More Efficient Post-Funding Auditing and Monitoring

The existing legal framework defines four precautions to audit and check equity-based crowdfunded projects. First, there are specific limitations on the domain of business activity. Due to these restrictions, startups should only focus on technology-based projects or production. Second, the fund seeker startup must present a proposal about its budgeting plans while applying to platforms. Third, ECF platforms must open a specific website for each ECF campaign and keep posting important updates about the startup related to the specific campaign for five years after the latest funding round. Lastly, the startup must be audited by an independent and licensed audit company, and these reports must be shared with crowdfunding investors through the campaign website.

In case of any misconduct, investors can attend the annual general assembly of shareholders. Still, they usually do not have voting power because they only have a small fraction of the company. The other legal option is to bring entrepreneurs to trial. However, neither crowd investors might be experts in the field nor generally have enough time and resources to go to court.

VC fund of Fonbulucu can be accepted as an alternative solution for the lack of an efficient post-funding audit and monitoring mechanism when ReINVeS Ventures of Fonbulucu invests in the startup projects and holds at least their 10% of shares, which amount gives the VC fund managers to take a seat on the board of a startup and intervene all significant decisions with a legally binding voting power.

Conclusion

The rapid development of technology, increasing Internet adoption, and the scarcity of conventional financial options catalyzed the ECF as an alternative financing instrument after the financial crisis. The revised regulation in Turkey set specific mechanisms to overcome information asymmetry, adverse selection, risks associated with unqualified investors, and post-funding misconduct. The main aims of the communique are to protect crowd investors and facilitate ECF activity in a legally trusted way. Thanks to the regulatory framework, there were eight licensed platforms in Turkey; six were active when this article was written. Additionally, the leading platform, Fonbulucu, has shown an important performance and reached more than 30,000 ECF investors. Therefore, the new regulatory framework of Turkey could be accepted as successful in building a new ecosystem in the first instance.

However, when the communique's practical implications on the nascent Turkish ecosystem are analyzed through a case study on Fonbulucu, a few significant deficiencies are explored, which Fonbulucu seeks to solve within the existing legal framework. The platform established a VC fund to prevent information asymmetry, increase the liquidity of the ECF investments for qualified investors and develop a more effective post-funding audit mechanism. Additionally, Fonbulucu tries to open a specific communication platform to facilitate equity trades between ECF investors alike a secondary market.

In light of the practical solutions of Fonbulucu against the insufficiencies of the existing regulation, we can recommend that policymakers should increase the liquidity of ECF investments through secondary markets. Another policy recommendation could be to design more effective post-funding auditing mechanisms to protect crowd investors against any misconduct made by entrepreneurs.

Researchers might further focus on three areas in this context. First, the effect of the interest-free period of the ECF process can be analysed in terms of investors' decisions. Additionally, none of the licensed platforms serves as a the-debt-based crowdfunding provider, although this was allowed in 2021. Further studies can investigate the reasons behind this refrainment. Finally, the Turkish experience could be helpful for other developing big economies, such as BRICS countries that have recently developed ECF regulations, and vice versa. Therefore, researchers might acquire essential lessons from a comparative study on ECF regulations in BRICS countries and Turkey. Such a study could be helpful for South Africa, which does not have a specific regulation on ECF, especially.

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DOES THE STRENGTH OF LABOUR REGULATION AFFECT SELF-EMPLOYMENT? EVIDENCE FROM THE BRICS COUNTRIES

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This article examines the relationship between labour regulation and self-employment in the BRICS countries by using data from the Labour Regulation Index developed at the Centre for Business Research at Cambridge University (CBR-LRI) and the ILOSTAT collected and developed by the ILO Department of Statistics from 1992 to 2013. The research is conducted in two strands. In the first strand, the study examines the relationship between labour regulation and self-employment at the overall level. The empirical results obtained suggest that a negative relationship exists in Brazil, China, and South Africa, while a positive relationship exists in Russia and South Africa. This implies that, as the relative strength of labour regulation increases in Brazil, China, and South Africa, fewer workers are likely to be engaged in self-employment. In Russia and India, however, the result implies that more workers are likely to be engaged in self-employment with relatively stronger labour regulation. In the second strand, the study provides a breakdown of labour regulation and self-employment into measures of their constituent components, including the regulation on different forms of employment, working time, dismissal of employees, employee representation, and industrial actions and employers' and vulnerable employment. The findings suggest that not all five aspects of labour regulation have a significant effect on employers' and vulnerable employment in the BRICS countries except for Russia. The most influential or the only aspect that has a significant effect on employers' employment is the regulation on different forms of employment in Brazil and South Africa (negative) and Russia (positive), and the regulation on industrial actions in India (positive) and China (negative), while the most influential or the only aspect affecting vulnerable employment is the regulation on dismissal in Brazil (negatively), the regulation on employee representation in Russia (positively), the regulation on different forms of employment in India (positively), the regulation on industrial actions in China (negatively), and the regulation on working time in South Africa (positively).

Keywords: labour regulation; self-employment; BRICS countries; CBR-LRI; ILOSTAT; empirical research.

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Introduction

Self-employment is becoming increasingly significant in the world of work. According to the International Labour Organization's (ILO) World Employment and Social Outlook 2021, an estimated 1.55 billion people, or 47 per cent were engaged in some form of self-employment by the end of 2019.[1] Self-employment is defined by the ILO Resolution concerning the International Classification of Status in Employment 1993 (ICSE-93) as

> the jobs where the remuneration is directly dependent upon the profits (or the potential for profits) derived from the goods and services produced (where own consumption is considered to be part of profits).[2]

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[1] ILO, *World Employment and Social Outlook: Trends 2020* (2020), at 18–9 (Jul. 1, 2023), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_734455.pdf.

[2] ILO Resolution concerning the International Classification of Status in Employment 1993 (ICSE-93), para. 7 (Jul. 1, 2023), available at https://www.ilo.org/global/statistics-and-databases/standards-and-guidelines/resolutions-adopted-by-international-conferences-of-labour-statisticians/WCMS_087562/lang--en/index.htm.

It is distinguished from "paid employment" on the other side, and it embraces four sub-categories: employers, own-account workers, members of producers' cooperatives, and contributing family workers.[3] Of the four sub-categories, the own-account workers and contributing family workers make up the group of "vulnerable employment," meaning that these workers have a lower likelihood of having formal work arrangements and are more likely to live in conditions of poverty.[4]

Many efforts have been made to get a better understanding of self-employment. Empirical research into self-employment has focused chiefly on its relationship with economic development. A number of scholars have observed a negative relationship between self-employment and economic development, which implies that the self-employment rate tends to decline with economic growth.[5] A few scholars, however, have found no evidence that increases in the self-employment rate have increased the real growth rate of the economy.[6] A second strand of research has attempted to explain the cross-national variations in the rate and characteristics of self-employment. In this regard, a variety of factors have been recognised, such as unemployment, female labour force participation, taxation, public policies, and cultural factors.[7] An additional third strand has attempted to analyse the relationship between employment protection legislation and self-employment, particularly in developed countries. Within this vein, several studies have reported evidence of a positive relationship existing between the strictness (or rigidity) of employment protection legislation and self-employment in OECD countries.[8] This indicates

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[3] According to the ICSE-93, "employers" are defined as "workers who working on their own account or with one or a few partners, hold the type of jobs defined as a self- employment job, and, in this capacity, on a continuous basis have engaged one or more persons to work for them as employees"; "own-account workers" are defined as "workers who working on their own account or with one or more partners, hold the type of jobs defined as a self-employment job, and have not engaged on a continuous basis any employees to work for them during the reference period"; "members of producers' cooperatives" are defined as "workers who hold a self-employment jobs in a cooperative producing goods and services"; "contributing family workers" are defined as "workers who hold a self- employment jobs in a market-oriented establishment operated by a related person living in the same household." For more information, *see* ICSE-93, paras. 9–12.

[4] ILO, *supra* note 1, at 16, 34.

[5] *E.g.*, Dieter Bögenhold & Udo Staber, *The Decline and Rise of Self-Employmen*t, 5(2) Work, Emp. & Soc'y 223 (1991); Zoltan J. Acs et al., *Why Does the Self-Employment Rate Vary Across Countries and Over Time?*, Centre for Economic Policy Research Discussion Paper No. 871 (1994); Carlo Pietrobelli et al., *An Empircal Study of the Determinants of Self-Employment in Developing Countries*, 16(6) J. Int'l Dev. 803 (2004).

[6] *E.g.*, David G. Blanchflower, *Self-Employment in OECD Countries*, 7(5) Lab. Econ. 471 (2000).

[7] *E.g.*, Simon C. Parker & Martin T. Robson, *Explaining International Variations in Entrepreneurship: Evidence from a Panel of OECD Countries*, 44 Entrepreneurship Res. Series (2003); Roberto Torrini, *Cross-Country Differences in Self-Employment Rates: The Role of Institutions*, 12(5) Lab. Econ. 661 (2005).

[8] *E.g.*, David Grubb & William Wells, *Employment Regulation and Patterns of Work in EC Countries*, OECD Economic Studies 7 (1993); OECD, *Employment Outlook* (1999) (Jul. 1, 2023), available at https://www.oecd-ilibrary.org/employment/oecd-employment-outlook-1999_empl_outlook-1999-en; Concepción Román et al., *Dependent Self-Employment as a Way to Evade Employment Protection Legislation*, 37(3) Small Bus. Econ. 363 (2011).

employers may use self-employed contractors as a means of circumventing the effects of regulation on their ability to hire and fire employees.[9] However, research professor, M. Robson questioned this result and re-examined the evidence on their relationship in OECD countries.[10] Based on empirical research, he concluded that little evidence for a positive relationship between the strictness of employment protection legislation and self-employment can be found, and in some cases, stricter employment protection legislation may even reduce the rate of self-employment.[11] A more recent study by Adams et al. tested the relationship between labour regulation and economic outcomes (including self-employment) using a dataset covering 117 countries.[12] They found that self-employment is negatively linked to the strength of regulation on different forms of employment, which implies that, as the relative strength of legislation on different forms of employment increases, self-employment becomes less attractive relative to paid employment.[13] As for the relationship between self-employment and employment protection legislation, however, they observed a positive result, indicating that more workers are likely to be engaged in self-employment with relatively stronger employment protection legislation.[14]

The interest of this article lies in the third strand, namely, the relationship between labour regulation and self-employment. As can be seen from the existing literature, the results of empirical work have been mixed or even conflicting. A possible explanation for this might be that the results depend on the model of econometric analysis and its underlying assumptions, as well as the sources of data that have been employed. In addition, much of the existing literature is confined to the developed countries; little is said about the developing countries. Although the recent study by Adams et al. provided an analysis across 117 countries, it failed to demonstrate significant differences between developed and developing countries. Considering the large differences in economic structures and labour market performances of the two groups of countries, it is neither appropriate to extend the findings based on one group to the other nor to incorporate both groups into a unified analytical framework. Moreover, the existing research fails to capture the complex, multi-dimensional nature of employment protection legislation and self-employment. When it comes to employment protection legislation, the focus tends to be limited to regulations governing the hiring and firing of employees. A full analysis of the

9 *Supra* note 8.

10 Martin T. Robson, *Does Stricter Employment Protection Legislation Promote Self-Employment?*, 21(3) Small Bus. Econ. 309 (2003).

11 *Id.*

12 Zoe Adams et al., *The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013*, 158(1) Int'l Lab. Rev. 1 (2019).

13 *Id.* at 15–6.

14 *Id.*

strength of labour regulation covering various aspects such as regulation on working time, employee representation, and industrial actions is lacking. As for the concept of self-employment, as mentioned at the very beginning of this introduction, it comprises four sub-categories: employers, own-account workers, members of producers' cooperatives, and contributing family workers. Each of these categories is further explicitly defined by the ILO. Unfortunately, to the best of our knowledge, no academic research has applied these sub-categories for empirical analysis, although a few research studies did use the concept of own-account workers or family workers to represent self-employment or distinguish non-agricultural self-employment from the more general category of self-employment.[15]

The present article attempts to fill the gaps and shed some light on the relationship between labour regulation and self-employment in developing countries. Research is conducted in two strands in five major developing countries, namely the member countries of BRICS. In the first strand, the study examines the relationship between the overall strength of labour regulation in general and the overall self-employment rate in the BRICS countries by using data from the Labour Regulation Index developed at the Centre for Business Research at Cambridge University (CBR-LRI) and the ILOSTAT dataset collected and developed by the ILO Department of Statistics.[16] In the second strand, it provides a breakdown of the incidence of labour regulation and self-employment into measures of their constituent components. Specifically, according to the CBR-LRI, the five areas of labour regulation are further divided into five sub-indices: different forms of employment; working time; dismissal; employee representation; and industrial actions. Based on the ICSE-93 and the ILOSTAT dataset, self-employment can be divided into two sub-categories: employers and vulnerable employment. The reason for the selection of the BRICS countries is because they are five large developing countries whose economies currently have a very significant impact in the world of work, representing about 42 per cent of the global population, 23 per cent of the world's production, 30 per cent of the territory, and 18 per cent of the global trade.[17] In addition, these countries tend to have the expertise as well as the political and economic capacities to determine the orientation of their own labour laws.[18]

In order to maintain consistency throughout the research, certain terminological issues need to be clarified at the outset. First, this research uses the expression "the strength of labour regulation' rather than 'the strictness of employment protection

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15 *E.g.*, Acs et al. 1994.

16 John Armour et al., *CBR Leximetric Datasets* (2016) (Jul. 1, 2023), available at https://ilostat.ilo.org/topics/employment.

17 BRICS INDIA 2021 (Jul. 1, 2023), available at https://brics2021.gov.in/.

18 Sean Cooney et al., *Building BRICS of Success?*, in Matthew W. Finkin & Guy Mundlak (eds.), Comparative Labour Law 440 (2015).

legislation." The term "strictness" is often used to indicate labour market rigidity or the degree of legal protection for workers regarding hiring and firing-related issues,[19] whereas the term "strength" tends to be broader, which implies the degree of legal protection of legal rules in general. Since the focus of this article is not merely limited to employment protection legislation, but rather on the overall labour regulation with its various constituent components, the term "strength" is employed, and it indicates a protective function of labour regulation for workers. Second, this research uses the concept of self-employment as defined by the ILO but with some adjustments. Instead of the four sub-categories of self-employment as developed by the ICSE-93, a dual classification of employers and vulnerable employment is made. This is because "employers" employment' may be fundamentally related to entrepreneurship, while "vulnerable employment" tends to be associated with informality, income insecurity, and a lack of access to social protection, leading to conditions of poverty.[20] This is consistent with the ILO's annual report, World Employment and Social Outlook: Trends, and the ILOSTAT dataset, in which a dual classification of employers and vulnerable employment that are made up of own-account workers and contributing family workers in self-employment is recognised.[21]

The remainder of this article proceeds as follows. Section 1 discusses the theory and sources of data that are relevant to this research. Section 2 firstly reviews the development of labour regulation in the BRICS countries and then provides the trends in the strength of labour regulation and its constituent components (i.e. different forms of employment; working time; dismissal; employee representation; and industrial actions). Section 3 provides the trends in the rate of self-employment and its constituent components (i.e. employers' and vulnerable employment). Section 4 examines the relationship between labour regulation (including its components) and self-employment (including its components) in the BRICS countries. Section 5 discusses the empirical results obtained from this study, followed by some concluding remarks.

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19 *E.g.*, Sangheon Lee et al., *The World Bank's "Employing Workers" Index: Findings and Critiques – A Review of Recent Evidence*, 147(4) Int'l Lab. Rev. 416 (2008).

20 *E.g.*, ILO, *supra* note 1, at 34; Brendan Burchell et al., *Self-Employment Programmes for Young People: A Review of the Context, Policies and Evidence*, ILO Working Papers, No. 198 (2015) (Jul. 1, 2023), available at https://www.ilo.org/employment/Whatwedo/Publications/working-papers/WCMS_466537/lang--en/index.htm.

21 It should be noted that one of the four sub-categories of self-employment – members of producers' cooperatives – that identified by the ICSE-93 has not (yet) been recorded by the ILO. Based on the ILOSTAT dataset and the ILO's report World Employment and Social Outlook: Trends, overall self-employment consists of three components: employers, own-account workers, and contributing family workers, and the last two make up vulnerable employment. *See* ILO, *supra* note 1, at 87.

1. Theory, Research Questions, and Sources of Data

The operation of the labour market is clearly affected to a large extent by labour regulation.[22] In general, the economic theory can offer two schools of thought in regard to the relationship between the strength of labour regulation and its economic effects: "neoclassical" and "new institutional." As pointed out by Davies, these two schools of thought "differ as to the goals they are pursuing and the assumptions they use in their analysis."[23] Neoclassical economists advocate that the self-regulating market is under perfect competition since the market in and of itself is efficient and the involved actors are rational, and any artificial interventions such as labour regulation would destroy the balance of the labour market.[24] New institutional economists, however, argue that the unregulated market often leads to failures in terms of the achievement of efficient outcomes, and labour regulation would help to overcome such failures and at the same also create a positive relationship between employers and employees.[25] Unfortunately, neither school of thought currently offers a clear answer when it comes to the economic effects of the strength of labour regulation on the rate of self-employment. The overriding message from the existing literature on the economic effects of the strength of labour regulation on the rate of self-employment, as mentioned in the introductory section of this article, is ambiguous, depending to a large extent on the model of econometric analysis and its underlying assumptions as well as the sources of data applied.

In this article, the author does not attempt to arrive at a more realistic theory, but instead intends to provide some preliminary empirical evidence for understanding the relationship between labour regulation and self-employment. Rather, this work seeks to address the following questions: (a) what are the trends in the strength of labour regulation and the rate of self-employment in the BRICS countries? (b) is there a relationship (either positive or negative) between the strength of labour regulation and the rate of self-employment in the BRICS countries? and (c) what are the similarities and differences in the empirical outcomes of the BRICS countries? The answers to these questions may help scholars and policy makers to gain a better understanding of how labour regulation affects self-employment in the BRICS countries, leading to theory building or some labour law reforms in the future.

One of the most well-known tools for examining the relationship between two variables is correlation analysis through the scatterplot.[26] If the points on a scatterplot

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22 Anne C.L. Davies, *Perspectives on Labour Law* 26 (2009).

23 *Id*.

24 *Id*. at 27–9.

25 *Id.* at 29–32.

26 Samprit Chatterjee & Ali S. Hadi, *Regression Analysis by Example* 25 (2015).

follow a somewhat straight-line pattern, a linear relationship (either positive or negative) can be identified.[27] To further quantify the strength and direction of the linear relationship between the two variables, a simple Ordinary Least Squares (OLS) regression may take place. In this study, the two primary variables are the strength of labour regulation and the rate of self-employment in the BRICS countries, and both the scatter plot and the simple OLS regression are employed to understand the relationship between these two variables.

Another challenge in examining the relationship between two variables is finding or developing the relevant data. Thus, in order to carry out this study, it was necessary to find or develop the data on the strength of labour regulation and the rate of self-employment in numerical values that are present in the BRICS countries. In terms of measuring the strength of labour regulation, a number of studies have been carried out, such as the Labour Regulation Index constructed by Botero et al., the World Bank's Employing Workers Index, the OECD's Employment Protection Index, and the ILO's Employment Protection Legislation Database.[28] However, these datasets only cover limited aspects of labour regulation. In addition, they either lack a consistent time series or fail to cover all five BRICS countries. The CBR–LRI dataset, by contrast, provides a time series of changes in labour laws across 117 countries going back to the early 1970s until 2013, including each of the five BRICS countries, and it provides data on the strength of labour regulation in numerical values. The CBR–LRI dataset contains a total of forty indicators, which are grouped into five sub-indices of labour regulation: different forms of employment (i.e. self-employment, part-time work, fixed-term employment, and temporary agency work); working time (i.e. annual leave entitlements, public holiday entitlements, overtime *premia*, weekend working, limits to overtime working, duration of the normal working week, and maximum daily working time); dismissal (i.e. both procedural and substantive constraints on dismissal, reinstatement as the standard solution for unfair dismissal, notification of dismissal, redundancy selection, and priority in re-employment); employee representation (i.e. the right to unionisation and collective bargaining, the duty to bargain, the extension of collective agreements, closed shops, and codetermination); and industrial actions (i.e. the unofficial, political, and secondary industrial action, lockouts, and the right to industrial action). Each indicator is scaled to lie between a minimum value of 0 (representing no protection or the lowest protection offered

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[27] Samprit Chatterjee & Ali S. Hadi, *Regression Analysis by Example* 25 (2015).

[28] Juan Botero et al., *The Regulation of Labour*, 119(4) Q.J. Econ. 1339 (2004); World Bank, *Labour Market Regulation Methodology* (Jul. 1, 2023), available at http://www.doingbusiness.org/Methodology/labor-market-regulation; The OECD, *Employment Protection Legislation* (Jul. 1, 2023), available at https://www.oecd-ilibrary.org/content/thematicgrouping/lfs-epl-data-en/datasets?fmt=ahah; ILO, *Employment Protection Legislation Database* (Jul. 1, 2023), available at https://www.ilo.org/dyn/eplex/termmain.home?p_lang=en.

for workers) and a maximum value of 1 (representing the maximum or highest protection offered for workers).[29]

The data on the self-employment rate tends to vary significantly across countries and time due to the differences in the way self-employment is measured. Nevertheless, the definitive source of data can be obtained from various international organisations, such as the ILO, the OECD, and the World Bank. Since the ILO has the most expertise in the world of work and covers nearly all of the countries, including the BRICS countries, this study uses the data collected and estimated by the ILO, namely, the ILOSTAT. The ILOSTAT is a leading source of labour statistics in the world of work, covering comprehensive international data on a wide range of labour-related topics for 189 countries, including the rate of self-employment in the BRICS countries since the early 1990s. It should be noted that the data on self-employment is divided into three different groups in the ILOSTAT: employers, own-account workers, and contributing family workers. As mentioned earlier in the introduction, for research purposes, own-account workers and contributing family workers are incorporated into one group, referred to as vulnerable employment. In other words, three variables concerning self-employment can be identified: the rate of overall self-employment and its two constituent components, namely, the rate of employers and the rate of vulnerable employment.

The production of data in the CBR-LRI and the ILOSTAT provides the possibility to carry out statistical analysis by means of the scatterplot and the simple OLS regression aimed at identifying the correlation between labour regulation and self-employment in the BRICS countries. The longitudinal data also offer significant advantages for researchers to track changes over time series and to conduct international comparisons. Due to the lack of data on the earlier part of the period covered by the dataset in Russia, this study focuses on the period from 1992 to 2013. For research purposes, the study also considers the relationship between the strength of labour regulation and the self-employment rate in the BRICS countries. In other words, the strength of labour regulation is considered the explanatory variable, while the rate of self-employment is the dependent variable. The two strands of our research will be examined in greater detail in the sections that follow.

2. Measuring Labour Regulation in the BRICS Countries

2.1. Labour Regulation in the BRICS Countries: An Overview

Before measuring the strength of labour regulation in the BRICS countries by using the data from the CBR-LRI, it is necessary to provide a brief overview on the labour law developments in the five countries over the selected time period. This

[29] For a more detailed explanation for each of the 40 indicators, *see* Zoe Adams et al., *CBR Labour Regulation Index: Dataset of 117 Countries* (2016).

is because such information would provide important contexts for the changes that are depicted graphically below in the data analysis and help us gain a better understanding of the empirical results.[30]

A useful place to start is with the introduction of the "labour code" in each of the BRICS countries. The term "labour code," in the most literal sense, refers to the codification of labour laws in legislative form, which can also be understood as the fundamental labour law governing labour matters in each country. Due to the complexity of the legal systems and national contexts of the BRICS countries, not all of these countries have a labour code, but even for those countries without a labour code, some primary labour legislation dealing with labour matters can still be identified. Based on the ILO's Database of National Labour, Social Security, and Related Human Rights Legislation (NATLEX) and National Labour Law Profiles and the International Encyclopaedia for Labour Law and Industrial Relations concerning the BRICS countries, the labour code or the functional equivalent of a labour code or the primary labour legislation of each country can be recognised: for example, the Consolidation of Labour Laws of 1943 in Brazil; the Labour Code of 2001 in Russia; various federal labour laws in India; the Labour Law of 1994 and the Labour Contract Law of 2007 in China; and the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997 in South Africa.[31]

In Brazil, the Consolidation of Labour Laws of 1943 is the fundamental labour law that regulates labour matters. It was enacted in 1943 by the then-President Getulio Vargas by uniting and structuring all of the existing labour laws at that time into a single codified document.[32] Since entering into force in 1943, it has undergone dozens of amendments. The law contains extensive labour provisions on labour matters such as duties of employers and rights of employees, special rules for certain groups and categories of employees, individual and collective labour contracts, industrial associations, application of administrative fines, labour courts,

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30 *Cf.* Simon Deakin et al., *Labour Law and Inclusive Development: The Economic Effects of Industrial Relations Laws in Middle-Income Countries*, in Michèle Schmiegelow & Henrik Schmiegelow (eds.), Institutional Competition Between Common Law and Civil Law 185 (2014).

31 The NATLEX is a legal database developed by the ILO's International Labour Standards Department. It contains national labour, social security, and related human rights legislation for 196 countries as well as 160 territories, provinces, or other sub-divisions, including the BRICS countries. It is available at https://www.ilo.org/dyn/natlex/natlex4.home?p_lang=en (Jul. 1, 2023); The National Labour Law Profiles are developed by the ILO's Governance and Tripartism Department. It aims to facilitate a general understanding of how labour law works in each country, and to provide the reader with easy access to information on various topics. It should be noted that, of the five BRICS countries, only Russia and South Africa are covered. The country profiles are available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/lang--en/index.htm (Jul. 1, 2023); The International Encyclopaedia for Labour Law and Industrial Relations provides information on international and national labour law and standards in the world of work. It covers various country monographs, including the BRICS countries.

32 Ronald Amorim e Souza, *Labour Law in Brazil* 29 (2004).

etc. In addition to the Consolidation of Labour Laws of 1943, the Constitution of 1988 also plays an essential role in dealing with labour matters. This Constitution provides a long list of labour rights, which not only confirm or reaffirm the provisions contained in the Consolidation of Labour Laws of 1943 but also serve to amend and supplement it.[33] Since its enactment in 1988, the Brazilian labour laws have been improved with the modernisation of previous laws, including the Consolidation of Labour Laws of 1943, and with intense state regulation regarding the nature of labour relations. Since 1992, the major developments in this Constitution include the enhancement of protections for part-time workers starting in 2001; the elimination of the warning period for dismissal under legislation enacted from 1998 to 2000 in an effort to promote greater labour market flexibility; and the introduction of an extra three days of paid leave per additional year of employment starting in 2011.[34]

In Russia, the labour regulation system can be characterised as "codified-plus": it consists of a labour code bringing together several statutory provisions concerning various labour-related issues and some other pieces of labour legislation supplementing or elaborating the provisions contained in the labour code.[35] The history of the labour code in Russia goes back to the Labour Codes of 1918, 1922, and 1971 that were enacted during the period of the Soviet Union. With the collapse of the Soviet Union in 1991, the Russian Federation emerged on the global stage as an independent country. Since 1991, the Labour Code of 1971 has been amended almost every year and supplemented by the adoption of federal labour laws, such as the Employment of Population Act of 1991, the Collective Agreements and Accords Act of 1992, the Settlement of Collective Labour Disputes Act of 1995, the Trade Union Act of 1996, the Russian Tripartite Commission for Regulation of Socio-Labour Relations Act of 1999, the Fundamentals of Health and Safety Act of 1999, the Compulsory Social Insurance Against Occupational Accidents and Diseases Act of 1998, and the Minimum Wages Act of 2000.[36] This reflected a new era of economic development and the fact that Russia had acquired sovereign statehood with an independent legislative system.[37] The Labour Code of 1971 ceased to be in force on 1 February 2002 due to the enactment and entry into effect of the current Labour Code of 2001. With the changing socio-economic conditions and the increasing complexity of the employer-employee relationship originating from globalization and technological progress, countless amendments have been added to the Labour

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33 Souza 2004, at 36–40.

34 *Cf.* Zoe Adams et al. 2016.

35 ILO, *National Labour Law Profile: Russian Federation* (January 2002) (Jul. 1, 2023), available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158917/lang--en/index.htm.

36 *Id.*

37 Zhanna A. Gorbacheva, *Labour Law in Russia* 53 (2019).

Code since its adoption in 2001.[38] In particular, substantial amendments were made in 2006, 2011, and 2013.[39] The current Labour Code of Russia contains extensive provisions on labour matters such as the fundamentals of labour legislation, labour relations, social partnership, employment contracts, working conditions, labour disciplines, female and youth labour, health and safety, different forms of work, trade unions, and labour dispute settlements.

Unlike Russia and Brazil, India has neither a labour code nor a functional equivalent of the labour code. However, it has a great number of labour laws since the federal and state legislatures have co-equal powers on the making of labour legislation, making it a very complex labour regulation system in India.[40] It should be noted that Indian labour laws are in many ways dispersed and fragmentary. They not only distinguish between workmen (i.e. those who are employed to do any manual, unskilled, skilled, technical, operational, clerical, or supervisory work for hire or reward) and non-workmen (i.e. those who mainly work in a managerial or administrative capacity), but also apply differently depending on the nature of the activity that workers are engaged in and their place of work.[41] In general, Indian labour laws can be broadly classified into four categories: conditions of work (e.g. the Factories Act of 1948, the Plantation Labour Act of 1951, the Mines Act of 1952, Contract Labour "Regulation and Abolition" Act of 1970, the Child Labour "Abolition and Regulation" Act 1985); labour relations (e.g. the Trade Unions Act of 1926, the Industrial Employment "Standing Orders" Act of 1946, and the Industrial Disputes Act of 1947); wages and monetary benefit (e.g. the Minimum Wages Act of 1948, the Payment of Wages Act of 1936, the Payment of Bonus Act of 1965, and the Equal Remuneration Act of 1976); and social security (e.g. the Workmen's Compensation Act 1923, the Employees' State Insurance Act of 1948, the Maternity Benefit Act 1961, and the Payment of Gratuity Act of 1972).[42] Since 1992, the major developments in Indian labour laws included the expansion of restrictions on industrial actions that started in 1998 and the relaxation of protections for workers who hold a fixed-term contract, which followed in 2003.[43]

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38 *See* Vladimir Lebedev, *The Development of Employment Legislation in the Post-Soviet Period*, in Vladimir Lebedev & Elena Radevic (eds.), Labour Law in Russia: Recent Developments and New Challenges (2014); Andrey Lushnikov, *The Development of Russian Labour Law in the 21st Century: A Comparative Sketch of Regularities and Trends*, in Vladimir Lebedev & Elena Radevic (eds.), Labour Law in Russia: Recent Developments and New Challenges (2014).

39 *Id.*

40 Chandra K. Johri, *Labour Law in India* 52–8 (2014).

41 *Id.*; *see also* Debi S. Saini, *Labour Law in India: Structure and Working*, in Pawan S. Budhwar & Jyotsna Bhatnagar (eds.), *The Changing Face of People Management in India* 60–94 (2008).

42 *Id.*

43 *Cf.* Zoe Adams et al., *supra* note 29.

In China, the primary labour legislations are the Labour Law of 1994 and the Labour Contract Law of 2007. The Labour Law of 1994 represented an important milestone for Chinese labour legislation. It established the basic legal rules on labour matters such as employment promotion, individual and collective labour contracts, working time, wages, occupational health and safety, special protection for female and juvenile workers, vocational training, social insurance, labour disputes resolution, and labour inspection. Based upon the Labour Law of 1994, the Labour Contract Law was enacted in 2007 and came into force in 2008. The Labour Contract Law of 2007 provides for systematic regulation of the conclusion, content, performance, and termination of labour contracts, along with matters concerning liability and dispute resolution. In addition to these two labour laws, some other regulations that serve to specify or enrich the contents of Labour Law of 1994 can also be recognised, such as the Trade Union Law of 1992, the Regulation on Working Time of Workers of 1995, the Regulation on Unemployment Insurance of 1999, the Employment Promotion Law of 2007, the Labour Dispute Mediation and Arbitration Law of 2007, and the Social Insurance Law of 2010.

In South Africa, the primary labour legislations are the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997. It should be noted that South Africa witnessed a new birth with the abolishment of the apartheid system during the period between 1991–1994. In 1994, the Department of Labour appointed a Ministerial Legal Task Team to draft new labour legislation. In this context, the Labour Relations Act was born in 1995 and came into effect in 1996, marking a new area in South African labour laws.[44] This law deals with issues such as unfair dismissal, unfair labour practices, trade unions, collective bargaining, strikes, workplace representation, fixed-term contracts, and part-time work. Another important labour law is the Basic Conditions of Employment Act of 1997, which deals with labour matters including written particulars of employment, payment of wages, working time, rest breaks and periods, annual leave, sick leave, maternity leave, other parenthood-related leave, family responsibility leave, and notice periods. Additionally, some other labour laws can also be recognised, such as the Occupational Health and Safety Act of 1993, the Compensation for Occupational Injuries and Diseases Act of 1993, the Employment Equity Act of 1998, the Skills Development Act of 1998, and the Unemployment Insurance Act of 2001.[45]

2.2. Trends in the Strength of Labour Regulation in the BRICS Countries

According to the CBR-LRI, the strength of labour regulation can be presented in numerical form in accordance with the provisions contained in the national labour

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[44] ILO, *National Labour Law Profile: South Africa* (March 2002) (Jul. 1, 2023), available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.html.

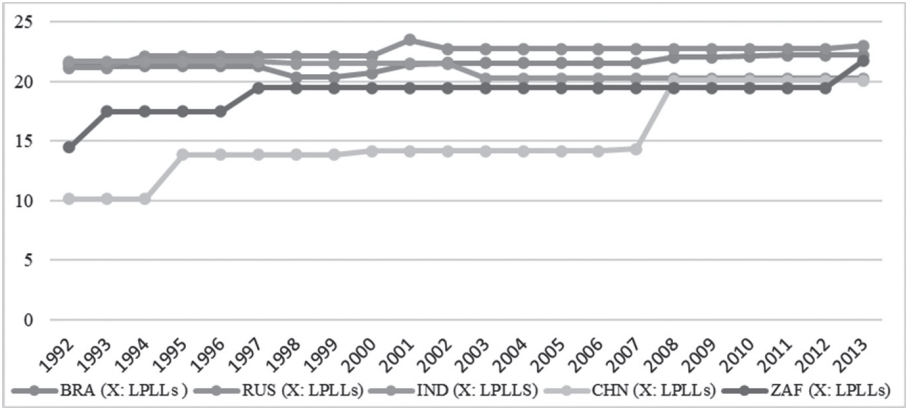
[45] *Id.*

laws. Figure 1 below shows the trends in the overall strength of labour regulation (that is, covering all of the five sub-indices) for the BRICS countries from 1992 to 2013. Scores are represented as the aggregative values of 40 indicators. As can be seen from the figure, Russia has had the strongest legal protection for workers among the five countries since 1994, reflecting the implementation of various labour provisions after the dissolution of the Soviet Union. Brazil also provided relatively strong protection for workers based on the Consolidation of Labour Laws of 1943. It is worth noting that both Russia and Brazil witnessed some fluctuations in the strength of labour regulation, but their overall trends saw a rise. China had the weakest legal protection for workers, running through almost the entire selected period, but in the meantime, it also witnessed the most significant changes in strengthening its labour laws. However, it has come close to the other four countries since 2008 due to the implementation of the Labour Contract Law of 2007. Like China, South Africa also experienced a significant increase in the strength of labour regulation, which reflected the implementation of various labour laws such as the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997. What is striking in Figure 1 is the decrease in the strength of labour regulation in India, which indicates that Indian labour laws became gradually less protective for workers over the selected period. This reflected a relaxation of the protection of labour laws for workers in India. Nevertheless, Indian labour laws remained at a high level of protection for workers due to the country's great number of labour laws, particularly from 1992 to 1994, when it had the strongest protection among the five countries.

Figures 2–6 break down the overall strength of labour regulation by sub-indices for the BRICS countries from 1992 to 2013. Scores are represented as averages to illustrate and compare general trends over time. In Figure 2, the trends in labour regulation on different forms of employment are presented. In general, Brazil and Russia had stronger legal protection for workers than India, China, and South Africa. Although Brazil witnessed some fluctuations, it remained at its topmost level during the whole period. China and South Africa experienced significant changes in the strengthening of each of these countries' respective labour laws in 2008 and 2013, respectively, making them notable increases in the trends. Russia also saw a rise in the legal protection of different forms of employment. India was the only country that showed a different trend, which means the regulation on different forms of employment became less protective for workers during the selected period. Figure 3 presents the changes in the regulation of working time. China showed the most significant changes among the five countries. It had the weakest legal protection before 1995. It then increased gradually, and after 2007, it reached the highest point among the five countries. Different from China, Russia and South Africa experienced a significant change in weakening working time regulation in 2002 and 1997, respectively, making them less protective for workers. Brazil witnessed a short-period fluctuation from 1997 to 2002, while India remained at the same

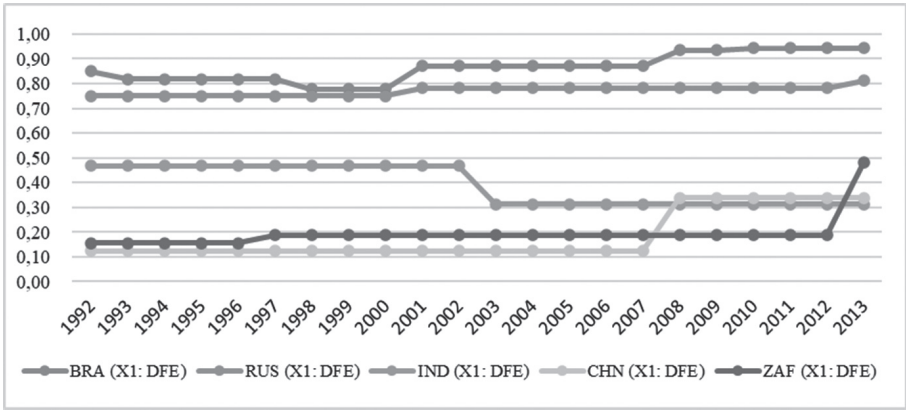
level without any changes for twenty-two years. Figure 4 illustrates the trends in the strength of dismissal regulation. The five countries tended to vary significantly from one another. India had the highest point of protection against dismissal before the year 2008 and remained at the same level without any changes over the whole period. China showed a rapid increase in 2008, reaching the highest level of protection among the five countries. Russia and South Africa also saw a rise in dismissal regulation. Brazil had the weakest dismissal protection and witnessed a flat trend apart from a short-period fluctuation from 1997 to 2000. Figure 5 illustrates the trends in the strength of employee representation regulation. In general, South Africa and Brazil had stronger legal protection for workers than India and China. Brazil, India, and China remained at the same level without any changes during this period. Only South Africa and Russia witnessed some changes. Specifically, South Africa experienced a significant increase in 1993, and later in 1997, it saw a slight decrease. Russia reached its highest point in 2001 but only lasted for one year. Figure 6 illustrates the trends in the strength of industrial actions regulation. In general, the disparity among the five countries became smaller over time. While Russia, China, and South Africa witnessed an increase in the legal protection for industrial actions, India showed a decreasing trend. It is interesting to note that none of the five countries have seen any changes since 2000. This is especially noticeable in Brazil, where a flat trend is observed running throughout the entire period.

Figure 1: **Trends in the overall strength of labour regulation in the BRICS countries, 1992–2013**



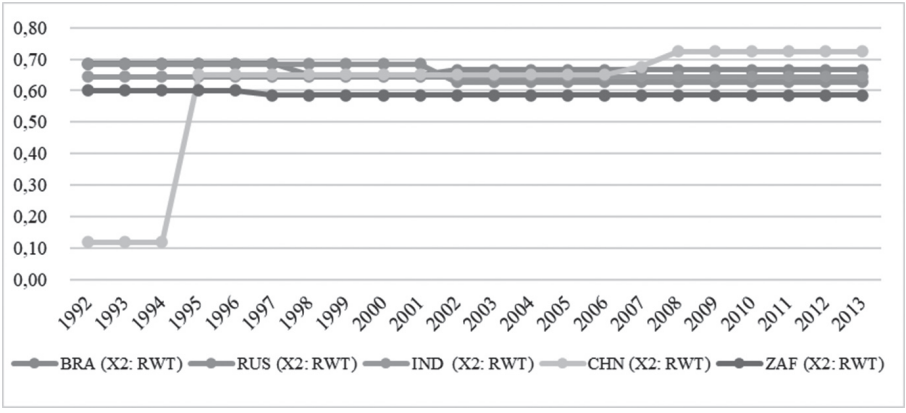
Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: CBR-LRI (2016), and own calculations.

Figure 2: **Trends in the strength of regulation on different forms of employment in the BRICS countries, 1992–2013**



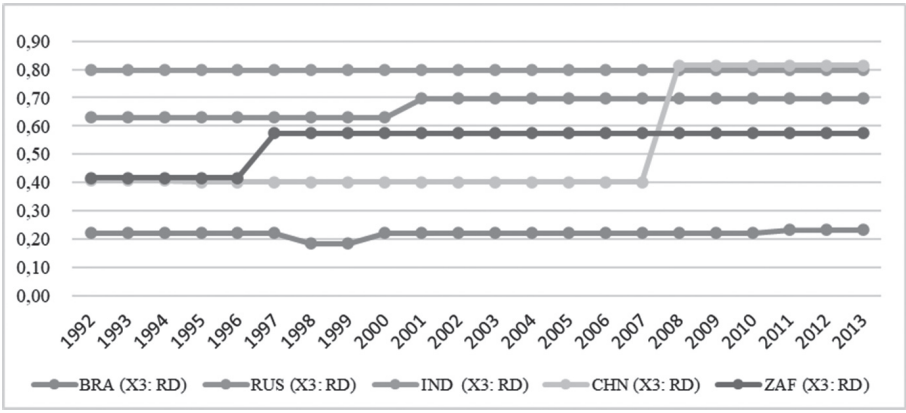
Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: CBR-LRI (2016), and own calculations.

Figure 3: **Trends in the strength of working time regulation in the BRICS countries, 1992–2013**



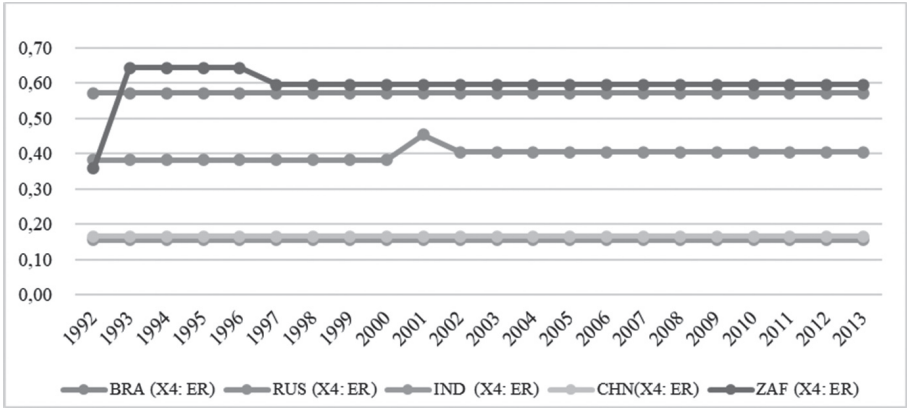
Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: CBR-LRI (2016), and own calculations.

Figure 4: **Trends in the strength of dismissal regulation in the BRICS countries, 1992–2013**



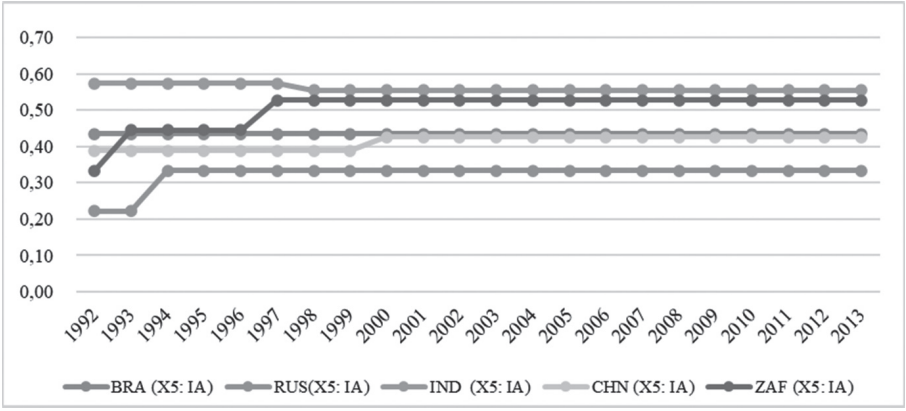
Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: CBR-LRI (2016), and own calculations.

Figure 5: **Trends in the strength of employee representation regulation in the BRICS countries, 1992–2013**



Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: CBR-LRI (2016), and own calculations.

Figure 6: **Trends in the strength of industrial actions regulation in the BRICS countries, 1992–2013**



Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: CBR-LRI (2016), and own calculations.

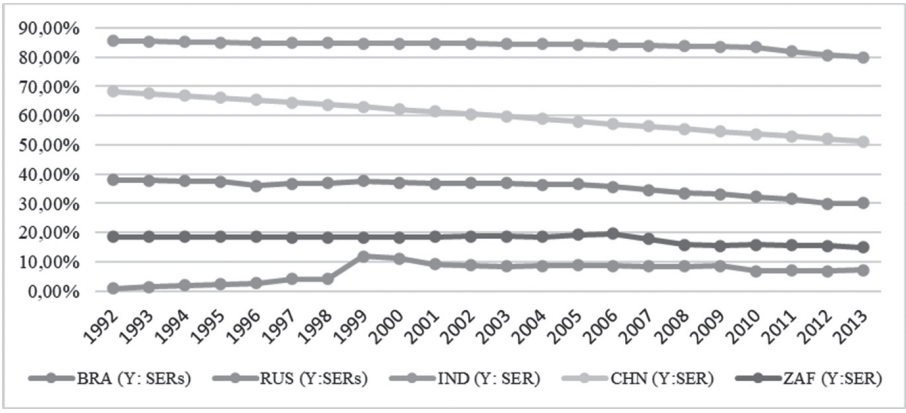
3. Measuring Self-Employment in the BRICS Countries

The ILOSTAT allows for the presentation of the trends in self-employment rates in the BRICS countries. Figure 7 illustrates the trends in the overall self-employment rates in the BRICS countries over the course of twenty-two years (1992–2013). As can be seen from this figure, India had the highest self-employment rate. Approximately 85 per cent of India's employment was self-employed. China's self-employment rate decreased from 68.29 per cent in 1992 to 51.17 per cent in 2013, representing the most significant change among the five countries analysed. In Brazil, the self-employment rate declined gradually between 1992 and 2013, falling by approximately 7.82 per cent to reach 30.13 per cent at the end of this period. Russia had the lowest self-employment rate among the five countries analysed. The self-employment rate was almost nil (0.86 per cent) in 1992 and only began to slowly increase during the subsequent seven years (1992–1999). Additionally, the rate rarely exceeded 10 per cent, with the exception of the years 1999 and 2000.

Figures 8–9 present a breakdown of self-employment by its two constituent components for the BRICS countries. Figure 8 provides the trends in employers' employment in the BRICS countries from 1992 to 2013. South Africa had the highest employers' employment rate, which reached its highest point (8.39 per cent) in 2006, and then declined significantly until 2013. Brazil showed a few fluctuations during

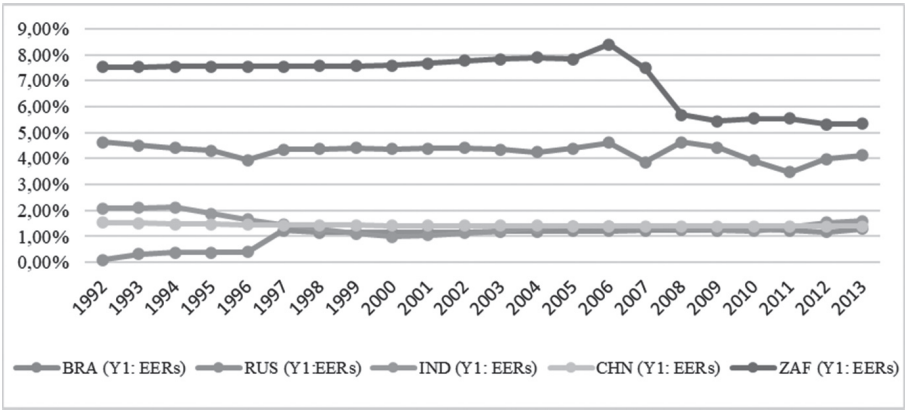
this period, ranging from 4 per cent to 5 per cent. What stand out most from the figure are the trends in Russia, India, and China; they tended to vary from 1992 to 1997. However, since 1997, the three countries have produced similar outcomes regarding the rates of employers' employment, at around 1.4 per cent. Figure 9 shows the trends in vulnerable employment in the BRICS countries from 1992 to 2013. As can be seen from this figure, the trend in vulnerable employment in the BRICS countries was consistent with the trend in overall self-employment, as indicated in Figure 7. In addition, it can be found that, in each of the five BRICS countries, the major proportion of self-employment is vulnerable employment.

Figure 7: **Trends in the overall self-employment rates in the BRICS countries, 1992–2013**



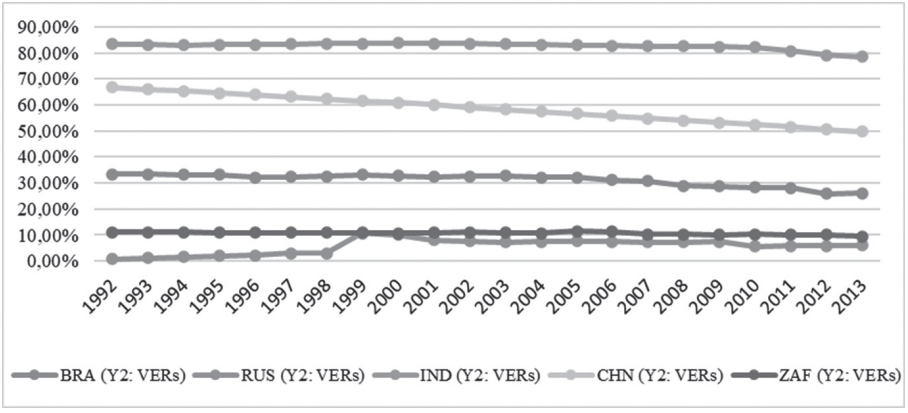
Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: ILOSTAT, ILO modelled estimates (2019).

Figure 8: **Trends in the rates of employers' employment in the BRICS countries, 1992–2013**



Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: ILOSTAT, ILO modelled estimates (2019).

Figure 9: **Trends in the rates of vulnerable employment in the BRICS countries, 1992–2013**



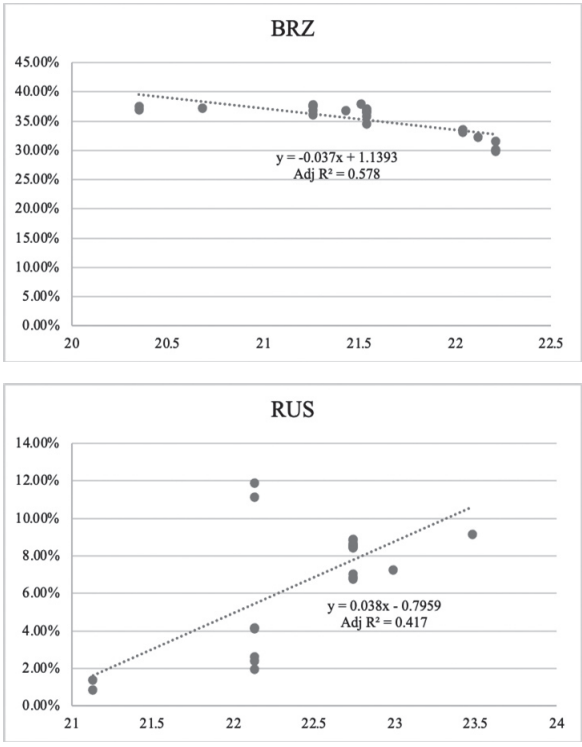
Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa.
Source: ILOSTAT, ILO modelled estimates (2019).

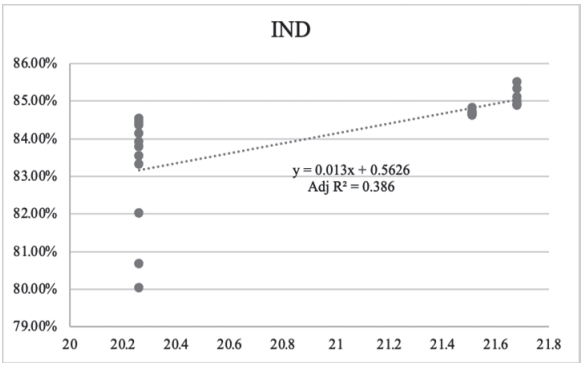
4. Labour Regulation and Self-Employment: Empirical Results

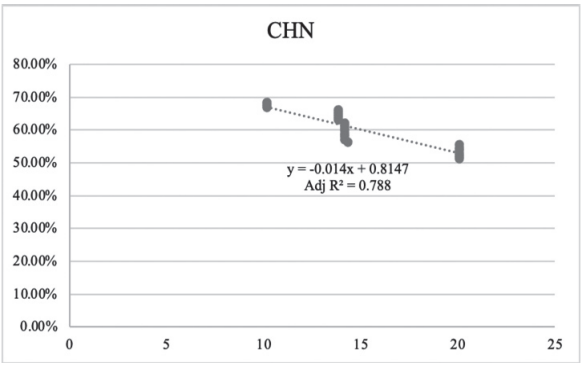
4.1. The Relationship Between Labour Regulation and Self-Employment

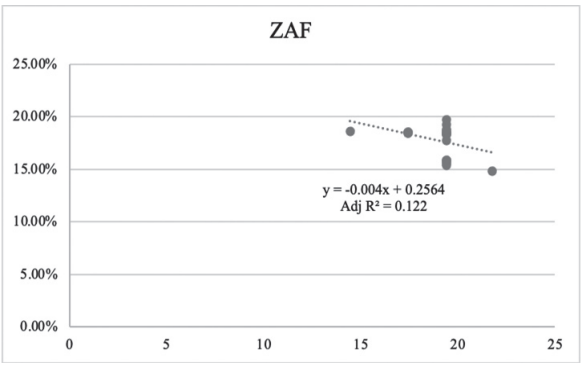
In this section, the empirical results regarding the relationship between labour regulation and self-employment in the BRICS countries are provided by using the data as described in sections 3 and 4. Figure 10 plots the values of the overall strength of labour regulation against the corresponding values of the overall self-employment rate in the BRICS countries from 1992 to 2013. The graph below illustrates a significant correlation between these two variables, indicating that changes in the strength of labour regulation tend to affect overall self-employment rates. While a negative relationship is observed in Brazil, China, and South Africa, a positive one exists in Russia and India. Specifically, it is expected that an increase in the strength of labour regulation in Brazil, China, and South Africa decreases the self-employment rate by 0.037 per cent, 0.014 per cent, and 0.004 per cent, respectively. In Russia and India, however, it is expected that an increase in the strength of labour regulation will increase the self-employment rate by 0.038 per cent and 0.013 per cent, respectively.

Figure 10: **The relationship between the overall strength of labour regulation and the overall self-employment rates in the BRICS countries, 1992–2013**









Note: BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa; X: the overall strength of labour regulation; Y: the overall employment rate.

Source: CBR-LRI (2016), ILOSTAT, ILO modelled estimates (2019), and own calculations.

4.2. The Relationship Between Individual Components of Labour Regulation and Self-Employment

In the second strand of the empirical analysis, a breakdown of labour regulation and self-employment into measures of their constituent components is conducted. While labour regulation is divided into five variables, including different forms of employment, working time, dismissal, employee representation, and industrial actions, self-employment is categorised into two variables, consisting of employers' and vulnerable employment. The research examines the effects of the strength of regulation relating to different forms of employment, working time, dismissal, employee representation, and industrial actions on the rates of employers' and vulnerable employment. The empirical results are reported in Table 1 below.

In Brazil, not all five variables of labour regulation have been shown to have significant effects on the rates of employers' and vulnerable employment. In fact, only the regulation on different forms of employment is negatively associated with the employers' employment rate, while the other four variables of labour regulation provide no evidence of a linear relationship ($p>0.1$ or no p-value). It is estimated that an increase in the strength of regulation on different forms of employment decreases the employers' employment rate by 0.019 per cent. With respect to the relationship to vulnerable employment, the regulation on different forms of employment remains significant and a negative relationship can be observed. In addition, the strength of dismissal regulation is also estimated to have a significant negative effect on the rate of vulnerable employment. Compared to the regulation on different forms of employment, its effect on vulnerable employment tends to be greater (-0.894 per cent).

Unlike Brazil, in Russia, all five variables of labour regulation have significant effects on the rates of employers' and vulnerable employment. While it is observed that the strength of regulation on different forms of employment, dismissal, employee representation, and industrial actions is positively associated with the rates of employers' and vulnerable employment, the regulation on working time tends to have a negative effect. The most influential variables for employers' and vulnerable employment are the regulation on different forms of employment and employee representation, respectively. It appears that an increase in the strength of regulation on different forms of employment increases the employers' employment rate by 0.137 per cent, while an increase in the strength of employee representation decreases the vulnerable employment rate by 0.833 per cent.

In India, like in Brazil, not all five variables of labour regulation have significant effects. The only significant relationships are those that exist between the strength of regulation on industrial actions and the rate of employers' employment and between the strength of regulation on different forms of employment and the rate of vulnerable employment, in both of which a positive relationship can be observed. In other words, with an increase in the strength of regulation on industrial actions and different forms of employment, the rates of employers' and vulnerable employment are expected to grow by 0.323 per cent and 0.102 per cent, respectively.

In China, except for the variable of the regulation on employee representation, all the other four variables provide significant results. It is estimated that fewer workers are likely to be engaged in both employers' and vulnerable employment as a result of relatively stronger regulation on different forms of employment, working time, dismissal, and industrial actions. The regulation on industrial actions serves as the most influential variable for both the employers' and vulnerable employment. It is also expected that an increase in the strength of regulation on industrial actions decreases the rate of employers' employment by 0.019 per cent and the rate of vulnerable employment by 2.425 per cent, respectively.

In South Africa, like in Brazil, only the strength of regulation on different forms of employment is negatively associated with the rate of employers' employment. It is observed that an increase in the strength of regulation on different forms of employment decreases the rate of employers' employment by 0.065 per cent. As for the relationship to vulnerable employment, like in China, except for the variable of the regulation on employee representation, all the other four variables provide significant results. While it is observed that the strength of regulation on different forms of employment, dismissal, and industrial actions is negatively associated with the rates of vulnerable employment, the regulation on working time tends to have a positive effect. The most influential variable for vulnerable employment is the regulation on working time, and it is estimated that an increase in the strength of regulation on working time increases the rate of vulnerable employment by 0.292 per cent.

Table 1: **Relationship of the strength of labour regulation (with its constituent components) to the self-employment rate (with its constituent components) in the BRICS countries, 1992–2013**

		BRA	*RUS*	*IND*	*CHN*	*ZAF*
Employers' employment	*Different forms of employment*	-0.019* (0.078)	0.137*** (0.001)	0.012 (0.219)	-0.002** (0.016)	-0.065* (0.055)
	Adjusted R^2	0.104	0.385	0.028	0.222	0.131
	Working time	0.011 (0.829)	-0.083*** (0.002)	0 (no p-value)	-0.002*** (0.000)	0.417 (0.263)
	Adjusted R^2	-0.047	0.362	-0.048	0.762	0.015
	Dismissal	-0.071 (0.184)	0.078*** (0.001)	0 (no p-value)	-0.001** (0.017)	-0.038 (0.263)
	Adjusted R^2	0.041	0.427	-0.048	0.214	0.015
	Employee representation	0 (no p-value)	0.119** (0.014)	0 (no p-value)	0 (no p-value)	-0.003 (0.946)
	Adjusted R^2	-0.048	0.232	-0.048	-0.048	-0.050
	Industrial actions	0 (no p-value)	0.079*** (0.001)	0.323*** (0.000)	-0.019*** (0.000)	-0.046 (0.317)
	Adjusted R^2	-0.048	0.416	0.653	0.646	0.002

Vulnerable employment	*Different forms of employment*	-0.356*** (0.000)	0.766** (0.024)	0.102*** (0.005)	-0.430*** (0.000)	-0.043*** (0.003)
	Adjusted R^2	0.712	0.193	0.297	0.598	0.337
	Working time	0.340 (0.430)	-0.460** (0.030)	0 (no p-value)	-0.181*** (0.001)	0.292* (0.073)
	Adjusted R^2	-0.017	0.175	-0.048	0.433	0.109
	Dismissal	-0.894** (0.040)	0.470*** (0.009)	0 (no p-value)	-0.220*** (0.000)	-0.027* (0.073)
	Adjusted R^2	0.154	0.262	-0.048	0.591	0.109
	Employee representation	0 (no p-value)	0.833** (0.022)	0 (no p-value)	0 (no p-value)	-0.006 (0.733)
	Adjusted R^2	-0.048	0.196	-0.048	-0.048	-0.044
	Industrial actions	0 (no p-value)	0.468** (0.011)	0.463 (0.204)	-2.425*** (0.000)	-0.034* (0.089)
	Adjusted R^2	-0.048	0.244	0.033	0.666	0.095

Notes: a) BRA: Brazil; RUS: Russia; IND: India; CHN: China; ZAF: South Africa. b) Regression coefficients are reported; p-values in parentheses; ***Significant at 0.01 level; **significant at 0.05 level; *significant at 0.1 level.

Source: CBR-LRI (2016), ILOSTAT, ILO modelled estimates (2019), and own calculations.

5. Discussion

On the basis of the above empirical results, it is evident that there is a significant relationship between labour regulation and self-employment in the BRICS countries, but the direction and degree of the relationship tend to be different. It should be noted at the outset that the empirical results primarily show the strength of the association between labour regulation and self-employment, and they can at most indicate the direction (positive or negative) of the potential effects of labour regulation on self-employment. They do not, in and of themselves, imply the causal effects of the strength of labour regulation to induce more or less self-employment.

In general, the results suggest that a negative relationship exists in Brazil, China, and South Africa. This could imply that, as the relative strength of labour regulation increases, fewer workers are likely to be engaged in self-employment, which means self-employment becomes less attractive relative to paid employment in these three countries. In addition, the estimated coefficient for Brazil is larger than the estimated coefficients for China and South Africa. This indicates that changes in the strength of labour regulation tend to have a larger effect on self-employment in Brazil than similar changes in China and South Africa. In other words, as the strength of labour regulation increases by the same degree in these three countries, Brazil would have a greater decrease in the rate of self-employment. In Russia and India, however,

a positive relationship can be observed. This could imply that more workers are likely to be engaged in self-employment with relatively stronger labour regulation, that is, self-employment becomes more attractive relative to paid employment. Moreover, it is found that the effect of the relationship in Russia is larger than that in India, meaning Russia would have a greater increase in the rate of self-employment than India with the relatively stronger labour regulation to the same degree.

Considering the complexity of labour regulation and self-employment, this article has also attempted to conduct a correlation analysis of their constituent components. The results suggest that not all five sub-indices of labour regulation have a significant effect on employers' and vulnerable employment in the BRICS countries, except for Russia. Specifically, in terms of the relationship to the employers' employment, only one aspect provides a significant result in Brazil (i.e. different forms of employment), India (i.e. industrial actions), and South Africa (i.e. different forms of employment), while four aspects in China (except for employee representation) and all five aspects in Russia provide significant effects. As for the relationship to vulnerable employment, similar results can be found in Russia and China, that is, four aspects (except for employee representation) and all five aspects result in significant outcomes, respectively. In Brazil and South Africa, however, in addition to the regulation on different forms of employment, some other aspects also have a significant effect on vulnerable employment, namely, the regulation on dismissal in Brazil and the regulation on working time, dismissal, and industrial actions in South Africa. In India, there remains one aspect that has a significant effect on vulnerable employment, but it has recently shifted from the regulation on industrial actions to the regulation on different forms of employment. A possible explanation for these results is that several aspects of labour regulation remained at the same level without any changes during the selected period, which means no additional information could be offered. For example, aspects such as the regulation on working time and dismissal in India, the regulation on employee representation in Brazil, China, and India, and the regulation on industrial actions in Brazil.

There is also some evidence to suggest that certain aspects of labour regulation provide an opposite outcome to the direction of the relationship between labour regulation and self-employment at the overall level. In the case of Russia, despite the fact that all five aspects have a significant effect on both employers' and vulnerable employment, one of them provides an opposite outcome to the direction of the relationship at the overall level, namely, the regulation on working time. This indicates that fewer workers are likely to be engaged in both employers' and vulnerable employment with relatively stronger regulation on working time. In the case of South Africa, in contrast to a negative relationship at the overall level, the effect of regulation on working time is positively associated with vulnerable employment, meaning more workers are likely to be engaged in vulnerable employment with relatively stronger regulation on working time. The inconsistent outcomes can be

explained by the multi-dimensional nature of labour regulation. In other words, different aspects of labour regulation in each country may have different effects on the protection of workers as well as economic outcomes. In this respect, further research is needed to focus on the effect of certain specific aspects of labour regulation on self-employment.

Moreover, it should be noted that the majority of the estimated coefficients for vulnerable employment are larger than those for employers' employment. This could imply that changes in different aspects of labour laws tend to have a greater effect on vulnerable employment than on employers' employment in the BRICS countries, with South Africa serving as an exception in terms of the regulation on different forms of employment and India serving as another exception, in which the only one but different aspect of labour regulation has a significant effect on employers' and vulnerable employment. Two points should be mentioned here. Firstly, it is observed that the major proportion of overall self-employment in the BRICS countries is vulnerable employment, rather than employers' employment. Secondly, the most influential aspect of labour regulation for self-employment varies according to countries as well as the categories of self-employment. A tailored approach regarding the country case study is needed. This is a matter for future research.

Additionally, several limitations need to be noted regarding the present study. The first limitation is that the data on the strength of labour regulation is based on the legal texts of each country. The data provided here only indicates a picture of the 'law in books', and it is not clear how labour laws operate in practice in the BRICS countries. This may hinder the actual regulatory impacts on self-employment in these countries. Secondly, the scope of this study was limited to the period from 1992 to 2013. In the absence of comparative data from before 1992 and after 2013, it is unfortunate that the study is not able to capture the earlier developments as well as the more recent changes regarding the relationship between labour regulation and self-employment in the BRICS countries. Thirdly, although the study has divided labour regulation into five specific aspects, these five aspects remain very broad. A further breakdown of each aspect is needed to determine how each legal rule may impact self-employment.

Conclusion

Several empirical studies have been done regarding the relationship between labour regulation and self-employment in developed countries. The results obtained from these studies tend to be mixed or even conflicting according to the model of econometric analysis and the underlying assumptions as well as the data employed. This article has attempted to extend the scope of the research to developing countries by undertaking an investigation of the relationship between the strength

of labour regulation and the rate of self-employment in the BRICS countries. Using data from the CBR-LRI from 1992 to 2013, our study found that labour regulation in general has been gradually strengthened over time in the BRICS countries, except for India, where labour regulation became less protective for workers. In addition, it is observed that several specific aspects of labour regulation have remained at the same level without any changes over time, such as the regulation on working time and dismissal in India, the regulation on employee representation in Brazil, China, and India, and the regulation on industrial actions in Brazil. Using data from the ILOSTAT, the study has found that the major proportion of self-employment in the BRICS countries is vulnerable employment, and there has been, in general, a decrease in the rate of self-employment in the BRICS countries over time, except for Russia, where an increasing trend was observed.

According to the statistical analysis that was carried out using the data from the CBR-LRI and ILOSTAT, this study found evidence for a significant relationship between the overall strength of labour regulation and the overall self-employment rate in the BRICS countries. While a negative relationship is observed in Brazil, China, and South Africa, a positive one is found in Russia and South Africa. This indicates that, as the relative strength of labour regulation increases, fewer workers are likely to be engaged in self-employment in Brazil, China, and South Africa, while more workers are likely to be self-employed in Russia and South Africa. Subsequently, this study has examined the relationship between individual components of labour regulation and self-employment, that is, the relationship between the regulation on different forms of employment, working time, dismissal, employee representation, and industrial actions and employers' and vulnerable employment. The findings suggest that not all five aspects of labour regulation have a significant effect on employers' and vulnerable employment in the BRICS countries, except for Russia, where all five aspects provide significant outcomes. In terms of the relationship to the employers' employment, the most influential or even the only aspect of labour regulation that has a significant effect is the regulation on different forms of employment in Brazil and South Africa (negative), and Russia (positive), and the regulation on industrial actions in India (positive) and China (negative). As for the relationship to vulnerable employment, the most influential or the only aspect affecting it is the regulation on dismissal in Brazil (negatively), the regulation on employee representation in Russia (positively), the regulation on different forms of employment in India (positively), the regulation on industrial actions in China (negatively), and the regulation on working time in South Africa (positive).

It should further be noted that this article provides some empirical evidence for understanding the relationship between labour regulation and self-employment in the BRICS countries. The results are only statistically presented. They should be considered a preliminary analysis, and much more work remains to be done in order to gain a better understanding of the relationship between labour regulation and

self-employment in each of the five BRICS countries, to extend the analysis to cover each legal rule of the five aspects of labour regulation, and to take into account the institutional and economic context of each country.

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BILATERAL RELATIONS BETWEEN THE RUSSIAN FEDERATION AND THE PEOPLE'S REPUBLIC OF CHINA: THEIR LEGAL EVOLUTION FROM THE SECOND WORLD WAR TO THE SPECIAL MILITARY OPERATION

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The relationship between the Russian Federation and the People's Republic of China goes back more than seventy years and has undergone considerable changes over the decades. This article attempts to shed light on the evolution of the two countries' bilateral relations over the decades, analyze the background and future of certain phenomena in those relations, such as the economic connections that exist in the Sino-Russian relations, and examine the strengthening of Moscow's and Beijing's ties in light of the Special Military Operation. Special attention is paid to the analysis of the treaties and agreements concluded between the two countries, with a particular focus on the documents of the post-Soviet period, while making extensive references to Russian judicial practice in the implementation of these treaties and agreements. By doing so, the article hopes to contribute to the understanding of two of the world's most important countries' relationship which has steadily been gaining importance on the international stage and is poised to bear strong influence on global politics in the 21st century.

Keywords: Russia; China; USSR; PRC; economy; trade; Special Military Operation; alliance; cooperation; Sino-Russian relations.

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Introduction

At their meeting on 22 January 1950, in Moscow, Joseph Stalin turned to Mao Zhedong and said, "Let us discuss the credit agreement. We need to officially formalize that which has already been agreed to earlier."[1] A few weeks later, on 14 February the Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance was signed, and the Soviet Union agreed to loan $300 million ($3.8 billion USD in 2023) to the nascent, war-torn People's Republic of China in $60 million installments over the next five years.[2] Nearly six decades later, in February 2009, Russian state-owned oil and pipeline companies Rosneft and Transneft signed a deal with the China Development Bank to supply oil to the PRC for the next 20 years in exchange for $25 billion ($34.6 billion USD in 2023).

In a little more than 70 years, the world has changed immensely: while the Russian Federation was struggling to find its footing and regain its confidence in a drastically changed world following the dissolution of the Union of Soviet Socialist Republics (USSR) up until the 2000s, the world witnessed China's meteoric rise. In 2011, the People's Republic of China (PRC) overtook Japan as the world's second largest economy and it has since, undoubtedly, emerged as a new superpower in the making, not only bolstering a massive economy but also rapidly developing its military capabilities, both of which are quintessential in the formation of international prestige.[3] Given the importance that China now holds globally and the strong ties the country maintains with Russia, it is of interest to explore how the relationship between two of the world's largest countries has developed over the past few decades and where it stands as of 2023. In what follows, a detailed list will be given

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1 Record of Talks between I.V. Stalin and Chairman of the Central People's Government of the People's Republic of China Mao Zedong, 22 January 1950, Wilson Center Digital Archive; Alexander V. Pantsov & Steven I. Levine, *Mao: The Real Story* (2012).

2 *See, e.g.*, the economic development of China after the Second World War: Cheng Chu-yuan, *The Economy of Communist China, 1949–1969* (1971); Gregory C. Chow & Kui-Wai Li, *China's Economic Growth: 1952–2010*, 5(1) Econ. Dev. Cult. Change 247 (2002).

3 Robert Gilpin, *War and Change in World Politics* (1981).

regarding the various areas of cooperation and agreements signed between the two countries, followed by an attempt to shed light on some of the less obvious aspects of their relationship.

1. Bilateral Cooperation and Agreements Between Russia and China

The Sino-Russian relations only began to blossom again after 1991.[4] It can be considered symbolic that in the year of the USSR's dissolution, an agreement was signed between the two governments about state credit for supplying goods from the PRC to the USSR. This time the loan was provided by Beijing, and it amounted to 1 billion Swiss francs at 4% per annum for the supply of goods. In 1991, as a result of the above-mentioned credit, the following list of goods were supplied from the PRC to the USSR: corn, fresh-frozen meat, canned meat, peanuts, tea, raw silk, tobacco, cigarettes, fabrics, sewing, knitwear, down, fur and leather products, and winter leather shoes.

In the same year, the USSR and the PRC took an important step towards resolving their long-standing border issues and territorial disagreements stemming from the Treaties of Aigun and Beijing signed in 1858 and 1860 respectively, in which Russia gained over one million square kilometers of territory. Following the 1991 agreement, further agreements were signed in 1994 and 2004, granting China control over a number of islands. Moscow designated the Verkhnekonstantinovsky Island and the adjacent water area on the Amur River (Heilongjiang) as a joint economic use area and allowed the border population of China to engage in economic activities (such as fishing) in the area. On the other hand, China has designated four regions of the Menkeilizhouzhu group of islands and the waters of the Argun (Ergunakhe) River adjacent to them, along with Island No. 1 of the Longzhangdao Islands group and the adjacent waters of the Amur River as a joint economic area (Heilongjiang) under the sovereignty of the PRC, and allowed the border population of the Russian Federation to engage in economic activities in the above areas.

Following the dissolution of the USSR in 1992, the Russian Federation and the People's Republic of China declared that they were pursuing a "good-neighborly and mutually beneficial" and "constructive partnership" which evolved into a treaty of "strategic partnership" as well as "friendship and cooperation."[5] Shortly after this treaty was enacted, on 16 January 1992, in order to develop economic ties between the two countries and to ensure the transportation of foreign trade goods between

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[4] Lorenz M. Lüthi, *The Sino-Soviet Split: Cold War in the Communist World* i–vi (2008).

[5] Joseph S. Nye, Jr., *A New Sino-Russian Alliance?*, Project Syndicate (2015) (May 15, 2023), available at https://www.project-syndicate.org/commentary/russia-china-alliance-by-joseph-s--nye-2015-01?barrier=accesspaylog.

Russia and China by river transport on the Amur and Songhua Rivers, the Ministry of Communications of the People's Republic of China opened the Chinese ports of Heihe, Qike, Tongjiang, Fujing, and Jiamusi to Russian ships, while the Ministry of Transport of the newly formed Russian Federation opened up the ports of Harbin, Blagoveshchensk, Poyarkovo, Nizhneleninskoye, Khabarovsk, Komsomolsk, and Mago for the entry of Chinese ships. On 5 March 1992, an Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on trade and economic relations was concluded in Beijing. The Parties declared the goals of strengthening friendship, cooperation, and the development of trade and economic relations between the two countries on the basis of equality and mutual benefit. In particular, Moscow and Beijing agreed to grant each other the "most favored nation" treatment in matters relating to customs duties and various other taxes and fees imposed on the import and export of goods and related services, as well as in relation to the rules of customs administration and customs formalities. It should be noted that Russian courts invariably take these agreements into account when resolving economic disputes arising with Chinese entities, with the exception of Hong Kong (Xianggang), as it is an independent customs territory, and thus, the "most favored nation treatment" clause does not apply to it.[6]

Nor did the equally pressing question of civil and criminal cases get resolved although it was not long before the issue was addressed. On 9 June 1992, the two countries signed a treaty firmly rooted in reciprocity and respect for sovereignty, which states that citizens of one Contracting Party enjoy the same legal protection in the territory of the other Contracting Party with respect to their personal and property rights as citizens of the other Contracting Party. Furthermore, citizens have the right to apply to the courts and other institutions whose competence includes civil and criminal cases, and they may file petitions and carry out other proceedings under the same conditions as citizens of the other Contracting Party.

In 2013, the Supreme Court of the Russian Federation used this Treaty to formulate an important legal position: if a citizen, as a private person, does not have the opportunity to independently obtain the official information necessary to resolve the dispute on the territory of another state, the court must, at the stage of preparing the case for trial, provide assistance in collecting and demanding the necessary evidence. This position was formulated as a result of a regional court that despite a reasoned request to assist the plaintiff in collecting evidence in the case while preparing the case for trial, returned her application, including using the grounds of her failure to provide information about a marriage registered by the defendant in the territory of the People's Republic of China, and thereby unreasonably refused to provide the necessary assistance, which included sending a corresponding request to the

[6] *See* Rulings of the Arbitration Court of the North Caucasus District dated 13 October 2014 in Case No. A32-42308/2013 and Case No. A32-42447/2013; and dated 19 June 2015 in Case No. F08-2560/2015.

Ministry of Justice of Russia. The Contracting Parties also undertook to recognize and, if required by the nature of the decision, to execute on their territory the following decisions made in the territory of the other Contracting Party after the Treaty came into force:

- court decisions in civil cases;
- court decisions on compensation for damages in criminal cases;
- decisions of the arbitration court.

Furthermore, Russia and China undertook to execute, upon request, orders in criminal cases to interrogate witnesses and victims as well as pay attention to experts and defendants; to search, examine, inspect, and undertake other procedural actions related to the collection of evidence; to transfer physical evidence and documents or valuables obtained as a result of a crime, as well as upon the delivery of documents related to the proceedings in a criminal case; and to inform each other about the results of criminal proceedings.

On 19 August 1992, the Government of the Russian Federation agreed to receive, and the Government of the People's Republic of China agreed to send its citizens to work at enterprises, associations, and organizations in Russia. The direction and admission of Chinese citizens to work at Russian enterprises are carried out in accordance with the procedures established in the PRC for sending labor abroad and the procedures established in the Russian Federation for attracting foreign labor, on the basis of contracts (economic contracts) concluded between Russian enterprises and companies that are approved by the Ministry of Foreign Economic Relations and Foreign Trade of the People's Republic of China.

In addition, a significant number of agreements between the governments of the two countries were signed on 18 December 1992 including the following:

- Agreement on cooperation in the social and labor spheres.
- Agreement on Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes.
- Agreement on cultural cooperation.
- Agreement on cooperation in the construction on the territory of the People's Republic of China of a gas centrifuge plant for uranium enrichment for nuclear power.
- Agreement on scientific and technical cooperation.
- Agreement on cooperation for the construction of a nuclear power plant on the territory of the PRC and the provision of a state loan by Russia to the PRC.

In the area of criminal policy, the 1996 "Agreement on Cooperation in Combating Illicit Traffic and Abuse of Narcotic Drugs and Psychotropic Substances" is of great importance. The Parties agreed to cooperate in the suppression of illicit trafficking in narcotic drugs and psychotropic substances and, if necessary, to carry out the following actions:

- exchange of relevant information on attempts to smuggle narcotic drugs and psychotropic substances into the territory of one of the Parties;

• exchange of information on the methods used to conceal consignments of illegal narcotic drugs and psychotropic substances when crossing the border, as well as on methods for their detection;

• exchange of information on persons identified as carrying out illegal transportation of narcotic drugs and psychotropic substances, as well as on the routes of transportation of such drugs and substances;

• exchange of specialists in the field of technology for detecting illegal consignments of narcotic drugs and psychotropic substances.

A few years later, 1997 saw a legal impetus for the development of interregional cooperation. Russia and China agreed to create favorable conditions to promote the development of bilateral cooperation between the administrations (governments) of the constituent entities of the Russian Federation and the local governments of the People's Republic of China. The exception were questions related to the fields of foreign policy, defense, state borders, air traffic, and other issues that are under the jurisdiction of the Russian Federation and the People's Republic of China and affect their state sovereignty and territory.

Since 2001, the legal "evolution" of Russian-Chinese relations has begun to acquire signs of a full-fledged "revolution." On 16 July 2001, the "Treaty of Good Neighborliness, Friendship and Cooperation Between the Russian Federation and the People's Republic of China" was signed in Moscow. Russia and China agreed to comprehensively develop their relationship while also focusing on a number of principles, such as long-term commitment, good neighborliness, friendship, cooperation, equal partnership, and strategic interaction. Moreover, Moscow and Beijing agreed that in their relations with each other, neither side would use force or the threat of using force, nor would they use economic or any other forms of pressure against each other. The juridical base for this agreement was provided by two main sources: provisions of the U.N. Charter and principles and norms of international law, including but not limited to mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence.

The Contracting Parties reaffirmed their commitment not to use nuclear weapons against each other as well as not to aim nuclear missiles at each other's territory.

The Russian side reaffirmed and acknowledged the existence of only one China, with the Government of the People's Republic of China being the only legitimate government representing all of China and Taiwan being an inalienable part of China. Furthermore, the Russian side declared its opposition to the independence of Taiwan in any form whatsoever. Both countries indicated their determination to turn their shared border into a border of "eternal peace and friendship passed down from generation to generation."

On 27 September 2010 in Beijing, the Russian Federation and the People's Republic of China agreed to cooperate in the fight against terrorism, separatism, and extremism.

In particular, the signatories agreed to share information on the following points:

1. Organizations established to commit acts covered by the agreement and their members, if possible, including the names, structure, and main activities of organizations, as well as names, information about citizenship, place of residence or location, characteristic features of appearance, photographs, fingerprints, and any other information about the members of such organizations that is deemed useful in establishing and identifying these members.

2. The plans of such organizations to commit acts covered by the agreement on the territory of the other Party, as well as information about the training of their members and the location of their training.

3. The acts covered by the agreement, which are being planned, carried out and committed, including on the territory of a third country, and that are directed against the other party.

4. The illegal manufacture, storage, circulation, use or threat to use poisonous, explosive, radioactive substances, radiation sources and nuclear materials, firearms, explosive devices, ammunition, weapons of mass destruction, as well as the materials and equipment that can be used to create them by organizations established to commit acts covered by the agreement.

5. The implementation or threat of terrorist activities by organizations created to commit acts covered by the agreement or their members, directed against heads of state and other state leaders, diplomatic missions, consular offices, employees of international organizations, important and high-ranking delegations, the security of public events, and objects of importance to any of the signing Parties.

6. The illegal production and distribution of propaganda materials (printed, audio, and video materials, as well as any other materials regardless of their format) about terrorist ideology, separatism, and extremism by organizations founded to commit acts covered by the agreement.

7. The sources and channels of financing of organizations created to commit acts covered by the agreement, as well as of their members.

8. The characteristic features, patterns, and methods of organizations created to commit acts covered by the agreement.

9. Identification data, categories, and numbers of identity documents; place of residence or location; photographs; and other relevant information about any persons in possession of citizenship of one Party, located in the territory of the other Party and suspected of committing acts covered by the agreement.

10. Organizations or persons providing equipment, weapons, financial and material resources or carrying out training in order to commit acts covered by the agreement.

11. Any relevant experience in detecting, preventing, and suppressing acts covered by the agreement.

In essence, this bilateral document became the continuation of the 2001 "Shanghai Convention for the Suppression of Terrorism, Separatism and Extremism",

which, along with Russia and China, was signed by Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan. The Convention is referred to not only by the decisions of courts of general jurisdiction, but it also serves as the international legal basis for the positions of the Constitutional Court of the Russian Federation.[7]

Since 2013, cooperation between the Russian Federation and the People's Republic of China has been gradually expanded to cover the Hong Kong Special Administrative Region. Meanwhile, the two countries have strengthened and expanded their cooperation in a field of utmost importance: the energy sector. The hallmarks of this cooperation have been expanding supplies of natural gas from Russia to China via the 'eastern' route; joint investments in the exploration and development of the South-Tambeyskoye gas field; the construction and operation of an integrated complex for the production, treatment, liquification, and storage of natural gas; the construction and operation of port infrastructure in the area of Sabetta port in northern Siberia, which is set to become the world's largest Arctic port; and the sale of liquified natural gas and gas condensate to the People's Republic of China.

In 2015, Russia and China agreed to cooperate in the field of international information security in the following areas:

1. Determination, coordination, and implementation of the necessary cooperation in the field in order to ensure international information security.

2. Development of communication channels and contacts in order to jointly respond to threats in the field of international information security.

3. Cooperation in the formation and promotion of international law in order to ensure national and international information security.

4. Joint response to threats.

5. Exchange of information and cooperation in the field of law enforcement with the aim of investigating cases related to the use of information and communication technologies for terrorist and criminal purposes.

6. Development and implementation of joint building measures.

7. Cooperation between the relevant Russian and Chinese authorities in critical information infrastructure security, exchange of technologies, and cooperation between these authorities in response to computer incidents.

8. Exchange of information on legislation between the Parties on issues concerning information security.

9. Assistance in improving the bilateral regulatory framework and practical mechanisms for cooperation between the Parties in ensuring international information security.

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[7] *See* Определение Конституционного Суда Российской Федерации от 2 июля 2013 г. № 1053-О // Официальный интернет-портал правовой информации [Determination of the Constitutional Court of the Russian Federation of 2 July 2013 No. 1053-O, Official Internet Portal of Legal Information] (May 15, 2023), available at http://www.pravo.gov.ru.

10. Creation of ideal conditions for interaction between the competent authorities of the Parties in order to implement the agreement.

11. Deepening cooperation and coordination of activities between the Parties to ensure international information security within the framework of international organizations and forums, including the United Nations, the International Telecommunication Union, the International Organization for Standardization, the Shanghai Cooperation Organization, the BRICS association, and the Association of Southeast Asian Nations Regional Forum, among others.

12. Promotion of research in the field of international information security, as well as fostering joint research.

13. Joint training of specialists, as well as the exchange of undergraduate and graduate students and researchers from various higher educational institutions.

14. Holding workshops, conferences, seminars, and other forums for the representatives and experts of the Parties in the field of international information security.

15. Establishing cooperation between the relevant bodies of the Parties with the aim of exchanging and sharing information about existing and potential risks, threats, and vulnerabilities in the field of information security, as well as their identification, assessment, analysis, intelligence sharing, and prevention. It was stated that the Parties or their relevant authorities may in the future determine, by mutual agreement, other areas of cooperation as well.

On 25 November 2022, the two governments agreed to create an organizational and legal framework for cooperation in specific areas related to the creation of the International Scientific Lunar Station.

2. Analysis of the Sino-Russian Relations

While the signing of ever newer and more encompassing treaties over time can easily strike the casual observer as organic development, such an approach ignores the fact that initially the Sino-Russian relations were burdened with plenty of historical baggage, and it required much wisdom and foresight to overcome it. Indeed, looking back over a period of more than seven decades, while the relationship between the Soviet Union and the People's Republic started on rosy terms in 1949, following Stalin's death in 1953, it slowly turned sour. A 180-degree turn in relations did not happen until after the dissolution of the USSR. Post-1991, Sino-Russian relations have indeed been blossoming with great intensity, with tremendous effort being put in from both sides into developing them; however, Western media portraying the relationship between the two countries as unbreakable since time immemorial is misleading.[8]

[8] Guy Taylor, *China Declares its 'Unbreakable' Friendship with Russia Ahead of Biden-Putin Summit*, Washington Times, 15 June 2021 (May 15, 2023), available at https://www.washingtontimes.com/news/2021/jun/15/china-united-russia-mountain-ahead-biden-putin-sum.

The dissolution of the Soviet Union thus coincided with the rise of China. The International Monetary Fund estimated that the People's Republic of China's GDP would reach almost $20 trillion by 2022.[9] In 2022, China's population reached 1.41 billion.[10] China and Russia share a border that stretches 4,200 kilometer, and each nation has a seat on the UN Security Council, where they almost always cooperate. Russia's Far East, a vast territory that is the source of a wealth of resources, has been welcoming Chinese investment since the late 1990s.

Contrary to what Western observers have anticipated, the Special Military Operation did not lead to a deterioration in the relations between Russia and China. Since February 2022, the position of the PRC on this issue has been based on five main considerations:

First, Beijing emphasizes that Washington and other Western capitals are primarily to blame, as they have, for decades, ignored Moscow's security concerns.

Second, instead of unipolar security arrangements exclusively favoring the United States and its allies, which should take the interests of other countries into consideration, security concepts should be developed and applied in Ukraine as well as globally.

Third, the conflict persists primarily because of Washington's involvement; the lion's share of military material (75%) for Ukraine comes from the United States.

Fourth, Beijing stresses that NATO should recognize the "indivisible security principle," which should become the foundation of the new international security order. The core tenet of this principle is that the security of any given country should not be realized to the detriment of other countries' security. This also means that there is a strong need for the world to embrace a multi-polar, more inclusive international system which would not exclusively be led by Western countries.

Fifth, sanctions against Russia are, in no small measure, part of a thinly veiled plan to expand American economic influence, and thus China cannot support them.

In a document titled "Position Paper" that was published on 24 February 2023, Beijing put forward twelve points towards achieving lasting peace in Ukraine.[11] Pointing to the decades-long expansion of NATO towards Russia dating back to the late 1990s, China emphasizes the need to "abandon cold war mentality" stating that, "The security of a region should not be achieved by strengthening or expanding military blocs", and highlights the supreme importance of "reducing strategic risks."

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[9] The People's Republic of China, International Monetary Fund (May 15, 2023), available at https://www.imf.org/en/Countries/CHN.

[10] Statistical communiqué of the People's Republic of China on the 2022 national economic and social development, National Bureau of Statistics of China (May 15, 2023), available at http://www.stats.gov.cn/english/PressRelease/202302/t20230227_1918979.html.

[11] China's Position on the Political Settlement of the Ukraine Crisis, Ministry of Foreign Affairs of the People's Republic of China (2023) (May 15, 2023), available at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202302/t20230224_11030713.html.2023.

Further, by pointing to the need for "stopping unilateral sanctions" which are not authorized by the U.N. Security Council, the "Position Paper" underscores the counter productiveness of the West's sanctions regime against Russia. Additionally, China stresses that it "stands ready to provide assistance and play a constructive role in this endeavor," fully agreeing with Moscow's repeatedly emphasized goal of post-conflict reconstruction, which has already begun in certain areas, such as in Donetsk, for example.[12]

It is also noteworthy that since the advent of 2023, Beijing has been increasingly vocal about its frustration over Washington's growing pressure to fall in line and support Western efforts to isolate Russia.[13]

As these points suggest, Beijing does not try to conceal its sympathy for Russia. In the months that followed the start of the Special Military Operation, the People's Republic began deepening economic ties with Russia. Despite the fact that Beijing has avoided directly challenging Western sanctions, much like Russian businesses have done, the Chinese government has also quickly begun filling the gaps Western companies have left in critical fields such as the manufacturing of semiconductors. Contrary to widespread predictions early in 2022, which expected the Russian economy to promptly collapse under the weight of the Western sanctions barrage, it quickly became clear that the country's economy is far more resilient than it was previously credited for, and no meltdown whatsoever can be expected.

Conclusion

In the coming years, the People's Republic is expected to expand its economic foothold in Russia through long-planned investments in Russia's Far East and Siberia for example, and plans are in place for China to begin paying for oil and gas in yuan, a non-convertible currency. This, taken together with Russia's economic decoupling from Europe and strategically planned orientation towards Asia, will undoubtedly lead to China's growing importance for Russia. Highlighting the questions of trade, as President Putin remarked before meeting President Xi at the Shanghai Cooperation Organization's 22nd summit in Samarkand in mid-September 2022, "Our Chinese friends are tough bargainers," and during his meeting with President Xi, President Putin stated, "We appreciate our Chinese friends' balanced position in connection with the Ukraine crisis. We understand your questions and your concerns in this

[12] Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on 21 February 2023 (May 15, 2023), available at http://belfast.china-consulate.gov.cn/eng/wjbfyrth_3/202302/t20230221_11028860.htm.

[13] Ilya Tsukanov, *Wang Yi Touts Rock-Solid Ties With Russia as Moscow Lauds 'More Just' Order Two Nations are Building*, Sputnik News, 21 February 2023 (May 15, 2023), available at https://sputniknews.com/20230221/wang-yi-touts-rock-solid-ties-with-russia-as-moscow-lauds-more-just-order-two-nations-are-building-1107673664.html.

regard."[14] In his reply, Xi Jinping, President of the People's Republic of China, remarked that "since the beginning of this year, China and Russia have maintained effective strategic communication," and underscored that "China will work with Russia to extend strong mutual support on issues concerning each other's core interests, and deepen practical cooperation in trade, agriculture, connectivity and other areas."[15] For Beijing and President Xi, it is of considerable importance that Moscow stands victorious, as the Special Military Operation not only promises triumph in its Ukrainian objectives, but achieving those will present a clear defeat for the West as well, which has been steadily supporting Ukraine, which, in turn, is a victory for China as well.

Remarks by President Xi on the Sino-Russian Relations

In March 2023, on the eve of a state visit to Moscow, President Xi noted that, *China and Russia are each other's biggest neighbor and comprehensive strategic partner of coordination. We are both major countries in the world and permanent members of the UN Security Council. Both countries uphold an independent foreign policy and see our relationship as a high priority in our diplomacy.*[16]

There is a clear historical logic and strong internal driving force for the growth of China-Russia relations. Over the past ten years, we have come a long way in our wide-ranging cooperation and made significant strides into the new era.

– High-level interactions have played a key strategic role in leading China-Russia relations. *We have established a whole set of mechanisms for high-level interactions and multi-faceted cooperation which provide important systemic and institutional safeguards for the growth of the bilateral ties. Over the years, I have maintained a close working relationship with President Putin. We have met 40 times on bilateral and international occasions. Together we have drawn the blueprint for the bilateral relations and cooperation in various fields, and have had timely communication on major international and regional issues of mutual interest, providing firm stewardship for the sustained, sound and stable growth of China-Russia relations.*

– Our two sides have cemented political mutual trust and fostered a new model of major-country relations. *Guided by a vision of lasting friendship and win-*

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[14] *Meeting with PRC President Xi Jinping: Vladimir Putin and President of the People's Republic of China Xi Jinping held bilateral talks on the sidelines of the SCO Summit in Samarkand*, President of Russia, 15 September 2022 (May 15, 2023), available at http://en.kremlin.ru/events/president/news/69356.

[15] *President Xi Jinping Meets with Russian President Vladimir Putin*, Press Release, Ministry of Foreign Affairs of the People's Republic of China (2022) (May 15, 2023), available at https://www.fmprc.gov.cn/eng/zxxx_662805/202209/t20220915_10766678.html.

[16] *Forging Ahead to Open a New Chapter of China-Russia Friendship, Cooperation and Common Development*, Ministry of Foreign Affairs of the People's Republic of China (2023) (May 15, 2023), available at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202303/t20230320_11044359.html.

win cooperation, China and Russia are committed to no-alliance, no-confrontation and not targeting any third party in developing our ties. We firmly support each other in following a development path suited to our respective national realities and support each other's development and rejuvenation. The bilateral relationship has grown more mature and resilient. It is brimming with new dynamism and vitality, setting a fine example for developing a new model of major-country relations featuring mutual respect, peaceful coexistence and win-win cooperation.

– Our two sides have put in place an all-round and multi-tiered cooperation framework. *Thanks to the joint efforts of both sides, China-Russia trade exceeded US$190 billion last year, up by 116 percent from ten years ago. China has been Russia's largest trading partner for 13 years running. We have seen steady increase in our two-way investment. Our cooperation on major projects in such fields as energy, aviation, space and connectivity is moving forward steadily. Our collaboration in scientific and technological innovation, cross-border e-commerce and other emerging areas is showing a strong momentum. Our cooperation at the sub-national level is also booming. All this has brought tangible benefits to both the Chinese and the Russian peoples and provided unceasing driving force for our respective development and rejuvenation.*

– Our two sides have acted on the vision of lasting friendship and steadily strengthened our traditional friendship. *On the occasion of commemorating the 20th anniversary of the China-Russia Treaty of Good-Neighborliness and Friendly Cooperation, President Putin and I announced the extension of the Treaty and added new dimensions to it. Our two sides have held eight "theme years" at the national level and continued to write new chapters for China-Russia friendship and cooperation. Our two peoples have stood by and rooted for each other in the fight against COVID, which once again proves that 'a friend in need is a friend indeed'.*

– Our two sides have had close coordination on the international stage and fulfilled our responsibilities as major countries. *China and Russia are firmly committed to safeguarding the UN-centered international system, the international order underpinned by international law, and the basic norms of international relations based on the purposes and principles of the UN Charter. We have stayed in close communication and coordination in the UN, the Shanghai Cooperation Organization, BRICS, the G20 and other multilateral mechanisms, and worked together for a multi-polar world and greater democracy in international relations. We have been active in practicing true multilateralism, promoting the common values of humanity, and championing the building of a new type of international relations and a community with a shared future for mankind.*

Looking back on the extraordinary journey of China-Russia relations over the past 70 years and more, we feel strongly that our relationship has not reached easily where it is today, and that our friendship is growing steadily and must be cherished by us all. China and Russia have found a right path of state-to-state interactions. This is essential for the relationship to stand the test of changing international circumstances, a lesson borne out by both history and reality.

My upcoming visit to Russia will be a journey of friendship, cooperation and peace. I look forward to working with President Putin to jointly adopt a new vision, a new blueprint and new measures for the growth of China-Russia comprehensive strategic partnership of coordination in the years to come.

To this end, our two sides need to enhance coordination and planning. As we focus on our respective cause of development and rejuvenation, we should get creative in our thinking, create new opportunities and inject new impetus. It is important that we increase mutual trust and bring out the potential of bilateral cooperation to keep China-Russia relations at a high level.

Our two sides need to raise both the quality and quantity of investment and economic cooperation and step up policy coordination to create favorable conditions for the high-quality development of our investment cooperation. We need to boost two-way trade, foster more convergence of interests and areas of cooperation, and promote the complementary and synchronized development of traditional trade and emerging areas of cooperation. We need to make sustained efforts to synergize the Belt and Road Initiative and the Eurasian Economic Union, so as to provide more institutional support for bilateral and regional cooperation.

Our two sides need to step up people-to-people and cultural exchanges and ensure the success of China-Russia Years of Sports Exchange. We should make good use of the sub-national cooperation mechanisms to facilitate more interactions between sister provinces/states and cities. We should encourage personnel exchanges and push for the resumption of tourism cooperation. We should make available better summer camps, jointly-run schools and other programs to steadily enhance the mutual understanding and friendship between our peoples, especially between the youth.

The world today is going through profound changes unseen in a century. The historical trend of peace, development and win-win cooperation is unstoppable. The prevailing trends of world multi-polarity, economic globalization and greater democracy in international relations are irreversible. On the other hand, our world is confronted with complex and intertwined traditional and non-traditional security challenges, damaging acts of hegemony, domination and bullying, and long and tortuous global economic recovery. Countries around the world are deeply concerned and eager to find a cooperative way out of the crisis.

In March 2013, when speaking at the Moscow State Institute of International Relations, I observed that countries are linked with and dependent on one another at a level never seen before, and that mankind, living in the same global village, have increasingly emerged as a community with a shared future in which everyone's interests are closely entwined. Since then, I have proposed the Belt and Road Initiative, the Global Development Initiative, the Global Security Initiative, and the Global Civilization Initiative on different occasions. All these have enriched our vision for a community with a shared future for mankind and provided practical pathways toward it. They are part of China's response to the changes of the world, of our times, and of the historic trajectory.

Through these ten years, the common values of humanity – peace, development, equity, justice, democracy and freedom – have taken deeper roots in the heart of the people. An open, inclusive, clean and beautiful world with lasting peace, universal security and common prosperity has become the shared aspiration of more and more countries. The international community has recognized that no country is superior to others, no model of governance is universal, and no single country should dictate the international order. The common interest of all humankind is in a world that is united and peaceful, rather than divided and volatile.

Since last year, there has been an all-round escalation of the Ukraine crisis. China has all along upheld an objective and impartial position based on the merits of the issue, and actively promoted peace talks. I have put forth several proposals, i.e., observing the purposes and principles of the UN Charter, respect of the legitimate security concerns of all countries, supporting all efforts conducive to the peaceful settlement of the crisis, and ensuring the stability of global industrial and supply chains. They have become China's fundamental principles for addressing the Ukraine crisis.

Not long ago, we released China's Position on the Political Settlement of the Ukraine Crisis, which takes into account the legitimate concerns of all parties and reflects the broadest common understanding of the international community on the crisis. It has been constructive in mitigating the spillovers of the crisis and facilitating its political settlement. There is no simple solution to a complex issue. We believe that as long as all parties embrace the vision of common, comprehensive, cooperative and sustainable security, and pursue equal-footed, rational and results-oriented dialogue and consultation, they will find a reasonable way to resolve the crisis as well as a broad path toward a world of lasting peace and common security.

To run the world's affairs well, one must first and foremost run its own affairs well. The Chinese people, under the leadership of the Communist Party of China, are striving in unity to advance the rejuvenation of the Chinese nation on all fronts through the Chinese path to modernization. Chinese modernization is characterized by the following features: it is the modernization of a huge population, the modernization of common prosperity for all, the modernization of material and cultural-ethical advancement, the modernization of harmony between humanity and nature, and the modernization of peaceful development. These distinctive Chinese features are the crystallization of our practices and explorations over the years, and reflect our profound understanding of international experience. Going forward, we will steadfastly advance the cause of Chinese modernization, strive to realize high-quality development, and expand high-standard opening up. I believe that this will bring new development opportunities to Russia and all countries in the world.

Just as every new year starts with spring, every success starts with actions. We have every reason to expect that China and Russia, as fellow travelers on the journey of development and rejuvenation, will make new and greater contributions to human advancement.[17]

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[17] Xi Jinping, *Forging Ahead to Open a New Chapter of China-Russia Friendship, Cooperation and Common Development*, Ministry of Foreign Affairs of the People's Republic of China (2023) (May 15, 2023), available at https://www.mfa.gov.cn/eng/zxxx_662805/202303/t20230320_11044359.html.

Epilogue

Regardless of certain differences which inevitably arise from time to time, Moscow and Beijing are working towards shared goals and can continue to rely on each other in the face of increasing Western pressure; without a doubt, Russia and China serve as a model of cooperation between leading countries.

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THE PRACTICE OF EFFICIENCY DEFENSE IN ANTITRUST CASES: A COMPARISON OF BRICS AND EUROPEAN CASES

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In non-merger antitrust cases efficiencies should play a significant role when authorities decide on cases as many potentially anticompetitive practices may have pro-competition effects, according to economic theory. In many jurisdictions rule of reason or effect based legal standard is claimed to be the policy adopted according to the own authorities. For such legal standards, considering efficiencies is part of the standard analysis protocol. We review the practice of efficiency defense in antitrust cases in selected BRICS and European countries. The case study shows that efficiencies are considered in rulings less often than expected. Similar arguments are used across countries, suggesting a common underlying economic analysis across jurisdictions that may have different legal institutions. We have employed the cross-country comparison based on Brazil, Russia, India, and South Africa cases. We also summarize the main reasons for efficiencies analysis not to be able to reverse the concluded anticompetitive effect from a business practice.

Keywords: competition law enforcement; efficiency defense; anticompetitive agreements; case study; Brazil, Russia, India, and South Africa.

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Introduction

Most competition laws across jurisdictions point that often antitrust cases should be evaluated considering the capacity to generate (potential) effects or that potential anticompetitive harm should be balanced with potential competitive benefits from the business conduct. The conduct could lead to a more efficient outcome, as understood in economic welfare analysis.[1]

Such efficiencies claims are standard in defendants' arguments in antitrust proceedings (as well as merger cases). The relevance of efficiencies arguments in competition policy practice may be far from such "rule of reason" (U.S. analysis) or "effects based" (EU analysis) analysis in non-cartel cases. There may be presumptions that lead to *per se* or object-based conclusions of illegality of certain conducts. Efficiencies may have such a high burden of proof that they are not even effectively considered by the authority. Katsoulacos and Makri (2020)[2] show that few convicted cases by the European Competition Authority have a detailed analysis of efficiencies. Katsoulacos et al. (2021)[3] confirm the conclusion for the Greek, French and Russian Competition authorities. Golovanova et al. (2022)[4] paint a similar picture for BRIS countries (Brazil, Russia, India, and South Africa).

The few cases where efficiencies have been fully considered by the competition authority across jurisdictions may attract attention to investigate whether the arguments were the same or not. It is known that international institutions as the

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1 Organisation for Economic Co-operation and Development (OECD), *The Role of Efficiency Claims in Antitrust Proceedings* (2012) (May 26, 2023), available at https://www.oecd.org/competition/EfficiencyClaims2012.pdf.

2 Yannis Katsoulacos & Galateia Makri, *The Role of Economics and the Type of Legal Standards in Antitrust Enforcement by the EC: An Empirical Investigation*, 9(3) J. Antitrust Enforc. 457 (2021).

3 Yannis Katsoulacos et al., *Comparing the Role of Economics/Effects-Based in Antitrust Enforcement and its Relation to the Judicial Review in the EC to Other Countries*, 12(2) J. Eur. Compet. L. Prac. 122 (2021).

4 Svetlana Golovanova et al., Testing the convergence of legal standards in antitrust investigations in BRICS (2022), presentation delivered at the CRESSE conference, Crete, Greece, 1 July 2022.

OECD,[5] and the International Competition Network strive to disseminate best practices or guidance in the tools and economic reasoning for analyzing cases.[6] At the same time, the underlying economic theory provides unifying framework for analysis.[7]

In this paper we review the practice of efficiencies arguments in cases on anticompetitive agreements using case study across different jurisdictions, namely, the EU, the UK, and BRIS countries (Brazil, Russia, India, and South Africa). The former are mature jurisdictions from high income countries, while the latter are younger jurisdictions, regarding the implementation of modern competition law.

Interestingly, the international discussion of efficiency arguments in the analysis of abuse of dominance, conducts or agreements appears to be foreshadowed by merger efficiencies analysis. While there are discussions of *per se* legal presumptions of some business conducts (as discussed in Ahlborn et al., 2004,[8] e.g.), the actual examples of efficiencies arguments are not extensive.[9]

Previous analysis of legal standards[10] indicated that efficiency analysis in cases on horizontal agreements and exclusionary abuse of dominance in cases where anticompetitive behavior was found is not frequent. The jurisdictions differ in the frequency that efficiency arguments are considered in cases. Overall, it is rarer in BRIS countries compared to the European countries.

We select cases on vertical restraints and horizontal agreements to gain knowledge from valid efficiencies arguments in conduct cases. Our analysis limits itself to vertical and horizontal agreements to allow better comparison of arguments. The analysis starts from convicted cases as non-convicted or cases that ended in cease-and-desist agreements may have a limited analysis of efficiencies. We do

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5 The most recent discussion of "Economic analysis and evidence in abuse cases" in December 2021 had contributions from over 20 countries (May 26, 2023), available at https://www.oecd.org/daf/competition/economic-analysis-and-evidence-in-abuse-cases.htm.

6 For an example of the ICN, take the Vertical Restraints report (May 26, 2023), available at https://internationalcompetitionnetwork.org/wp-content/uploads/2019/05/UCWG-2019-Vertical-Restraints-Project.pdf.

7 For example, Massimo Motta's *Competition Policy* book has been translated into Spanish, Chinese, Portuguese, Italian and Hungaria (May 26, 2023), available at https://sites.google.com/site/massimomottawebpage/short-cv.

8 Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49(1-2) Antitrust Bull. 287 (2004).

9 We take as illustrative the discussions in one of the international forums. In many of the countries contributions to roundtables by the OCDE, focus is on mergers, and less so on analysis of conducts and agreements, as may be seen in OECD, *Competition Policy and Efficiency Claims in Horizontal Agreements* (1995) (May 26, 2023), available at https://www.oecd.org/daf/competition/2379526.pdf; OECD, *The Role of Efficiency Claims in Antitrust Proceedings* (2012) (May 26, 2023), available at https://www.oecd.org/competition/EfficiencyClaims2012.pdf; OECD, *Safe Harbours and Legal Presumptions in Competition Law* (2017) (May 26, 2023), available at https://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm.

10 Katsoulacos & Makri 2020; Katsoulacos et al. 2021; Golovanova et al. 2022.

not provide a broad review of all cases with efficiencies as we focus on detailed arguments presented in each case. This may be more helpful to antitrust practitioners given that broad overviews are available, as cited above.

The paper is organized as follows. The first section presents the place of efficiency analysis in the logic of antitrust investigation and briefly overviews the related norms of the selected jurisdictions' competition laws. The second section provides the case summaries. The last section gathers concluding comments.

1. Comparative Treatment of Efficiency Effects

Legal standards may be interpreted as the extent of economic analysis necessary to prove a violation of competition law. Legal standards may be understood as the evidentiary evidence level or the decision-making process to reach a verdict in antitrust cases.

There are two extremes for legal standards, broadly speaking. *Per se* (or object-based approach) means that some conduct is presumed to contradict requirements of the competition law and there is no need to prove negative effects on the market and agents of the market. A jurisdiction competition law may state that such presumption exists, while in other jurisdictions, case law may conclude that the chance of no anticompetitive effect is extremely unlikely. The presumption is grounded on previous analysis.

The other extreme is a full effect-based approach. This requires that actual or potential anticompetitive effects (under the welfare standard adopted in the competition law) are proven. For the effects to be confirmed from the business practice, the application of all the following screens would be required,[11] in addition to characterizing that the practice existed:

- Market analysis for the possibility of anticompetitive effects;
- Competition restriction effects;
- Theory of harm from the anticompetitive effect to consumers;
- Efficiency, or welfare enhancing, effects from the conduct;
- Balancing of competition restriction and efficiency effects.

The legal framework in a jurisdiction may allow the competition authority to stop at any stage of the analysis, with the use of presumptions to conclude the analysis. This depends on the adopted legal standard and specifics of each case. As we shall see below, the efficiency step is motivated by defendants' arguments, with a burden of proof shift from the authority to the parties.

Violations of competition law can be divided into 2 main groups: agreements that restrict competition (horizontal or vertical) and abuse of dominance. In Tables 1

[11] Yannis Katsoulacos, *On the Concepts of Legal Standards and Substantive Standards (and How the Latter Influences the Choice of the Former)*, 7(3) J. Antitrust Enforc. 365 (2019); Yannis Katsoulacos, *Legal and Substantive Standards in Competition Law Enforcement: Relationships and Jurisdictional Variations*, 68(2) Anali Pravnog fakulteta u Beogradu 7 (2020).

and 2 we present norms of competition laws related to efficiency analysis in selected jurisdictions: EU, UK and four of five BRICS countries (Brazil, Russia, India, and South Africa). In most countries except Brazil, there are specific sections of competition law that deal with abuse of dominance and with agreements.

As of agreements, in the competition laws presented of the analyzed jurisdictions there are specific norms that point that efficiency effects should be taken into consideration by a competition authority when deciding on the case.

The general meaning is the same. Anticompetitive agreements are prohibited. But some exceptions are possible if there may be effects that either shelter consumers from welfare harm or generate other benefits to the economy, i.e. if business practice contributes to improving production/distribution, or supports technical or economic progress.

In South Africa the list and the wording are a bit different with the focus on export promotion, support to small and medium businesses, again growth and development and employment, with no requirement that consumers directly benefit from it.

Table 1: **Exceptions for antitrust purposes: agreements**

EU, **UK**: Art. 101(3) of the TFEU	Improving the production or distribution of goods or contribute to promoting technical or economic progress
UK: Section 9(1) of the Competition Act (1998)	(i) improving production or distribution, or (ii) promoting technical or economic progress
Brazil: par. 6, art. 88, Law 12.529/2011.	(From mergers) increase productivity or quality and innovations, if passed on to consumers
Russia: Art. 13 of the Law on Protection of Competition (2006)	improving the production, sale of goods or stimulating technical, economic progress or increasing the competitiveness of Russian-made goods on the world commodity market
India: Art. 19(3)(f) of the Competition act (2002)	Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services
South Africa: Art. 10(3) (b) of the Competition act (1998)	1998: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses…; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister… 2018: (v) competitiveness and efficiency gains that promote employment or industrial expansion

In case of abuse of dominance, the situation is a bit different. The norms of competition laws in Europe and the UK do not contain any exceptions related to efficiencies for abuses of dominance. In Russia, Brazil and South Africa the norms are the same with the ones for agreements. However, in Russia there is a precise list of conducts for which such analysis is applicable. Lastly, in India the list of efficiencies for abuse of dominance cases is different from the one for agreements. It is stated that the business practice should contribute to relative advantages and thus to economic development.

Table 2: **Exceptions for antitrust purposes: abuse of dominance**

EU, UK: Art. 102 of the TFEU	No exemptions
UK: Section 9(1) of the Competition Act (1998)	No exemptions
Brazil: par. 6, art. 88, Law 12.529/2011.	(from mergers) increase productivity or quality and innovations, if passed on to consumers
Russia: Art. 13 of the Law on Protection of Competition (2006)	Improving the production, sale of goods or stimulating technical, economic progress or increasing the competitiveness of Russian-made goods on the world commodity market
India: Art. 19(4)(l) of the Competition act (2002)	Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition
South Africa: Art. 10(3)(b) of the Competition act (1998)	1998: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses…; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister… 2018: (v) competitiveness and efficiency gains that promote employment or industrial expansion

It is worth saying that the practice of antitrust enforcement might differ from what follows from the norms. For example, O'Donohue and Padilla (2020)[12] show that investigations of abuse of dominance in Europe and UK may include efficiency analysis "under objective justifications."

Several criteria are to be satisfied to provide an exception to a particular anticompetitive business practice. They are explicitly formulated in European and UK competition laws. Something similar can be found in other countries.[13]

• *Improvement/Promotion Criterion* means that it is necessary to provide evidence on the efficiency effects.

• *Indispensability Criterion* means that it is important to prove that the efficiencies are the result of the business practice under consideration and could not be achieved without it. We can find such explicit norms in competition laws in Europe, UK and Brazil (for mergers).

• *Consumer Benefit Criterion* means that it is required to prove that consumers receive a fair share of the resulting benefit. This is actually related to the last screen of analysis, which is balancing of positive and negative effects. Such norms are present in the competition laws in Europe, UK, Russia and Brazil.

• *No Elimination of Competition Criterion* is the requirement for anticompetitive effect to be limited so that not to affect a substantial part of the products in question.

It is stated in the laws in all the countries that the burden of proof to justify efficiency effects is on the violator side. Companies are allowed to provide arguments to justify their practice that restricts competition. In case they do, the competition authority should consider and assess the arguments.

The likelihood that the decision making by the authority reaches the stage that efficiencies are considered varies depending on the conduct (*see* Table 3).

Table 3: **Legal standards by conducts**

Group of conducts	**Conducts**	**Competition restriction effect**	**Legal standards (written law)**
Horizontal agreements	(1) Cartels (market sharing, price fixing, bid rigging…) (2) Concerted practice	(1) Presumed (2) To be proved (effect-based)	(1) *Per se* (2) Effect based

[12] Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd ed. 2020).

[13] For the case of Brazil for example, the Compliance Guidelines summarizes the case law and suggests that indispensability (restrain is required to generate or sustain the efficiency) and reasonableness (there are no other means to achieve the same goals) criteria are required for the potential lawfulness of conducts.

Vertical agreements	(1) Vertical exclusionary agreements (2) RPM	To be proved (effect-based)	Effect based
Abuse of dominance	(1) Exploitative practices (unfair price, price discrimination) (2) Exclusionary practices (boycott, tying, non-price discrimination…)	(1) Presumed (2) Mix	(1) *Per se* ** (2) Mix

Source: Avdasheva et al. 2020.[14] Note: Mix – some conducts may be effects based while others may be *per se*, depending on the jurisdiction. ** The Brazilian competition authority (CADE) has not accepted cases on exploitative practices such as excessive prices and price discrimination, if unrelated to other practices, such as exclusion[15]. *See, e.g.*, Ribeiro & Mattos (2018).

Some types of conduct are presumed to have strong anticompetitive effect in all jurisdictions. Cartels are a prime example. In the presence of direct evidence of the conduct the harm to competition is not to be proved (object-based approach). In other words, it is very unlikely to meet efficiency analysis in antitrust investigations of market sharing, price fixing, bid rigging. In some jurisdictions companies are not even allowed to provide evidence justifying this business practice as "such practices cannot be justified." Abuses of dominance are also often *per se* illegal, which means that anticompetitive effects of presumed to be stronger than possible efficiency effects. This minimizes the chance of application of an effect-based approach. However, there are exceptions.

On the other hand, the impact of vertical agreements on social or consumer welfare is not obvious.[16] Both antitrust and not antitrust explanations of such business practices are possible. This is well recognized in different jurisdictions that mostly apply effect-based approach investigating such cases.

[14] Svetlana Avdasheva et al., *The Contribution of BRICS to the International Competition Policy Regime*, in Leonid M. Grigoryev & Adrian Pabst (eds.). Global Governance in Transformation Challenges for International Cooperation 241 (2020).

[15] *See, e.g.*, Eduardo P. Ribeiro & Cesar Mattos, *The Brazilian Experience with Excessive Pricing Cases: Hello, Goodbye*, in Yannis Katsoulacos & Frederic Jenny (eds.), Excessive Pricing and Competition Law Enforcement 173 (2018)

[16] Massimo Motta, *Competition Policy* (2004).

2. Efficiency Analysis in Antitrust Investigations: Case Studies

In our study, we focus on infringement decisions. This means that efficiency effects were considered, but found not enough to compensate harm from restriction of competition.

The case selection criteria pose a trade-off to researchers. On the one hand, in infringement decisions efficiencies may be weak so that the anticompetitive harm evaluation is not reversed by efficiencies. On the other hand, most closed cases without infringements may not reach the efficiency analysis stage, as they may lack material evidence that the practice took place or the conduct does not have potential for anticompetitive effect. Other cases that may have agreements may be reviewed in a superficial or incomplete way. Often the motivation for an agreement between the party and the competition authority is exactly a shorter investigation with not all elements for conviction, such as efficiencies, investigated. This is motivated by convenience and efficiency of competition policy (costs *vs* benefits of the investigation).

The case studies we present are selected from information gathered reading cases. The infringement decisions were read, and the legal standard characteristics based on the above steps were analyzed. For those cases where efficiencies were significantly considered by the competition authority in the decision, we selected some for the case study below.

2.1. The European Practice

The EU practice of efficiency analysis in antitrust cases has been reviewed in Katsoulacos and Makri (2020) and Katsoulacos et al. (2021). The main conclusion that arises from their analysis is that instances when efficiencies are considered in detail are actually few, even excluding horizontal agreements, where the analysis tends to be under object-based standard.

Below we provide details on efficiency analysis in two cases decided by the EC and CMA, for vertical agreements and concerted practice. These jurisdictions are chosen as they influence significantly the competition policy practice in other jurisdictions.[17] The most recent cases are chosen for the analysis.

EC: Case AT. 40208 – vertical agreement

This is the case, brought against the International Skating Union (ISU). This is an international sport federation recognized by the International Olympic Committee as the body that manages figure skating and speed skating on ice in the world. ISU controls the organization of important international speed skating events, such as

[17] The influence of European competition policy in the rest of the world has been argued by Anu Bradford et al., *The Global Dominance of European Competition Law over American Antitrust Law*, 16(4) J. Empirical Legal Stud. 731 (2019).

the European and World Championships, as well as access to the Winter Olympic Games.

Under so-named *eligibility rules* adopted by the organization, speed skaters were not allowed to participate in events that are not authorized by the Union or a local association/federation that is a member of the Union. Otherwise, they would be subject to sanctions ranging from a warning to a lifetime ineligibility. This would basically ban the athlete from the sport as it would bar her participating in events organized by the union, including the Olympic Games. Under the ISU athlete eligibility rules, the organizers of competing sport events, not authorized by, or possibly competing with the Union, met difficulties attracting skaters. The athletes did not want to take a risk of becoming ineligible.

The Commission's point of view was that restriction of competition through authorization of sport events allowed the ISU not to let third parties to commercially exploit speed skating events by selling of tickets, media and sponsoring rights. What is important here is that the criteria for the authorization were found unclear and voluntary.

ISU provided several efficiency arguments aimed to justify its practice, explaining the benefits from authorization (Table 4).

Table 4: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
• One-stop-shop contributes to improving the production or distribution of goods or to promoting technical and economic progress • It also ensures that events do not clash with major events on the International Skating Calendar • Pre-authorization protects the pyramid structure of the sport and the ISU's role as a sole regulator of the sport • It also protects from free-riding	• Authorization criteria are not clear, objective, transparent and non-discriminatory and go further than necessary to protect legitimate aims • Indispensability Criterion and Consumer Benefit Criterion are not satisfied

The first three points in the ISU list of arguments are about benefits resulting from the Union as a sole regulator of the sport, as it would contribute to better production and distribution of the products and would not overlap with the main sport events. At the same time, pre-authorization helps to protect this leading role. One may note that the anticompetitive effect is presented by the organization as an efficiency by itself.

The Commission mentions that such logic is not acceptable and that the quality arguments require more evidence. It also states that in the absence of clear and non-discriminatory authorization criteria, it is impossible to discuss benefits which resulted from pre-authorization.

The fourth ISU point is related to free riding. The Union shows it invested a lot in administering and developing speed skating and that it does not want third party event organizers to benefit from this. However, the mechanism of the free riding has not been explained and, thus, the argument is rejected.

Irrespective of the presence or absence of the mentioned efficiencies, the Union did not prove that there was no other way to reach the targets but the restriction of competition and the ban for skaters to participate third parties' sport events. So, Indispensability Criterion and Consumer Benefit Criterion were not satisfied.

UK: Case 50283 – cartel

This is a rare example of market sharing (cartel), where efficiency arguments were considered in the analysis. It is a UK case on market sharing decided in 2017. The market of cleanroom laundry services and consumables was under consideration. Several producers of the services in the UK set up a joint venture (JV) and started to provide their services under the Micronclean Brand, from 1980 onwards. After a number of mergers and acquisitions, the number of JV parties decreased to 2 with 50% shareholding each. These entities provided about 80% of the services on the market.

At some point of time, the two companies decided to update their trademark license agreements (TMLA). In particular, they included explicit clauses on market sharing. The TMLAs clauses signed by the JV and its parties fixed "allocated territories" and obligations of the companies not to obtain a customer in the other licensee's territory under the trademark (Micronclean) without written permission. The antitrust authority showed the companies followed this strategy till the termination of the joint venture.

What is interesting in this case is that the companies provided efficiency arguments, which were analyzed by the Competition and Markets Authority (CMA) on the merits (Table 5). There was an initial questioning whether the cartel accusation was unfounded, as a licensing agreement was in play. To clarify the role and limitations of TMLAs, the case required further investigation. The CMA noted that a particular characteristic of this licensing was that the vertical restrain from IP was from a JV to downstream companies that were the same companies with the JV controllers. That is why the agreement was considered horizontal in nature rather than vertical.

The companies did a lot to show that they contributed to social welfare. There were 3 groups of arguments.

The first one is the development of new production facilities. The companies provided data on investments in construction and improvement of cleanroom

laundries. They also identified that development of trademark and marketing standards were beneficial to consumers as this resulted in better qualities of the services. However, the companies were not able to show that all these were a consequence of market sharing. Most of the investments of this type were made in the early stages of the joint venture, much before the relevant period. So, this argument was rejected by the authority.

The companies also argued that they continued to invest in the quality of their services during the relevant period of time. They provided information on R&D projects and facts on bringing new products to the market. The companies mentioned that sharing costs and resources (for advertising, website creation, management and so on) allowed them to decrease costs and improve the quality of services for consumers. The non-confidential version of the decision does not show, however, if any cost calculations were provided. There is also mentioning that such activities required some protection from free riding, with no explanation on what was meant.

Table 5: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
Development of new facilities and the development of new services and intellectual property: • Examples of new cleanroom laundry services • Statistics on investments in the construction, maintenance and improvement of the cleanroom laundries • Introducing a single trademark and joint brand marketing standards to be used by all businesses applying that trademark	These were completed primarily in the early stages of the JV, many years before the relevant period
Benefits shared with consumers in the form of improved products and lower costs: • Examples of R&D, innovation, and bringing new products to market (patent innovations relating to mop systems, cleanroom wipes and cleanroom garments) • The JV enabled the Parties to share costs and resources, resulting in lower costs and higher quality to consumers. Areas of joint activity identified included advertising, the creation of technical literature, and website creation and management	All the examples appear to be benefits of co-operative working. None of these examples of benefits which have any relationship with territorial restrictions

Efficiencies resulting directly from the abilities: • to "jointly sell" to customers with more than one site, with each site being serviced by its "local" laundry, and so reducing transport costs • to use the other Party's laundry facility in the event of an incident or disaster, and so limit disruption to customers; • to avoid potential customer confusion caused by both Parties operating under the Micronclean Brand	The Addressees have not provided any quantified evidence It is unclear that any of these points could not have been achieved without the Restrictions

The competition agency, on the basis of all the information provided, confirmed that there could be efficiencies resulted from cooperation between the companies. However, there was no evidence that the efficiencies *resulted* from the territorial restrictions. Even if so, the restrictions were not indispensable to these efficiencies, as there could be other ways to reach the same result. Besides, there was no quantitative assessment of the benefits to consumers to prove they overweight the harm.

There was also a group of arguments that were somehow related to geography and location of laundries: optimization of logistics in order to minimize transport costs; efforts aimed to avoid potential customer confusion given that both companies used the same brand. These were just statements, without any quantitative assessment. The arguments were rejected as, again, market sharing was not proved to be the only way to reach these targets.

2.2. The Practice of BRIS Countries

In Table 6 we provide information on the frequency of appearance of efficiency effects analysis in antitrust decisions made by competition authorities of Brazil, Russia, India, and South Africa.

Table 6: **Efficiency analysis in antitrust cases by BRIS**

	Case decision period	The number of cases with efficiency analysis / total number of cases by conduct groups (% of cases with efficiency analysis)			
		Cartels	Concerted practice	Vertical agreements	Abuse of dominance
Brazil	2013–2020	4 / 115 (3,5%)	0 / 0 (-)	4 / 9 (44,4%)	1 / 10 (10,0%)
Russia	2008–2018	0 / 554 (0%)	0 / 170 (0%)	0 / 308 (0%)	0 / 255 (0%)
India	2011–2020	0 / 60 (0%)	0 / 6 (0%)	2 / 5 (40,0%)	1 / 14 (7,1%)
South Africa	2002–2021	0 / 25 (0%)	0 / 2 (0%)	1 / 8 (12,5%)	0 / 1 (0%)

Source: Based on information from Golovanova, Ribeiro, 2022.

The table illustrates that efficiency analysis in cases on horizontal agreements and exclusionary abuse of dominance is rare in BRIS countries. Compared to other BRIS countries, Brazil applies efficiency analysis more often. It is also the only jurisdiction in the group which applies this analysis in cartel cases. There are no cases with efficiency analysis in Russia[18]. Below we provide details on efficiency analysis in some cases decided by the authorities. The most recent cases are chosen for the analysis.

Brazil: Case 08012.005009/2010-60 – vertical agreement

An automobile audio and accessories parts manufacturer (H-Buster) complained to the Brazilian competition authority (CADE) that PST, another audio and accessories manufacturer, was imposing exclusive dealings contracts with distributors and retailers. Such exclusive agreements were blocking the expansion and entry of competitors in the market for vehicle alarm systems.

PST imposed exclusive contracts with retailers and, mainly, distributors, that forbid them to sell competitors' products. PST was found to have a significant market share, above 70% of non-OES alarm systems, and the extent of distributors under such contracts reached 30-40%. As the exclusive contracts blocked access to the most efficient resellers, it effectively hindered growth by competitors and entrants. The contracts were in effect for more than five years and were used by PST as it gained market share.

The efficiency arguments of the company and the response of the competition authority to the arguments are summarized in Table 7.

Table 7: **Efficiency arguments in the case**

Arguments of the violator(s)	Response of the Competition authority
• Higher quality lets retailers seek exclusive dealing • Protection of specific investments in training and marketing	• Investments in training and marketing were observed in distributors and retailers not under exclusive contracts • Market information pointed that the very high market share induced distributors to take the exclusive deals to guarantee supply by the firm

It claimed that the products sold were of higher quality than the ones produced by competitors and that the exclusive agreements were necessary to protect specific

[18] Given the likelihood of judicial review of antitrust cases in Russia, it is often the case that the best companies' strategy is to take efficiencies arguments to courts directly, instead of presenting them in full during the antitrust investigation by Russian competition authority (FAS). For the extent of judicial review in antitrust cases in Russia *see, e.g.*, Avdasheva et al. 2020.

investments with the dealers such as training of sales force and mechanics and advertising products. The authority obtained evidence showing that the training of the sales force and mechanics was general and took place with dealers not under exclusive agreements. In addition, advertising materials were not essential in multiproduct stores (general auto parts stores), as they were provided for products not under exclusive dealing by PST itself. This led to the conclusion that the protection of specific investments was unsubstantiated by the evidence.

The fact that the products were of supposedly higher quality was seen as an argument against the exclusive dealing. CADE argued that the higher quality was a substitute for exclusive agreements, as the quality would generate demand for the PST products. As such, the agreements were considered not indispensable to secure access to retailers and distributors. Last, but not least, the very high market share of the PST forced the distributors to accept the exclusive agreements so not to lose the opportunity to sell such high-demand product. The anticompetitive effect was that once the exclusive agreement was signed, future potentially efficient entrants would not be able to access the most effective retail channel, according to CADE.

Given (i) the unproven indispensability of exclusive contracts to support alleged specific investments; (ii) that the specific investments were not specific nor key to the sale of the products; efficiencies were concluded not observed and unable to counteract the exclusionary effects of the conduct.

Brazil: Case 08012.001591/200447 - cartel

In a string of cases,[19] physicians have gathered under trade associations or self-regulatory bodies (guilds organized by the State), to negotiate individual honoraria for patient visits, when the patients have contracted services with health management organizations (HMOs). The negotiation referred to the use of a price table (that indexed relative prices for different services, such as a review visit or a surgery). Often, the trade associations or self-regulatory bodies would promote boycotts to HMOs and/or threaten to sue and ban from practice physicians that did not abide to the collective bargaining. After the negotiations, individual physicians would sign contracts with HMOs. In another set of cases, the defendants were trade associations (or cooperatives) that were contracted by HMOs to provide services through their associates.

The analysis at CADE on price tables and collective bargaining by business entities in the health industry is varied and differentiates individuals and entities. Labs and hospitals were systematically convicted of cartel when jointly negotiating with HMOs, in a *per se* analysis. Trade associations that were contracted by HMOs

[19] Other cases referred to different regions of the country, or different physicians' entities and health management organizations (HMOs). *See, e.g.*, 08012.005101/2004-17, 08012.004276/2004-32 and 08012.009381/2004-50 to mention those with similar efficiencies analysis. The complete list of cases may be seen at (DEE-CADE, 2021).

to provide services were also convicted of concerted practices, in a *per se* analysis, when imposing restrictive clauses such as exclusive dealing with the HMOs. For individuals, contracted directly by HMOs, though with a negotiation, the analysis was under a modified rule of reason, with potential efficiencies allowed to eventually balance the concerted practice effects.

The argument for a different treatment of individual physicians when organized to bargain, but contracted independently, was that the numerous physicians would be atomistic in the market and have no market power at all. The asymmetry in bargaining with (a concentrated market) of HMOs was seen as an argument for moving beyond *per se*.

The main point of violators was an argument of efficiencies arising from compensating market power (Table 8). It may sound peculiar to use a compensating market power argument as an efficiency defense. In the international literature, the discussion would be of countervailing market power. The argument of compensating market power as an efficiency argument was present in the Horizontal Merger Guidelines, both in the original 2002 version and the 2016 revision.

The efficiency argument was also coached in a broad non-economy, legal argument of what the competition law should evaluate to conviction as an anticompetitive harm. The decisions use the argument of abusiveness as a mandate from the competition law and in case of structurally weak bargaining position.[20] In addition, the argument was that for skilled services such as physicians, a minimum and fair price would entice quality services. Nevertheless, for the compensating market power efficiency defense to be valid[21] a number of restrictions were imposed, such as skilled individuals being contracted, clear bargaining asymmetry to begin with, no harmful boycotts, the use of price table as references and limited to individuals.

The medical trade associations were convicted as the price table negotiated included imaging and exams conducted by (physician owned) labs and clinics, beyond individual physicians' activities. The bargaining included strict boycotts that rendered patients either non-serviced or having to pay more than the price on the negotiation table.

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[20] The structurally weak bargaining position is a legal concept in Brazil that states that workers (and to some extent, individual consumers) have an unfair situation when bargaining with large buyers of labor (or sellers of goods), as the latter are atomistic, and face take it or leave situations. The legal term in Portuguese would be "hipossuficiência."

[21] The reporting Commissioner argued for antitrust immunity or legality in a modified *per se*, of such bargaining instances.

Table 8: **Efficiency arguments in the case**

Arguments of the violator(s)	Response of the Competition authority
• Price tables with minimum prices would provide fair compensations according to complexity of tasks, inducing quality services • There is clear asymmetry in bargaining of atomistic physicians and dominant HMOs in their product markets • The HMO boycotts by physicians and penalties for non-abiding association members are necessary for bargaining	• The quality argument was accepted for physicians • The compensating market power argument was accepted for individual physicians contracted on a person-by-person basis • Boycotts harm consumers, and price tables negotiated affect both individual physicians' fees and business entities such as labs and clinics (that have more bargaining power than atomistic physicians)

India: Case 03/2011 – vertical agreement

This is the case against a number of car producers: Honda, Fiat, Ford, BMW, Mercedes Benz, General Motors, Maruti Suzuki, Mahindra and Mahindra, Nissan Motor, Skoda Auto, Tata Motors Limited, Volkswagen, Toyota Kirloskar, Hindustan Motors. Denial of market access to independent repairers was the conduct under consideration.

The Competition Commission of India (CCI) analyzed clauses of agreements between the car manufactures and independent equipment producers, as well as the clauses of authorized dealer agreements. It was found that the supply of spare parts and diagnostic tools to the open market was restricted, as both their licensed producers and authorized dealers could not resell for open market (non-authorized dealers). This resulted that only authorized dealers were allowed to provide the service of repair, maintenance, and servicing of such automobiles. Technological information, diagnostic tools and software programs required for that also were not freely available to the independent repair workshops.

The case was presented as a case on restrictions of competition on the after-sale market. The main efficiency arguments of the companies are summarized in Table 9.

The companies stated that the restraints were aimed to safeguard the buyers from purchasing spurious and counterfeit spares by mistake. When it is known that such parts cannot be bought on a free market, independent repairers cannot mislead clients and sell products of unknown quality as if they were original, according to the defendant's arguments. The companies also argued that the quality of the service depends a lot on the skills of the specialists that fit spare parts. So, even if the parts are original, the service provided by an unskilled person may lead to safety damages.

The companies do not have resources to train thousands of "roadside" mechanics. The restrictions were the argued as the only way to ensure the quality of the services. The defendants also mentioned that many spare parts were manufactured using trade secrets and confidential information, which they wanted to protect.

The arguments were rejected by the competition authority. According to the CCI ruling, car owners should not be restricted in their decision whether to use or not the services of authorized centers by inability of original spare parts. Besides, given that after the warrant period consumers shift to spurious spares anyway, non-availability of original spares results in incentives to use not original ones.

Arguments related to protection of intellectual property right were rejected as well as companies did not explain how selling of the products on the open market compromise the intellectual property rights.

Table 9: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
Quality protection • to safeguard the buyers from purchasing spurious and counterfeit spares; • to maintain the quality of the spare parts; • to ensure that the spare parts meet the quality standards through quality and safety tests carried out by the OEM; • to ensure an organized system of warranty support to end consumers	Since substantial segments of car owners shifts to unauthorized network for their repair and maintenance needs once their warranty expires, the absence of genuine spare parts, tools leads to a rise in usage of spurious spare parts, thus jeopardizing the safety of car owners and leading to high emissions

The main argument for the dismissal of the efficiencies was the unreasonableness of the restraints, with an imbalance of the supposed benefits to the protected and the means to reach such benefits. The case did not deal with IP licensing in so far manufacturers would still be obliged to produce parts only under licensing. The case focused on the control of the sale of production under licensing in the repair (non-OEM) market.

South Africa: Case CR188Nov15 – vertical agreement

This is the case against the company Uniplate, a producer of embossing machines and number plate blanks. There are 3 types of the machines used in the country, 2 of which are produced by the company. Each type of the embossing machines requires a corresponding type of a plate blank. The company required its customers

to exclusively purchase all types of blanks when purchasing its embossing machine of any type. So after buying a type A machine the customer had to buy plate blanks of type A and B only from the Uniplate company even having B type machine produced by a competitor. A 10-years exclusivity period was required.

The efficiency arguments provided by the company and the response of the competition authority (Table 10). The main argument of Uniplate was the need to recoup its R&D costs for development of the machines. It argued that it used the strategy of cross-subsidization when the machines were provided at a subsidized cost or at no cost and the main profit was from selling plate blanks. Thus, the company had to guaranty a certain demand for plate blanks during a certain time period, to cover R&D investments.

From the non-confidential version of the decision on the antitrust case we see that the company provided investment, production costs prices and sales data. Such data could be used to assess the period of time necessary for recoupment of initial investments by cross-subsidization (net present value of the project). This would justify the 10-year exclusivity period. According to the SACC the data provided was not able to sustain the 10-year exclusivity requirement.

Table 10: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
Recoupment of R&D costs (of about R15 million) Cross subsidization: the machines are provided at a subsidized cost or at no cost (data on costs and margins)	R&D costs and cross subsidization statements are not supported by the evidence (not relevant period, methodology is not clear) The data is not helpful in supporting the claim that the company required a 10-years exclusivity period in all types of blanks
Preventing free-riding and quality control (just a statement)	Not sustainable as: • use of the company's blanks on unknown suppliers' machine is allowed (free riding on the machines) • no legislation or SABS requirements preventing the use of a different blank plate, no evidence on SABS certification revoked because of this
Free servicing and ongoing maintenance of the embossing machines	6-months warranty period No evidence that the practice was more favorable to the embossers than what is contained in the agreement. Invoicing embossers for maintenance costs without exclusivity requirements by a competitor did not make its machines unaffordable to the customers

Preventing free riding and quality arguments were mentioned as well. However, no empirical evidence was provided. The company stated that the use of unknown suppliers' blanks on the company's machine would harm the quality of the final goods and could harm the machines as well. However, the company failed to provide any evidence to confirm the harm. Moreover, based on the results of independent expertise, the competition authority proved that the mix of machines and plate blanks of the same type but produced by different companies was technically possible without a decrease in the quality of the final good.

Uniplated named the practice of use of competitor's plates on its equipment a free-riding, as there were investments in development of the equipment. But Uniplate's business practice was aimed to enforce using its plates irrespective of the equipment used. According to the logic above, it's a free riding as well (use of Uniplate plates on the equipment of competitors). As such, the argument was dismissed as a reasonable restriction of trade.

Conclusion

Most competition laws across jurisdictions point that often antitrust cases should be evaluated taking into account either the capacity to generate (potential) effects or that potential anticompetitive harm should be balanced with potential competitive benefits. The competitive benefit of the business conduct would lead to a more efficient outcome, as understood in economic welfare analysis.

Such efficiencies arguments are standard in defendants' arguments in antitrust proceedings. The relevance of efficiencies arguments in competition law enforcement practice may be far from such "rule of reason" (U.S. analysis) or "effects based" (EU analysis) analysis in non-cartel cases.

The evidence collected by other researchers indicates that efficiency analysis in antitrust cases is not frequent and, overall, it is rarer in BRIS countries compared to the European ones. In this paper we contribute to the literature and review the actual practice of efficiency analysis in cases on anticompetitive agreements using case study across selected jurisdictions, namely, the EU, the UK and BRIS countries (Brazil, Russia, India, and South Africa) with the focus on the last. We show that BRIS jurisdictions differ in the frequency that efficiency arguments are considered in antitrust cases. Compared to other BRIS countries, Brazil applies efficiency analysis more often. It is also the only jurisdiction which applies this analysis in cartel cases. At the other extreme, in the more than one thousand Russian antitrust cases, none contain analysis of efficiency arguments by the competition authority.

Moving on to the actual case study analysis of sample cases that have a proper efficiency analysis, our paper identifies that efficiency arguments may not be far from well-established economic theory, such as the avoidance of free riding and protection of specific investments on vertical restraints.

The main issues for efficiencies analysis not to be able to reverse the concluded anticompetitive effect from a business practice can be collected under the following. First, it appears that parties do not provide strong backing to justify restraints on competition, as actual problems are often vaguely stated. Second, competition authorities, when shifting the burden to defendants to present the efficiency arguments, move the decision making to a standard that only very strong evidence of actual benefits would reverse the preliminary anticompetitive conclusions. Third, other rights, such as intellectual property rights protection, may be seen by competition authorities as evaluated under competition effects and not under a safe harbor. In general, the Indispensability Criterion is often used by authorities to dismiss the efficiency claims.

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FROM THE OLD FINANCIAL TO THE NEW COMMODITY ECONOMY IN THE ERA OF STAGFLATION

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In the process of reducing the speculative financial adjustment that artificially stimulates consumer demand in developed countries, the importance of suppliers of physical goods (commodities) from developing countries will increase. I don't believe in a complete dictate of commodities producers because they are dependent on counter deliveries of technologies from developed countries. However, relationships will be built between holders of physical goods, and technologies will change significantly. The pricing function for commodities will be transferred to several exchanges of developing countries which will be controlled by the commodity producers. Food consumers from Asian and African developing countries will be provided with the BRICS assistance in the creation and protection of reserve food warehouses on their territory as well as supporting their key exports through the creation of a network of new commodity exchanges. The article substantiates the need for independent formation of regional prices by the BRICS countries for the primary goods of their exports on their exchanges. I propose various combinations among the founding countries for new commodity exchanges for mineral fertilizers, oil, diamonds, titanium, vanadium, palladium, wheat, and uranium. Trading on all these new commodity exchanges must take place entirely in the currencies of the engaged countries.

Keywords: BRICS; stagflation; structural inflation; recession; food security; commodities exchange; currency union.

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Introduction

If Republican Party hardliners wish to restore the real sector of economy and in the process beat the Democratic Party cosmopolitan international bankers, then US reindustrialization objectively leads the simultaneous deindustrialization of Germany. They compete in the same markets. With lower energy prices and lower taxes, the U.S. will definitely beat the EU in this race. In addition, in 2022–2023, the EU voluntarily renounced large volumes of supplies of its goods and services to the Russian market. No new comparable sales markets for significantly more expensive European goods that could replace the Russian market are foreseen. In my opinion, in the future, both the U.S. and the EU will meet a reduction of excessive artificial consumer demand. The new EU economy will have less credit, less manufacturing, and less employed labor.

1. Stagflation

Imagine we believe in the monetary theory of inflation. Even if so, widely used in macroeconomics is the "Fischer equation"

MV=PQ, where
M – the amount of money in circulation;
V – the velocity of money circulation;
P – average price level;
Q – volume (quantity) of goods

In recent years, there has been no significant increase in the velocity of circulation of money or the physical mass of commodities; we believe that the latter can be equated to nominal GDP for the purposes of this article. This means that a significant increase in the amount of money in circulation will inevitably, albeit with a time lag, cause hyperinflation. It is not clear to us why European regulators believe that they will not experience hyperinflation also with energy prices more than doubling in

2022. In Germany, producer inflation (PPI) reached about 28% in 2022.[1] In the UK, the deterioration of the food situation for the population was noted as early as May 2022,[2] by the end of the year the situation worsened even more.[3] Food inflation rate in the EU was 15.04% in 2022, and around 14% at the end of June 2022 year-on-year.[4]

Of course, I'm not talking about the physical absence of food, but that people do not have money to buy high-quality food. For the same nominal money, people will buy less quality food.[5] Officially in 2022 the inflation rate in the EU was 9.2%, while in Lithuania, Latvia and Hungary it exceeded 20%.[6] I believe that inflation in the EU will remain significant in the foreseeable future due to the colossal emissions, primarily structural causes of inflation and rising energy prices. True, the massive closure of energy-intensive industries in the EU and their relocation to the U.S. may have a downward effect on inflation in the EU, but this will be associated with such social costs as a significant increase in unemployment and social tension in the EU.

In the U.S., the official inflation rate in 2022 was 6.5%, but food inflation was 10.4 %.[7] It is well known that in any country of the world, for the disadvantaged part of the population, the cost of food and utilities are key in the consumer basket, and due to American specific factors, also for health insurance. The CNBC, laying out the official statistics (Bureau of Labor Statistics' Consumer Price Index) by its components, indicates that in 2022, in particular, in the United States, eggs have risen in price by 59.9%, butter and margarine by 35.3%, white bread by 17.7%, utilities 19.3%, electricity 14.3%, health insurance 7.9%. Prices included in the inflation calculation fell for TVs by 14.4%, for used cars by 8.8%, for women's clothing by 2.3%, for beef, veal and some related products by 3.5%.[8] However, in terms of beef and veal, the

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1 Germany Producer Price Index (PPI) (Jul. 31, 2023), available at https://www.investing.com/economic-calendar/german-ppi-739.

2 Patrick Butler, *More Than 2m Adults in UK Cannot Eat Every Day, Survey Funds*, The Guardian, 9 May 2022 (Jul. 31, 2023), available at https://www.theguardian.com/society/2022/may/09/more-than-2m-adults-in-uk-cannot-afford-to-eat-every-day-survey-finds.

3 Mark Sweney, *Prices of Staples Such as Pasta and Tea Soar in UK, Hitting Poorest Hard*, The Guardian, 25 October 2022 (Jul. 31, 2023), available at https://www.theguardian.com/business/2022/oct/25/prices-staples-surge-cost-of-living-crisis-inflation-ons.

4 Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/country-list/food-inflation.

5 Some additional details *see* Food Price Monitoring and Analysis (FPMA) Bulletin #9: November 2022, European Commission (Jul. 31, 2023), available at https://knowledge4policy.ec.europa.eu/publication/food-price-monitoring-analysis-fpma-bulletin-9-november-2022_en.

6 Trading Economics (Jul. 31, 2023), available at https://ru.tradingeconomics.com/country-list/inflation-rate?continent=europe.

7 Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/united-states/food-inflation.

8 Greg Iacurci, *Here the Inflation Breakdown for December 2022 in One Chart*, CNBC, 13 January 2023 (Jul. 31, 2023), available at https://www.cnbc.com/2023/01/12/heres-the-inflation-breakdown-for-december-2022-in-one-chart.html.

price reduction is a one-time phenomenon, caused by the fact that in the conditions of a severe summer drought, farm owners almost all over the country carried out an emergency mass slaughter of livestock, which caused a situational oversupply in the market.[9]

Inflationary processes in the EU could be mitigated by the development of the real sector in the small peripheral countries of the Union, but this is unrealistic in practice, because then the sales market for German exports will decrease. This sale takes place for euros issued on credit. This general "scheme" of the functioning of the EU was described 10 years ago by the well-known German economist, former member of the board of the Bundesbank Thilo Sarrazin.[10] In this regard, Brexit is useful for the UK in that it can help revive the British national industry, no longer worrying about the artificial support of German industry. France at least has cheap nuclear power. But what does the EU plan to do when Germany will soon be unable to sell its expensive products? Print euros and distribute them on credit against new purchases of German goods? In fact, stagflation in the EU under these conditions is a technical way to overcome the artificial gap between finance and commodity circulation, restore the link between them with the priority of commodity circulation. However, the standard of living of the population will decrease.

In addition, since consumer demand in the U.S. has been artificially stimulated for many years and, as a result, is now much higher than the normal market level, it will be significantly reduced. Since there was an understanding in China that artificial consumer demand in the United States could not be sustained in the long term, a few years ago the ideology of gradually reorienting production, as far as possible, to domestic consumption won in the internal struggle in China.

I do not believe that prices in the EU will skyrocket all the time. Obviously there is a limit to growth. Statistics demonstrate that producer prices in the EU skyrocketed during 2021–2022 and then in the first half of 2023 slightly reduced.[11] Likely a new market equilibrium will be found, but the new level will be about a third higher than it was in 2020. This means a significant impoverishment of the EU population compared to 2020.

While the issuance of the dollar along with the subprime mortgage bubble is often credited as one of the causes of the 2008 global economic crisis, in fact the over-issuance actually started later. In macroeconomics, five monetary aggregates can be analyzed – M0, M1, M2, M3, M4, respectively, but usually experts and regulators

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[9] Scott Horseley, *Beef prices are down right now. But that may not last*, NPR, 30 August 2022 (Jul. 31, 2023), available at https://www.npr.org/2022/08/30/1120023642/beef-prices-are-down-right-now-but-that-may-not-last.

[10] Thilo Sarrazin, *Europa braucht den Euro nicht: Wie uns politisches Wunschdenken in die Krise geführt hat* (2012).

[11] Industrial Producer Price Index Overview, Eurostat (Jul. 31, 2023), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Industrial_producer_price_index_overview.

are limited to two main ones such as M0 (monetary base), i.e. direct government monetary issue M2 this is M0 + additional new money created by the financial sector under fractional reserve conditions through the multiplication mechanism. So, in the U.S. at the end of the corresponding years:

2000 M0 = 0.6 trn USD M2 = 4.9 trn USD
2007 M0 = 0.84 trn USD M2 = 7.5 trn USD
2008 M0 = 1.7 trn USD M2 = 8.2 trn USD
2021 M0 = 6.4 trn USD M2 = 21.5 trn USD
2022 M0 = 5.4 trn USD M2 = 21.3 trn USD[12]

At the same time, the U.S. nominal GDP after the 2008 crisis, that is, for 2009–2022, grew in the by only 66% from 14.48 to 24 USD trn.[13]

The European Central Bank is not that far behind its American colleagues printing money. Several EU members are not part of the eurozone, retaining their national currencies, but subject to the general discipline of the EU in basic economic matters. In the Eurozone, the M2 was approximately EUR 5.5 trn in 2005. At the end of 2022, it was about EUR 15.3 trn.[14]

So in the Eurozone at the end of the relevant year:

2008 M0 = EUR 1.15 trn M2 = EUR 8 trn
2021 M0 = EUR 6.1 trn M2 = EUR 14.7 trn
2022 M0 = EUR 6.3 trn M2 = EUR 15.3 trn[15]

Given the close economic relationship of the EU countries that have not adopted the euro with the eurozone, I'll apply the most conservative estimate, taking into account the GDP of all EU countries. The nominal GDP (Gross Domestic Product) of the EU, including countries that are not members of the eurozone, in U.S. dollars for

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[12] M2 in the U.S. *see* Federal Reserve Economic Data, St. Louis Fed (Jul. 31, 2023), available at https://fred.stlouisfed.org/series/M2SL; M2 in the U.S. *see* Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/united-states/money-supply-m2; M0 in the U.S. *see* Federal Reserve Economic Data, St. Louis Fed (Jul. 31, 2023), available at https://fred.stlouisfed.org/series/BOGMBASE; M0 in the U.S. *see* Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/united-states/money-supply-m0.

[13] *See* Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/united-states/gdp.

[14] Edward Yardeni et al., *Money & Credit: Monetary Aggregates in Eurozone* (January 2023), at 3 (Jul. 31, 2023), available at https://www.yardeni.com/pub/eum1m2m3.pdf.

[15] M2 in the EU *see* Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/euro-area/money-supply-m2; M0 in the EU *see* European Central Bank, Statistical Data Warehouse (Jul. 31, 2023), available at https://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=123.ILM.M.U2.C.LT00001.Z5.EUR; also *see* Statista (Jul. 31, 2023), available at https://www.statista.com/statistics/254226/development-of-the-money-supply-m1-in-the-euro-area/.

the methodological correctness of comparing it with U.S. GDP, did not grow from 2009 to 2019, but rather fell from USD 16.3 trn to USD 15.7 trn. Through the Covid pandemic of 2020, it fell even more to USD 15.3 trn, but in 2021, despite Brexit and the devaluation of the euro against the dollar for the year from about 1.20 to 1.14 dollars per 1 euro, in a very strange way, it formally soared to USD 17.2 trn. In 2022, the EU GDP, denominated in USD, fell to USD 17.1 trn[16] at a year-end exchange rate of USD 1.07 per EUR 1 euro (although it temporarily fell to USD 0.98 dollars per EUR 1), while the inflation rate in the euro area in 2022 was about 9%.

Even to count in euros, according to the European Commission, GDP growth in the EU as a whole and in the eurozone was 3.5% in 2022, and in 2021 it was 5.3% in the eurozone and 5.4% in the EU as a whole.[17] In July 2023, the Eurostat reported that for the first quarter of 2023 the growth rate for GDP was 0 for the euro area and 0.2 % for the EU respectively.[18] This is called stagflation. In the U.S., at least some people aged 60+ understand what stagflation is because they lived under Jimmy Carter, whom I sincerely wish to live to be 100 years old. Although he was a very good professional, he was simply unlucky, as he had to pay the price for the economic mistakes of his predecessors. For many Europeans, however, stagflation is an abstract theory that turns into practical reality before their very eyes, to their surprise. Adjusted for inflation, real GDP in the EU, denominated in US dollars, is now lower than in 2009, meaning there is no long-term economic growth in the EU. In fact, the EU is an economically unprofitable project.

Since the beginning of 2022, the U.S. Fed, trying to urgently deal with the threat of hyperinflation, frantically withdrew part of the dollars from circulation. The monetary base M0 in the U.S. was reduced in 2022 from about USD 6.4 trn to USD 5.4 trn.[19] However, money cannot be withdrawn to the extent that it was printed, even if we forget about structural inflation and recognize the monetary factor as the main cause of inflation. No one will withdraw from circulation, for example, a third or a half of dollars or euros, this is completely unrealistic. One of the technical forms of reducing monetary aggregates is the bankruptcy of financial companies through the partial liquidation of the relevant assets of these organizations and their clients.

The bankruptcies of Signature Bank and Silicon Valley Bank in March 2023 were partly caused by a drop in the value of corporate bonds on their balance sheets,

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16 Trading Economics (Jul. 31, 2023), available at https://tradingeconomics.com/european-union/gdp.

17 Eurostat, GDP stable and employment up by 0.3% in the euro area, 29/023, 8 March 2023 (Jul. 31, 2023), available at https://ec.europa.eu/eurostat/documents/2995521/16249744/2-08032023-AP-EN.pdf/30b3811c-f085-b7aa-c533-4733b1457ab9#:~:text=For%20the%20year%202022%20as,%2B5.4%25%20respectively%20in%202021.

18 Quarterly national accounts – GDP and employment, Eurostat (Jul. 31, 2023), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Quarterly_national_accounts_-_GDP_and_employment.

19 Federal Reserve Economic Data, St. Louis Fed (Jul. 31, 2023), available at https://fred.stlouisfed.org/series/BOGMBASE.

associated with the growing attractiveness of U.S. treasuries, which became more profitable due to an increase in the key rate. Now, with a high degree of probability, the Fed will turn on the printing press again, or maybe at the same time start raising the key rate. The problem of the both the Fed and its European colleagues is the misunderstanding that inflation is caused not by monetary, but by structural reasons, which no one is going to really fight. The monetary authorities of the U.S. and the EU, mistakenly considering inflation as a monetary phenomenon, are frantically turning the steering wheel left and right. In particular, in 2022, after pumping the economy with money, the Fed reduced the amount of money in circulation and raised the key rate, while the ECB raised the rate, continuing to issue money.[20] However, this will not help, because it is pointless to fight structural inflation by changing the key rate, withdrawing money from circulation and changing reserve ratios.

Even if one believes in the monetary theory of inflation, then in accordance with this theory, in addition to changing the amount of money in circulation and the key rate, a change in reserve requirements and ratios is also applied. But in the U.S., UK, Canada, Australia, these reserve requirements for banks are now zero. Accordingly, regulators cannot lower reserve requirements, even assuming that this will activate lending to the real sector of the economy. In addition, the law of diminishing returns is true not only at the micro level, but also at the macro level. This means that even if we believe in monetary policy, it, like any external factor of influence, over time has less and less influence on the real sector of the economy, that is, industry and agriculture. Another reason for inflation is the reluctance of many countries around the world to continue to use dollars and euros as a reserve currency.

In 2023, the European Central Bank decided to turn the steering wheel sharply in the other direction, reduced M0 from 6.3 to 5.7 trillion euros in the first 5 months of the year. In July 2023, it raised the rate to a range of the main refinancing operations and the interest rates on the marginal lending facility and the deposit facility will be increased to 4.25%, 4.50% and 3.75% respectively.[21] Historically it was planned to increase the rate to 4.75–5.25% by December 2023, and then until September 2024 to reduce it to 1.75–2.25%.[22] I cannot understand how it is planned to achieve economic growth in the Eurozone with such a policy. I believe there is no plausible and realistic industrial policy in the EU, and the ECB monetary policy is completely meaningless.

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[20] Monetary Policy Decision, European Central Bank, 15 December 2022 (Jul. 31, 2023), available at https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.mp221215~f3461d7b6e.en.html.

[21] Monetary Policy Decision, European Central Bank, 27 July 2023 (Jul. 31, 2023), available at https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.mp230727~da80cfcf24.en.html#:~:text=Key%20ECB%20interest%20rates,-The%20Governing%20Council&text=Accordingly%2C%20the%20interest%20rate%20on,effect%20from%202%20August%202023.

[22] ECB Interest Rated Forecast 2023, 2024, 2025, 30 Rates – The Economic Forecast Agency, 21 July 2023 (Jul. 31, 2023), available at https://30rates.com/ecb-rate.

Previously, a number of states, especially China, increased their reserves in dollars and euros in various forms, including in securities denominated in these currencies. Public opinion often assumes that the main holder of U.S. debt (Treasury bills) is now China. It was true five years ago, but over the past 5 years, China got rid of about 30% of the U.S. debt it owned, reducing the package of treasury obligations (treasuries) from USD 1.123 trn to USD 867 bn. Japan has now come out on top in holding U.S. debt with a stake of about USD 1.1 trn. The Chinese package is now even less than the total package of the UK (USD 655 billion) + Belgium (USD 354 billion) + Luxembourg (USD 329 billion), so in sum USD 1.338 trn dollars. China now holds only about 12% of all U.S. treasuries in circulation, amounting to about $7.3 trn.[23] It is possible that there are some other treasuries that China owns indirectly through third countries, but China's policy of dumping American treasuries gradually, in order to avoid a collapse in the price of treasuries, is obvious.

In addition, it should be taken into account that a huge overhang of "shadow" exaggerated financial assets denominated primarily in US dollars hangs over the commodity market and money circulation. This was announced in December 2022 by the Bank for International Settlements (BIS).[24] It is likely that Signature Bank and Silicon Valley Bank were part of this bubble, but there is no doubt that other large banks are also involved, since this bubble cannot be inflated without the participation of the world's leading financial institutions.

Statistics formally still show economic growth in developed countries, but these figures are doubtful. First, they take into account gigantic exaggerated financial transactions. Secondly, the statistics include the turnover of objects of intellectual property rights, which from a legal point of view is a legal monopoly. The inevitable imminent sequestration of intellectual property rights, without which the developing world will never catch up with the Western one, will also reduce the corresponding GDP indicators of developed countries. Thirdly, the statistics include huge international payments for the circulation of entertainment via the Internet, payments for which it is technically easy for the authorities to limit if necessary.

2. Reserve Currencies. Why Would the Saudis Board Chinese Yuan?

The share of the U.S. dollar in international reserves has historically been volatile. It decreased in 1978–1990, then grew until 2002, after which a gradual decline is observed.[25] According to the IMF, as of March 31, 2023, allocated reserves in foreign

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[23] Dorothy Neufeld, *Foreign Holders of U.S. Debt*, Visual Capitalist, 24 March 2023 (Jul. 31, 2023), available at https://www.visualcapitalist.com/which-countries-hold-the-most-us-debt/

[24] Bank for International Settlements, *Quarterly Review*, 5 December 2022, at 67–73 (Jul. 31, 2023), available at https://www.bis.org/publ/qtrpdf/r_qt2212.pdf.

[25] International Monetary Fund, *Reserve Currencies in an Evolving International Monetary System*, No. 20/02, prepared by an IMF staff team led by Alina Iancu (2020), at 5 (Jul. 31, 2023), available at https://www.imf.org/-/media/Files/Publications/DP/2020/English/RCEIMSEA.ashx.

currencies, denominated in U.S. dollars, amounted to USD 11.15 trn, of which 6.58 trn in U.S. dollars, 2.20 trn in euros, 609 bln in Japanese yens, 541 bln in pounds sterling respectively. For comparison, two years earlier on 31 March 2021, allocated reserves amounted to 11.73 trn U.S. dollars, of which 7.0 trn in U.S. dollars, 2.40 trn in euros, 672 billion in Japanese yens, 554 billion in pounds sterling respectively.[26] It's important that despite the some exchange rate fluctuations inside this period of time, the yen and the euro have devalued to the USD assessing the full period of time. So the decrease of reserves denominated in euros and yens is even larger compared to their nominal decrease denominated in U.S. dollars. Since the IMF does not disclose in detail the structure of allocated reserves by their holders, I can assume that their decline is accompanied by an increase of concentration in developed countries hands. But more important is the physical lack of goods and services on which to spend this money.

One of the main purposes of creating "reserve currencies" is usually to export inflation from the country that prints and exports its reserve currency. The country issuing the reserve currency brings down its internal inflation by transferring it to other countries that accept and store its currency.[27] Therefore, the refusal to use U.S. dollars or euros as reserve currencies by other states increases the level of inflation in the U.S., or the eurozone, respectively. In addition, this feature of reserve currencies implies the inexpediency of excessive accumulation of any foreign currencies as reserve currencies, including the Chinese yuan, since it makes no sense to import inflation from China in the same way as to import it from the U.S. and the Eurozone. In this context, I believe that the arrest of part of the Russian state reserves was partly due to anti-inflationary considerations. Technically, it is possible to carry out new money emissions "for sequestered assets," which increases inflation less than compared to the situation than if this money could be simultaneously used by their owner.

Currently, the main direction of de-dollarization within the BRICS, which is publicly recognized, is the transition to mutual trade in the national currencies of the BRICS countries. However, trade in national currencies is always complicated by the fact that there are imbalances in the mutual trade of the two countries, and it is almost never possible to balance the mutual trade flows. The surplus of the partner's currency, formed in the course of mutual trade in national currencies, is unclear how it is to be used. You can, of course, try to invest this money in the economy of a specified partner or sell it to some third country, but this is far from always possible in practice on favorable conditions. A technically tougher option which is offset trading is also associated with pricing difficulties. In addition, as we mentioned

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[26] Currency Composition of Official Foreign Exchange Reserves (COFER), International Monetary Fund (Jul. 31, 2023), available at https://data.imf.org/?sk=e6a5f467-c14b-4aa8-9f6d-5a09ec4e62a4.

[27] Murray N. Rothbard, *A History of Money and Banking in the United States: The Colonial Era to World War II* (2022).

above, the accumulation of foreign currency, in fact, is an import of inflation from the country that issued it.

The recent news that Saudi Arabia will sell oil to China for Chinese yuan caused wide resonance. In fact, this is a departure from the famous 1974 deal between U.S. Secretary of State Henry Kissinger and President Richard Nixon, the King Faisal bin Abdulaziz Al Saud and the Prince Fahd bin Abdul Aziz and, which included the sale of Saudi oil for US dollars. But it is completely unclear how the parties to the China-Saudi new deal are going to balance mutual settlements, especially in an environment where the yuan is not even a freely convertible currency? Its conversion occurs to a limited extent in manual mode through the Hong Kong dollar.

Under these conditions, there is no doubt that Saudi Arabia will soon accumulate very large amounts of Chinese yuan, but then what to do with it? A similar problem, by the way, will arise in before any country that China or India will very soon demand for expanding access to their huge settlement markets, mainly in yuan and rupees, respectively. The population of Saudi Arabia is not very large, is about 37 million people and wealthy, it can freely acquire all the necessary Chinese goods without yuan, which is what happens in practice. Even if to exchange the yuan on the free market for the currencies of other developing countries, then similarly what to do with them then? Therefore, we believe that the Saudis are planning to start massive lending to other Islamic countries in the Chinese yuan they are accumulating in order to increase their influence in the Islamic world in competition with other centers of influence. In fact, this is just a way to promote Chinese merchandise exports in the Islamic world, from which the Saudis will also receive part of the profits in formats that Sharia allows. Perhaps in these schemes there will be no Sharia-prohibited interest Riba, so such loans will be nominally cheaper than loans from conventional Western banks with interest, but there will be other forms of income.

There is no doubt that India seeks to buy as much oil and all other goods as possible from Russia for its rupees. However, this leads to a significant imbalance in Russian-Indian trade. Russia has already accumulated very large amounts of rupees, which are not a freely convertible currency and Russia does not need such an amount[28]. Russia managed to insist on the transfer of part of the settlements with India for oil into Chinese yuan,[29] but it is not clear whether Russia will face now an excess of yuan. If yes, what will be the next Russian step?

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[28] Arab Ahmed & Swati Bhat, *India, Russia Suspend Negotiations to Settle Trade in Rupees*, Reuters, 4 May 2023 (Jul. 31, 2023), available at https://www.reuters.com/markets/currencies/india-russia-suspend-negotiations-settle-trade-rupees-sources-2023-05-04/; Sylvia Westall, *Russia's Rupee Trap is Adding to $147 Billion Hoard Abroad*, Bloomberg, 1 June 2023 (Jul. 31, 2023), available at https://www.bloomberg.com/news/articles/2023-06-01/russia-s-rupee-trap-is-adding-to-147-billion-hoard-stuck-abroad.

[29] Nidhi Verma, *India, Refiners Start Yuan Payments for Russian oil Imports*, Reuters, 3 July 2023 (Jul. 31, 2023), available at https://www.reuters.com/business/energy/india-refiners-start-yuan-payments-russian-oil-imports-sources-2023-07-03/.

Another critical area is intellectual property, without which it is impossible to produce physical goods. I believe that patents will not disappear, but in developing countries there will be a mass compulsory licenses issue. The patent holders will have to prove every time that they really use these patents with a profit, and compensation for a compulsory license will be calculated on the basis of such proven profit. Accordingly, patent trolls will not receive anything. There is no doubt that people who profit in good faith from the use of their patents have the right to earn on them, but within reasonable limits. The needs of the new commodity economy objectively require that patent holders be prevented from restricting the use of inventions by others, that is, limiting the dissemination of knowledge in society.

3. Exacerbation of the Global Food Problem

Since it is physically impossible to describe each commodity market within the framework of a short article, I will focus on the most, perhaps, the most sensitive, critical and politicized entity now which is the food market. I do not see the need to provide evidence that the global food problem is escalating, since this topic appears almost daily in the world media.

At the end of 2020, the U.N. World Food Program (WFP) was awarded the Nobel Prize for its efforts in fighting hunger. I do not underestimate the efforts of the program and the sincerity of its leader David Beasley in the desire to overcome hunger. This person does a lot of useful things and deserves deep respect. Nevertheless, the activities of the program are largely based on the principle of "collecting money from governments and, if possible, other donors, for this money to promptly purchase and distribute food." They simply do not have the opportunity to work differently. This is momentary help in the moment for those who are starving here and now. At the same time, these actions are simply extinguishing individual fires by administrative methods, that is, treating symptoms, but not treating the disease, and certainly not preventing it. The WFP, like the Food and Agriculture Organization of the United Nations (FAO), has neither a practical plan for solving the global food problem, nor the resources to make serious progress in solving it.

Speaking of the International Grain Council (IGC) the developing grain-producing countries have no motivation to actively participate in the work of this organization, in which they were de facto removed from management. The IGC uses two voting systems depending on which issue is being voted on. Under the first system, out of a total of 2000 votes, the U.S., European Union, The United Kingdom, Australia, Canada, and Japan have a total of 1295 votes. Under the second system, out of a total of 2000 votes, the United States, EU, the UK, Australia, Canada, and Japan have a total of 1127 votes.[30] Brazil and China are not part of the IGC at all.

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[30] International Grains Council, *Report for Fiscal Year 2021/2022* (January 2023), at 20 (Jul. 31, 2023), available at http://www.igc.int/downloads/publications/rfy/rfy2122.pdf.

I am convinced that the mechanism for solving the global food problem is primarily national governments, and not international organizations. Firstly, international organizations are characterized by lengthy debates on any petty issue, and secondly, because national governments control physical food.

Table 1: **Trends in the performance of the world's major wheat exporting countries since 2000 (million tonnes)**[31]

YEARS	EU	USA	Argentina	Australia	France	Canada	Russia	Ukraine	Kazakhstan	Total top8	Total world exports
2000/01	16	28	11	17	19	17	1	0	4	97	102
2001/02	13	26	12	16	12	17	4	5	4	96	108
2002/03	18	23	6	11	17	9	13	7	6	92	107
2003/04	10	32	7	15	14	16	3	0	4	91	104
2004/05	15	28	14	16	17	15	8	4	3	105	114
2005/06	16	27	8	15	17	16	11	6	4	104	114
2006/07	14	25	12	11	15	19	11	3	8	104	116
2007/08	12	34	10	7	12	17	12	1	8	101	116
2008/09	25	27	9	13	16	19	18	13	6	121	143
2009/10	22	24	5	14	17	19	19	9	8	115	134
2010/11	23	36	8	18	20	17	4	4	5	112	133
2011/12	17	28	12	23	16	18	22	5	11	135	153
2012/13	22	27	7	21	17	19	11	7	7	116	147
2013/14	32	32	2	18	19	22	19	10	8	130	162
2014/15	36	23	5	17	19	24	22	11	6	127	153
2015/16	35	21	10	16	20	22	26	17	7	139	166
2016/17	28	29	14	23	11	20	28	18	7	150	178
2017/18	24	25	13	14	17	22	41	18	8	158	176
2018/19	24	26	13	9	17	24	36	16	9	150	168
2019/20	39	26	14	9	20	26	34	21	7	157	185
2020/21	30	27	11	24	14	26	38	17	8	165	190
2021/22	33	21	15	26	18	15	33	19	8	155	190
Totals 2000-2022	504	595	218	353	364	419	414	211	146	2720	3159
Totals 2017-2022	150	125	66	82	86	113	182	91	40	785	909

[31] Sébastien Abis, *The Geopolitics of European Wheat*, Robert Schuman Foundation, European Issue No. 66, 15 May 2023 (Jul. 31, 2023), available at https://www.robert-schuman.eu/en/european-issues/0669-the-geopolitics-of-european-wheat.

It should be noted that Turkey, one of the key centers of influence in the Islamic world that competes with the Saudis, is largely dependent on both food imports and exports. Before the Covid pandemic, huge processing facilities were built in Turkey, focused on processing wheat into flour. Of course, it is much more profitable to export flour as a product of a more advanced stage of the value chain than grain. Therefore, before the pandemic, there was a tendency with the Russian authorities to demand from Turkish business a partial transfer of flour milling production to Russia.

Turkey is now striving for a monopoly on processing Russian grain into flour, using Russia's logistical dependence on its straits.[32] In addition, Turkey is beginning to raise the issue of organizing a regional grain exchange on its territory, that is, it wants to be the center of pricing for grain crops in the Eastern Hemisphere.[33] Since Russian food exports depend on access to the Turkish straits, it is likely that the Russian government will make serious efforts to diversify the logistics routes for exports to Asia and Africa, primarily along the North-South transport corridor through Iran.

I believe that the geopolitical aggravation will become a driver for developing countries to concentrate as much as possible on physical food and other goods that are critical for them within their territory. The literature points to the failure of attempts to create even small international reserves of rice even within small pools of Asian countries.[34] It was also proposed to create a global food reserve for rice, wheat and corn managed by the WFP through voluntary contributions.[35] But it is not clear who in real life will agree to make contributions to the reserve in the required volumes. Another project described the formation, under the management of the WFP, of a small Reserve Grain Fund in independent warehouses and a large "virtual" fund for intervention during a period of price surge.[36]

There were also some subsequent proposals to focus on regional cooperation. Food reserves could be organized more efficiently on a regional level. Poor harvests, local factors and, more generally, all cyclical factors affecting food security are often

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[32] Timur Batyrov, *Erdogan announced Turkey's readiness to process grain from Russia and supply it to Africa*, Forbes, 5 January 2023 (Jul. 31, 2023), available at https://www.forbes.ru/society/483462-erdogan-zaavil-o-gotovnosti-turcii-pererabatyvat-zerno-iz-rossii-i-postavlat-afrike.

[33] The largest grain exchange can be created in Istanbul, APK inform, 26 July 2022 (Jul. 31, 2023), available at https://www.apk-inform.com/ru/news/1528345.

[34] For example, in framework of Agreement on the ASEAN Food Security Reserve, New York, 4 October 1979 (Jul. 31, 2023), available at https://asean.org/wp-content/uploads/images/2012/Economic/AMAF/Agreements/Agreement%20On%20The%20ASEAN%20Food%20Security%20Reserve.pdf.

[35] Corazon Aragon, *The United Nations Must Manage a Global Food Reserve*, UN.org (2008) (Jul. 31, 2023), available at https://www.un.org/en/chronicle/article/united-nations-must-manage-global-food-reserve.

[36] Joachim Von Braun & Maximo Torero, *Implementing Physical and Virtual Food Reserves to Protect the Poor and Prevent Market Failure*, IFPRI Policy Brief, 10 February 2009 (Jul. 31, 2023), available at https://www.semanticscholar.org/paper/Implementing-physical-and-virtual-food-reserves-to-Braun-Torero/519135153121da543fa4e1da1a87a4e560e493bf.

limited to one country or a part of it. Regionally integrated national stockpiles can in such cases mitigate famines, as do the regional food reserves of the World Food Programme (WFP). Such a "virtual" joint operation of food reserves, through sales or loans, would probably reduce price volatility and speculative market behavior. The biggest problem here, for obvious reasons, is in the conditions under which stock releases would be automatically triggered: a "regional right to food" in sufficient quantities is not available today. There is only one such scheme in operation, the ASEAN Plus Three Emergency Rice Reserve Agreement (APTERR) signed on 7 October 2011. It is one of several policy instruments to manage food security risks within the context of effective regional cooperation. It provides for international food stock releases to respond to local emergencies. In practice, however, its functioning has been limited to its voluntary food aid window.[37]

In my opinion, the authors of these projects did not take into account that many poor countries could not even tolerate the average annual prices for grain. Therefore, the fight against short-term spikes in prices is not a solution to the problem. It is impossible to imagine coordinated behavior, especially during periods of aggravation of the international situation, behavior between a large number of exporting countries, sometimes with opposing interests and conflicts among themselves. In addition, many governments of poor countries may rightly believe that only stocks that are in physical form in warehouses on their territory under their own control can be considered reliable food reserves. In the real physical world, when it is not about future "virtual obligations," but about real physical goods in reserve warehouses, the situation with them is disappointing. In mid-2018, ASEAN rice demand was approximately 500.000 metric tons per day, so APTERR's stock of 787.000 metric tons was only enough for a day and a half of consumption.[38] There is no convincing evidence that this situation has improved in 5 years. China has prudently created a very serious reserve of wheat and rice. The relatively low stocks of wheat and rice in the EU and India are worrisome, while their stocks of wheat are declining dynamically.[39] But what about those states that do not have Chinese capabilities?

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[37] Christian Häberli, *After Bali: WTO rules applying to public food reserves*, Food and Agriculture Organization of the United Nations, Rome (2014), at 11–12 (Jul. 31, 2023), available at https://www.fao.org/3/i3820e/i3820e.pdf.

[38] Kunmin Kim & Paula Plaza, *Building Food Security in Asia through International Agreements on Rice Reserves*, Asian Development Bank Institute, Policy Brief No. 2018-1 (August 2018), at 8 (Jul. 31, 2023), available at https://www.adb.org/publications/building-food-security-asia-through-international-agreements-rice-reserves.

[39] Grains: World Markets and Trade, U.S. Department of Agriculture, Foreign Agricultural Service, 12 July 2023, at 22–23, 25–26 (Jul. 31, 2023), available at https://www.fas.usda.gov/data/grain-world-markets-and-trade; also *see* Food and Agriculture Organization of the United Nations (FAO), *Crop Prospects and Food Situation*, Quarterly Global Report, No. 2 (July 2023), at 39 (Jul. 31, 2023), available at https://www.fao.org/3/cc6806en/cc6806en.pdf.

As for the World Trade Organization (WTO), the cornerstone principle of its work which is the Most Favored Nation (MFN) principle is now in ruins. No one pays any attention to the fact that companies from "allied" WTO member countries are not discriminated against in comparison with companies from "non-allied" countries. In addition, within the framework of the WTO there are no mechanisms for protection against many types of economic sanctions; moreover, WTO treaties directly allow them. I do not think that the WTO will be formally liquidated or that anyone will formally withdraw from the WTO, but I believe that the current WTO rules will no longer de facto regulate most world trade. Not only because of the collapse of the MFN principle, but also because these norms are fundamentally monetary in nature. The WTO rules are ideologically aimed primarily at ensuring a reduction in the price level in conditions when it is fundamentally possible to buy any non-military goods with "Western money." Even if it is not possible to bring down the prices of some goods and services, this is also not a problem, because money for their purchase does not need to be earned by counter deliveries of goods, since it can simply be printed. The rules and regulations of the WTO would lose their significance, because they are not designed for application in a non-monetary economy, when a number of goods cannot be bought at all with "Western money" from non-Western countries. For these goods, "Eastern money" or specific technologies would be demanded by barter or shares of certain companies with seats on their boards of directors.

Of course, there will be no complete dictatorship of commodities producers, because there is their mutual dependence on technologies. Without them, the production of goods will not disappear, of course, but will significantly decrease. But technology owners also need to sell them to someone. In addition, the system of rapid automatic issuance of compulsory licenses already described above will become a powerful factor that will encourage technology owners to be compliant. Therefore, relations between developing and developed countries of the world could become more equal and balanced.

If we are to talk about the de facto replacement of the WTO in the food sector, then the scenario of the parallel operation of several competing international grain unions is highly probable.

4. Regional Currencies and Currency Unions

Since it is impossible to quickly integrate all five currencies of the BRICS countries, the idea under consideration is put forward at first to try to integrate at least the Russian ruble, Chinese yuan and Indian rupee. However, the success of even such a trilateral currency project is debatable, since there will be endless disputes about the current exchange rate of the supranational currency in relation to the national currencies of each country, the volume of emission and quantity, the location of emission centers, etc.

According to Fuji, the world is currently gradually intensifying the movement to create a new settlement currency and a new payment system to replace SWIFT. So far, such possible alternatives have significant drawbacks, namely, they have a slow processing speed of financial messages, high cost and propensity for errors. If Beijing is now leading in the total volume of trade with Africa, then Moscow is far ahead of it in terms of arms and food supplies to the African continent. Until now, the dollar and the euro have a monopoly place as settlement currencies in Africa. But since China and Russia have begun to create alternative international settlement systems, there is a possibility that the "world map of currencies," at least across Eurasia landmass, may change significantly in the future.[40]

As Friedrich von Hayek interpreted the very old but deeply correct Gresham-Copernicus monetary law in the new realities of the 20th century, in contrast to the case of fixed exchange rates established by law; with floating exchange rates, money of inferior quality will be valued lower and people will try to get rid of the money as soon as possible, especially if there is a threat of a further decline in their value.[41]

In this regard, money can be defined in the form of physical goods, and bonds for their delivery, but only if the reliability of their physical delivery is beyond doubt. Mainstream economic literature sometimes ridicules the past use of physical goods in various societies being money,[42] but there is nothing funny here. As a short historical digression, I note that, for example, the world-famous legislator King Hammurabi successfully led Ancient Babylon for 42 years until his death, because he perfectly understood the importance of national food security and how to ensure it in practice. He introduced a complex highly developed system of field irrigation with very strict compliance control. Hammurabi paid the salaries to soldiers mainly in food and land, although there was also money circulation based on silver. Officials and army officers, depending on their hierarchical level, received various complex combinations for salaries, consisting of silver, food, housing and high-quality clothing. In today's realities, there is no need to transfer physical goods from place to place every time, but it is critical that the opportunity to receive a physical product is provided for everyone who wants to do this.

According to Papa to achieve a global currency status, BRICS would need a strong track record of joint currency management to convince others that the new currency is reliable. De-dollarization efforts have been struggling both at the multilateral and bilateral level. In 2023, the New Development Bank remains heavily dependent on the dollar for its survival. Local currency financing represents around 22% of the bank's portfolio, although its new president hopes to increase that to 30% by 2026.

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40 Kazuhiko Fuji, *Is the Era of Dollar Hegemony Coming to an End? Settlement Currencies Begin to Diversify?*, JBpress, 7 September 2022 (Jul. 31, 2023), available at https://jbpress.ismedia.jp/articles/-/71637.

41 Friedrich von Hayek, *The Denationalisation of Money* (1976).

42 Jason Goodwin, *Greenback: The Almighty Dollar and the Invention of America* (2003).

Despite the barriers to de-dollarization, the BRICS group's determination to act should not be dismissed – the group has been known for defying expectations in the pat. No doubt, talk of a new BRICS currency in itself an important indicator of the desire of many nations to diversify assay from the dollar. But focusing on the BRICS currency risks missing the forest for the trees. A new global economic order will not emerge out of a new BRICS currency or de-dollarization happening overnight. But it can potentially emerge out of BRICS' commitment to coordinating their policies and innovating – something this currency initiative represents.[43]

Miller, the CEO of the Russian state gas company Gazprom, argues that two systems are breaking apart, on the one hand, the system of commodity markets, which is a resource-based system, and on the other hand, the nominal system, which is the system of central banks. Central banks regulate the nominal value of money through interest rates and exchange rates, they control the demand, but not the supply of raw materials and their volume. The classical scheme "money–goods–money," i.e. Bretton Woods paradigm, is being replaced by "commodity–money–commodity." The demand for raw materials is increasingly replacing foreign exchange reserves. This is a serious tectonic shift, it gives us a window of opportunity in terms of restructuring the global system of production and distribution of fuel and energy resources for a more efficient and fair energy provision.[44] Earlier, in 2009 Feigin, adviser to the CEO of the Russian state oil company Rosneft, substantiated the fallacy of the ideology that a sharp excess of non-commodity transactions over commodity transactions is sign of a developed market, since it allegedly provides "liquidity" and contributes to the formation of an "objective price" for this product. He referred to it as the capture of commodity flows by monetary methods.[45]

Conclusion

There is no doubt that the creation of a new financial infrastructure for the BRICS has stalled. In my opinion, any financial infrastructure is always derived from the pricing rules for basic physical goods, since banks serve the commodity turnover. If there is political will, significant financial speculation is easily blocked by regulatory

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[43] Mihaela Papa, *How long will the dollar last as the world's default currency? The BRICS nations are gathering in South Africa this August with it on the agenda*, Fortune, 25 June 2023 (Jul. 31, 2023), available at https://fortune.com/2023/06/25/dollar-reserve-currency-brics-brazil-russia-india-china-south-africa/.

[44] *Миллер А.* Сырьевые рынки переживают тектонические изменения, для России и Газпрома это окно возможностей // Neftegaz.ru. 16 июня 2022 г. [Alexey Miller, *Commodity Markets Are Undergoing Tectonic Changes, for Russia and Gazprom – This Is a Window of Opportunity*, Neftegaz.ru, 16 June 2022] (Jul. 31, 2023), available at https://neftegaz.ru/news/transport-and-storage/741023-a-miller-na-pmef-2022-syrevye-rynki-perezhivayut-tektonicheskie-izmeneniya-dlya-rossii-i-gazproma-et/.

[45] *Фейгин В.* Конец эры «бумажной нефти» // Россия в глобальной политике. 2009. № 1 [Vladimir Feigin, *The End of the "Paper Oil" Era*, 1 Russia in Global Affairs (2009)] (Jul. 31, 2023), available at https://globalaffairs.ru/articles/konecz-ery-bumazhnoj-nefti/.

methods so the fantastic financial speculations always testify solely to the lack of political will of the authorities to suppress them. I believe that a developed BRICS financial infrastructure will not be created until an agreement is reached between at least some of the BRICS members on new exchange pricing rules for the main goods they export. Since the BRICS New Development Bank is part of the dollar Bretton Woods system and cut its activity in Russia in 2022, it is inevitable that it would be excluded from the commodity-based financial system under the new pricing rules.

When experts talk about international payments in physical goods, they most often mean a return to the gold standard in one form or another. However, gold is not a basic necessity of life. In terms of pricing, the prices of delivery contracts of the Chicago Exchange for wheat objectively reflect the balance of supply and demand for this commodity within the United States. However, the BRICS countries are growing irritated that they are used as a price target in the Eastern Hemisphere as well, by adding mechanically to the domestic price of transport, logistics and customs costs for delivery from the United States to the corresponding countries of the Eastern Hemisphere. The balances of supply and demand in the Eastern Hemisphere are different, as are the balances of interests of producing and consuming countries in the context of different types of commodities. The same applies to metal trading in London.

Likely developing countries could introduce a new concept of exchange trading commodities, namely, trading on an exchange, not with individual goods, but with combined combinations of goods. The key way to reduce price volatility for individual commodities will be "packages," or "bundles" consisting of 4-5 heterogeneous commodities. It is always possible to "shake" the market of one product, and there are many historical examples of this in the literature.[46] However, it is unrealistic to swing the exchange markets of several unrelated goods at the same time. Of course, the sphere of exchange trading and individual commodities will remain. Trading on the exchange will be carried out at first in the currencies of developing countries. At the second stage, bonds for the supply of food and other critical goods will become the new international currency, provided that the reliability of their physical delivery is beyond doubt.

There may be such joint international commodity exchanges as the following:

– Chinese-Indian-Russian-Belarusian mineral fertilizers exchange,
– South Africa- Russian-Indian diamonds exchange,
– Chinese-Russian-Saudi-Kazakh titanium exchange,
– Saudi-Russian-Chinese oil exchange,
– Chinese-Russian-Brazilian-South African vanadium exchange,
– South African-Russian platinum and palladium exchange,

[46] Torsten Dennin, *From Tulips to Bitcoins: A History of Fortunes Made and Lost in Commodity Markets* (2019).

– Russian-Kazakh-Turkish-Argentine wheat exchange,
– Russian-Kazakh-Iranian-Argentine wheat exchange,
– Russian-Kazakh uranium exchange.

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IMPROVING THE LEGISLATION ON PUBLIC-PRIVATE PARTNERSHIPS IN ENVIRONMENTAL PROTECTION IN THE BRICS COUNTRIES

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The Concept of Sustainable Development is one of the basic principles of the modern world. An increasing number of fields are coming under regulation governed by this concept. Recent updates to the environmental agenda have resulted in growing demands for increased environmental responsibility on the part of states and businesses. The global nature of environmental problems, their diversity and scale, and, at times, the irreversibility of the consequences of the negative environmental impact of the economy often provide for the consolidation of efforts by the state and business, particularly, through the implementation of public-private partnership (PPP) mechanisms. This article focuses on the pros and cons of legislation in the BRICS countries in the area of PPP practice in general and in environmental protection in particular. The data and PPP practices have been collected from the World Bank, UNCITRAL, and other official national sources related to PPP. An analysis of the legislation on PPPs in the BRICS countries indicates a lack of uniformity in the legal regulation of the relationships arising from this partnership, as well as a lack of specific legislation on PPPs specifically addressing environmental protection. The analysis shows that only those BRICS countries using the common law system (South Africa and India) have the instruments available to allow potential investors to fully assess the PPP model as it currently exists in a particular country. This practice developed as a result of a more flexible approach to the regulation

of public relations. Undoubtedly, one of the many advantages of this approach is the ability to adjust the PPP system and model all of the known forms and types of PPPs in accordance with the specific needs of society and the state. The lack of flexibility, for example, of the Russian legislation on PPP regulation, has led to the limited forms or types and objects of PPPs, which is inconsistent with the modern needs of society and the state to achieve the UN Sustainable Development Goals.

Keywords: public-private partnership; sustainable development; BRICS countries; environmental protection.

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Introduction

Modern challenges and threats from the ongoing pandemic, climate change, and rising natural hazards require the optimization and wider application of existing mechanisms as well as the introduction of new mechanisms in order to reduce anthropogenic pressure. The majority of environmental protection challenges are largely attributed to and interconnected with economic and social problems. At the same time, the environment serves as the primary habitat for people, flora, and fauna.

At the 48th session of the United Nations (U.N.) General Assembly (1993–1994), U.N. Secretary-General Boutros Boutros-Ghali noted:

> The environment, like the world, economy, society, and democracy, permeates all aspects of development and affects all countries, regardless of

> their development level. Development and the environment are not separate concepts, and problems in one of these areas cannot be successfully solved in isolation from the other. The environment is a source of potential resources for development. Its condition is an important criterion, and its preservation is the subject of constant attention in the development process. An environmentally sound policy is needed for successful development.[1]

This policy is being implemented, among other things, through the concept of sustainable development, which is a key vector for a way out of the global crisis. The concept of sustainable development is defined by the U.N. World Commission on Environment and Development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Since 1987, it has been a yardstick for assessing the environment. The significance of this concept has only increased with time. In 1992, Program 21, which identified the main areas of sustainable development, was approved at a conference in Rio de Janeiro.[2] In 2002, the Declaration on Sustainable Development[3] was adopted in Johannesburg, which became the foundation for the development and adoption of a new plan – "Transforming our World: The 2030 Agenda for Sustainable Development"[4] (hereinafter the Concept of Sustainable Development) in 2015 in New York.

The Concept of Sustainable Development acts as an alternative to the long-standing consumerist attitude towards nature and extensive use of natural resources, which has existed for a long period of time and resulted in irreversible natural processes and unfavorable socio-ecological consequences. The conceptual approaches and principles of sustainable development focused on overcoming contradictions and achieving a balance between economic, social, and environmental interests, predetermine the need for a systematic and integrated approach when choosing a set of regulators and effective means to move towards the goal of "sustainability" of social order.

This fully applies to the ecological element of sustainable development, which is an equally important component of both the economy and social well-being. On the one hand, the solution to environmental problems lies within the scope of the state environmental policies that are implemented in different countries, and, on

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1 U.N. General Assembly, Report of the Secretary-General, *An Agenda for Development*, A/48/935, 6 May 1994, cl. 68, 69 (Jun. 2, 2023), available at https://undocs.org/ru/A/48/935.

2 United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3–14 June 1992 (Jun. 2, 2023), available at https://www.un.org/en/conferences/environment/rio1992.

3 World Summit on Sustainable Development, 26 August – 4 September 2002, Johannesburg (Jun. 2, 2023), available at https://www.un.org/en/conferences/environment/johannesburg2002.

4 United Nations Summit on Sustainable Development, 25–27 September 2015, New York (Jun. 2, 2023), available at https://www.un.org/en/conferences/environment/newyork2015.

the other hand, it is directly related to the formation of socially and environmentally responsible behavior in business practices.

The environmental agenda has recently been updated worldwide, which has resulted in growing demands for increased environmental responsibility by the state and businesses. Companies and enterprises that make use of natural resources and follow the principles of environmental friendliness and social responsibility in the course of corporate governance (including in their investment policies) are gaining greater popularity and support. The vast majority of developed economies, primarily those in the European Union, follows and implements the principles of ESG (environmental, social, and corporate governance) investment or responsible investment. These principles are based on factors related to the environment, society, and corporate governance, the impact of which should be assessed in terms of the economic well-being of society, including when considering issues related to environmental protection and the implementation of the Concept of Sustainable Development.

At the same time, the global nature of environmental problems, their diversity and scale, and, at times, the irreversibility of the consequences of the negative environmental impact of the economy often provide for the consolidation of efforts by the state and business, in particular, through the implementation of public-private partnership (PPP) mechanisms.

In global practice, this form of cooperation between the government and the business community (which involves attracting private capital for the implementation of infrastructural, social, and other projects at the national level) covers various areas of activity (transport, healthcare, education, tourism, etc.). According to the World Bank's estimates, in 2020, the total global financing of PPPs totaled 45.7 billion U.S. dollars (252 infrastructural projects).[5] At the same time, the top five countries included Brazil (7.733 million U.S. dollars), China (6.285 million U.S. dollars), India (5.251 million U.S. dollars), Mexico (4.269 million U.S. dollars), and Bangladesh (2.948 million U.S. dollars)).[6]

As of September 2020, Russia had implemented over 3,000 projects worth more than 4.5 trillion rubles, out of which private investments amounted to 3.1 trillion rubles (69%). 63% of project investments were allocated to transport infrastructure, 18% to utilities and energy, 9% to social infrastructure, and 6% to information technology (IT) infrastructure.[7]

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[5] The World Bank, *Private Participation in Infrastructure (PPI): 2020 Annual Report* (2020) (Jun. 2, 2023), available at https://ppi.worldbank.org/content/dam/PPI/documents/PPI_2020_AnnualReport.pdf.

[6] *Id.*

[7] Инвестиции в инфраструктуру и ГЧП. Как кредитные рейтинги помогут привлечь новых игроков? [PPP Center, *Investment in Infrastructure and PPP. How Can Credit Ratings Help Attract New Players?*] 33 (2019).

The importance of PPPs in solving global social problems, including those of environmental protection, is evidenced by the adoption of the U.N. General Assembly Resolution – UNCITRAL Legislative Guide on Public-Private Partnerships on 18 December 2019. This Guide highlights the important role of PPPs in environmental protection for the achievement of the U.N. Sustainable Development Goals (SDGs), the significance of which is particularly growing in the conditions of the epidemiological situation (pandemic) and economic recession.

The BRICS countries have also included PPPs and SDGs in their agendas, focusing on the development of modern IT technologies, the power generation sector, and the reduction of greenhouse gas emissions.[8] An integral part of these and similar projects is the environmental component.

Along with national PPP projects, agreements were reached between the environmental ministers of the BRICS countries within the framework of the BRICS Environmentally Sound Technology Platform (BEST)[9] created in 2015. The main areas of focus of BEST covered the following programs: Clean Rivers of BRICS (2016), Partnership on Urban Environmental Sustainability Initiative (2017), Cooperation in the Field of Environmental Protection (2018), and the implementation of Best Available Technologies (2019).[10] The importance of PPPs in the environmental sphere (air quality, water, biodiversity, climate change, waste management, and the SDGs) was highlighted within the framework of the Urban Sustainability Partnership.[11] Moreover, the New Development Bank, founded by the BRICS group of countries in 2015, also focuses on the development of PPPs for its projects.

The approaches taken by each of the BRICS countries in their understanding of PPPs are very similar to one another.[12] In China, PPPs are understood as an innovative long-term partnership (interaction) between the government and entrepreneurs, aimed at the development of infrastructure, provision of public services associated with obtaining mutual benefits and distributing risks.[13] In Brazil, public-private partnerships are a form of cooperation in which the government, nonprofit, and

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8 Leonid Grigoriev, *Sustainable Development Goals – BRICS Countries' Specifics*, International Affairs 60 (2020) (Jun. 2, 2023), available at https://eng.brics-russia2020.ru/images/39/54/395496.pdf.

9 Environment, BRICS INDIA 2021 (Jun. 2, 2023), available at https://brics2021.gov.in/environment.

10 Joint statement for the 5th BRICS ministers of environment meeting: Contribution of urban environmental management to improving the quality of life in cities (2019) (Jun. 2, 2023), available at http://brics2019.itamaraty.gov.br/images/documentos/PDFBRICS2019_Draft_FINAL_STATEMENT_5th_BRICS_Environment_Ministerial_Meeting_Rev1.pdf.

11 Elena Gladun, *Chief Editor's Note on Collaboration and Research as the Key Contribution to the BRICS Environmental and Sustainable Development Agenda*, 8(2) BRICS L.J. 4 (2021).

12 Hanna Kociemska, *Development of Public-Private Partnerships (PPPs) in Diversified Economic Areas*, in Hanna Kociemska, *Public-Private Partnership for Sub-Saharan Africa* 13 (2019).

13 Yongheng Yang et al., *Promoting Healthy and Sustainable Development of PPP in China*, in Tianyi Wang et al. (eds.), Research Series on the Chinese Dream and China's Development Path 1 (2020).

for-profit companies work together on specific projects in order to derive greater benefits and more value from the cooperation. In the majority of instances, this cooperation is long-term, aimed at the production of goods and the provision of services, and based on private investments, allowing the government to reduce costs, risks, etc.[14] In India, a PPP typically refers to a project based on an agreement or concession agreement between the government or a statutory entity, on the one hand, and a private sector company, on the other, to provide infrastructural services through the collection of user fees.[15] In Russia, a PPP is defined as

> a formalized agreement concluded for a certain period, based on resource pooling and distributing risks, a mutually beneficial cooperation between public and private partners aimed at solving public, municipal, and other socially significant tasks, carried out through the implementation of investment projects pertaining to objects within public interest and control.[16]

PPPs are implemented in various forms across the world. For example, the UNCITRAL Legislative Guide on PPPs also covers leases, service agreements, turnkey contracts, and design-build-finance-operate contracts. From an economic standpoint, more than twenty basic PPP models are distinguished, starting with the model of complete state control and ending with the transfer of objects (i.e. civil works, such as roads, dams, airports, and water treatment facilities and services such as those in the healthcare and education sectors) to private ownership.[17]

The potential of PPPs in environmental protection has not yet been fully realized. In particular, there are unresolved problems with PPP objects in the environmental sphere and a lack of special legal regulation of the relationships arising son the basis of these objects. In the legal and scientific literature, various opinions are expressed on these problems, including the need to be able to use PPP models for any objects in this area.[18]

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[14] Mahmood Ahmad & Muhammad Y. Raza, *Role of Public-Private Partnerships Investment in Energy and Technological Innovations in Driving Climate Change: Evidence from Brazil*, 27 Environ. Sci. & Pollution Res. Int'l 30638 (2020).

[15] Scheme and Guidelines for Financial Support to Public Private Partnerships in Infrastructure (2013), Annex-I. 3/, at 6 (Jun. 2, 2023), available at https://ppp.worldbank.org/public-private-partnership/library/scheme-and-guidelines-financial-support-public-private-partnerships-infrastructure.

[16] Публично-частное партнерство в России и зарубежных странах: правовые аспекты / под ред. В.Ф. Попондопуло, Н.А. Шевелевой [Vladimir F. Popondopulo & Natalia A. Sheveleva (eds.), *Public-Private Partnership in Russia and Abroad: Legal Aspects*] 528 (2015).

[17] *Голубцов В.Г.* Совершенствование правового регулирования отношений в сфере государственно-частного партнерства на современном этапе // Вестник Пермского университета. Юридические науки. 2014. № 1. С. 179–188 [Valery G. Golubtsov, *Improving the Legal Regulation of Public-Private Partnership Relations at the Present Stage*, 1 Bulletin of Perm University, Legal Sciences 179 (2014)].

[18] *Бабич А.А.* Правовое регулирование государственно-частного партнерства в сфере охраны окружающей среды: дис. ... канд. юрид. наук [Arseny A. Babich, *Legal Regulation of Public-Private Part-*

Some experts have proposed expanding the list of areas of environmental protection included in the PPP mechanism in the relevant legislation.[19] When considering the integration of the BRICS member countries, it is necessary to study the legislation of each individual member country of the association, develop common approaches to building national PPP models with the participation of international actors, and eliminate uncertainties in the legal regulation of these relationships as well as any legislative gaps.

The UNCITRAL Legislative Guide on Public-Private Partnerships expresses concerns about an inadequate legal framework for PPPs and insufficient transparency, both of which may impede investments in infrastructure and public services. It invites countries interested in promoting private sector investments in infrastructure to review the existing sector-specific legislation in order to determine its applicability for PPPs.

1. Research Methods

When writing this article, we used comparative legal research methods to conduct an analysis of the international legislation on the objectives of sustainable development and PPPs, the legislation of the BRICS countries on PPP in environmental protection, and the practice of its implementation. Based on this analysis, we came to the conclusion that the BRICS countries need to update their legislation on PPPs.

2. Results

An analysis of the legislation relating to PPPs in the BRICS countries indicates a lack of uniformity in the legal regulation of the relationships arising from such a partnership, as well as a lack of specific legislation governing PPP projects for environmental protection. A similar situation can be found in the legislation of the majority of countries worldwide. Moreover, there are no two countries in the world with identical PPP legislation or governance systems in this area; rather, each country has its own institutional environment, level of PPP development, unique public

nership in Environmental Protection: Thesis] 12 (2021); *Кванина В.В.* Публично-частное партнерство в сфере охраны окружающей среды // Вестник ЮУрГУ. Серия «Право». 2021. Т. 21. № 3. С. 85–92 [Valentina V. Kvanina, *Public-Private Environmental Partnership*, 21(3) Bulletin of South Ural State University, Series "Law" 85 (2021)].

[19] *Маслова Е.М.* Перспективы государственно-частного партнерства в области правовой охраны окружающей среды и рационального природопользования // Электронное приложение к «Российскому юридическому журналу». 2015. № 5. С. 59–66 [Ekaterina M. Maslova, *Prospects for Public-Private Partnership in Legal Environmental Protection and Environmental Management*, 5 Electronic Supplement to the Russian Legal Journal 59 (2015)]; Babich 2021, at 11; *Выпханова Г.В.* Теоретико-правовые проблемы экологических инноваций и меры государственной поддержки их внедрения // Законодательство. 2020. № 12. С. 22–30 [Galina V. Vypkhanova, *Theoretical and Legal Problems of Environmental Innovations and Measures of State Support to Implement Them*, 12 Lagislation 22 (2020)].

administration, business traditions, cultural traits, and national and psychological features, all of which affect the formation of models of partnership between the state and business.[20]

Due to the lack of special legislation on PPPs for environmental protection in the BRICS countries, the legal regulation of the relationships under this agreement at the national level is carried out within the framework of the general legislation on PPPs and is characterized by significant differences.

2.1. The Brazilian PPP Model

The Brazilian PPP model is based primarily on Law No. 11,079 of 30 December 2004, "Institutes General Rules for Bidding and Hiring Public-Private Partnerships within the Public Administration" (Institui normas gerais para licitação e contratação de parceria público-privada no âmbito da administração pública, Lei No. 11.079 de 30 de Dezembro de 2004).[21] This law is supplemented by the Law on Concession Agreements (Dispõe sobre o regime de concessão e permissão da prestação de serviços públicos previsto no art. 175 da Constituição Federal, e dá outras providências, Lei No. 8.987 de 13 de Fevereido de 1995[22]), the Law on Administrative Contracts and Tenders (Lei de Licitações e Contratos Administrativos, Lei No. 14.133 de 1 de Abril de 2021[23]), and the Investment Partnership Program (Cria o Programa de Parcerias de Investimentos – PPI, Lei No. 13.334 de 13 de Setembro de 2016[24]).

The concession agreement is the main form of a PPP agreement in Brazil, which is explained by a constitutional provision, namely Article 175 of the Brazilian Constitution[25] and obliges public authorities to provide public services directly or according to the concession or permit regime. At the same time, Law No. 8,987/95 (Art. 2) emphasizes that the concluded contracts are aimed at the provision of state or public services and Law No. 11,079/04 (Art. 2) provides for a sponsored concession (a concession for the provision of public services or public works, including, in addition to tariffs charged to users, a monetary remuneration from a public partner to a private person) and an administrative concession (a contract for the provision

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20 Oleg V. Ivanov & Agnessa O. Inshakova, *Public-Private Partnerships in Russia: Institutional Frameworks and Best Practices* 312 (2020).

21 Lei nº 11.079 de 30 de dezembro de 2004 (Jun. 2, 2023), available at http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm.

22 Lei nº 8.987 de 13 de fevereiro de 1995 (Jun. 2, 2023), available at https://www.planalto.gov.br/ccivil_03/leis/l8987cons.htm.

23 Lei nº 14.133 de 1 de abril de 2021 (Jun. 2, 2023), available at http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2021/Lei/L14133.htm#art186.

24 Lei nº 13.334 de 13 de setembro de 2016 (Jun. 2, 2023), available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/L13334.htm.

25 Constituição da República Federativa do Brasil de 1988 (Jun. 2, 2023), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm#art175.

of services in which the public administration is a direct or indirect user, even if this includes the performance of works or the delivery and installation of goods).

This legislation does not limit the objects of the concession agreement. First of all, the administration delegates the responsibility to provide a service to a private partner, and secondly, the agreement determines the individual conditions (with or without preliminary construction works, as well as the remuneration paid by the users and the state, or only the state[26]). Various arrangements between the state and businesses can be exemplified by the following programs: (a) the State Parks Concession (Programa de Concessão de Parques Estaduais (PARC)) aimed at implementing innovations in the management of the protected areas of the state to be used to preserve the environment;[27] (b) a project for the implementation of photovoltaic power plants as a way to introduce renewable power sources to meet the needs of municipalities.[28]

2.2. PPP Instruments in South Africa

In contrast to the countries of the Romano-Germanic system of law, the primary PPP instrument in South Africa is Treasury Regulation 16 to the Public Finance Management Act, 1999 (PFMA)[29] issued by the PPP division of the National Treasury.[30] Regulation 16 provides for two main PPP areas: (a) the private party performs an institutional function; (b) the private party acquires the right to use public property (movable and immovable property, as well as intellectual property) for its own commercial purposes. Both of these forms can be combined.[31]

The National Treasury has developed the PPP Manual[32] and Standardized PPP Provisions[33] in order to establish a unified approach to PPP regulation in South Africa. These documents fully provide for the entire process of regulating PPP relationships. In particular, they provide for six stages of the PPP Project Cycle: project announcement,

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26 Cesar Queiroz et al., *An Overview of the Brazilian PPP Experience from a Stakeholders' Viewpoint*, Inter-American Development Bank, Infrastructure and Environment Sector, Technical Note No. IDB-TN-641 (2014), at 13 (Jun. 2, 2023), available at https://publications.iadb.org/publications/english/document/An-Overview-of-the-Brazilian-PPP-Experience-from-a-Stakeholders-Viewpoint.pdf.

27 Parques Estaduais, Concessões e Parcerias (Jun. 2, 2023), available at http://www.ppp.mg.gov.br/projetos/projetos-em-estruturacao/parques-estaduais.

28 Conselho gestor aprova estudos para nove concessões e PPPs, Prefeitura de Porto Alegre (Jun. 2, 2023), available at http://www2.portoalegre.rs.gov.br/ppp/default.php?reg=311&p_secao=1120.

29 Public-Private Partnership Manual (Jun. 2, 2023), available at https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf.

30 Mzwanele Mfunwa et al., *Public-Private Partnerships for Social and Economic Transformation in Southern Africa: Progress and Emerging Issues*, 2(2) Southern African J. Pol'y & Dev. 6 (2016).

31 Public-Private Partnership Manual, *supra* note 29.

32 *Id*.

33 Standardized Public-Private Partnership Provisions (Jun. 2, 2023), available at https://www.gtac.gov.za/Publications/1280-Standardised%20Public-Private%20Partnership%20Provisions.pdf.

project study, tenders to conclude a contract, project development, implementation, and completion. Key performance indicators and responsible persons are identified at each stage. Moreover, the stage of each project can be tracked and monitored.[34] These instruments do not distinguish between the different forms or types of PPP agreements and do not define PPP objects. The main difference between PPP agreements is their forms of financing (the process of attracting funds to the project).[35] However, along with the standard types of PPP (BOT, DFBOT, DF (part) BOT, etc.), reporting data[36] also includes DFOM, DFO, equity partnership, facilities management, tourism concession, and renovation. For example, a concession agreement for the investment in water supply and sanitation in the Ilembe District Municipality was concluded between South Africa and Siza Water Company (Pty) Ltd.[37]

A peculiar feature of PPPs in South Africa is the application of the Black Economic Empowerment (BEE) policy, which aims to promote a greater participation of black people in the economy. This policy is implemented by verifying the compliance of the PPP project with the requirements of the Broad-Based Black Economic Empowerment Act, 2003. In particular, the report on each PPP project should indicate the percentage of BEE included.[38]

2.3. China's PPP Legislation

In China, a wide variety of legislative authorities and agencies are empowered to issue legal instruments of varying legal force.[39] Laws form the basis of national regulation. However, a major role is also assigned to the government, which is responsible for enacting by-laws. As for PPPs, since 2014, the Chinese government has begun to recommend the use of various types of PPPs as a means to provide public services in a wider range of sectors, including power engineering, transport, water and environmental protection, agriculture and forestry, science and technology, affordable housing, medical services, healthcare, senior care, education, culture, etc.[40]

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[34] *See* https://www.gtac.gov.za/Publications/Updated-PPP-Project-List-April-2021.pdf (Jun. 2, 2023).

[35] *See* Standardised PPP Provisions (B).

[36] *See* PPP Projects signed/Closed in terms of Treasury Regulation 16, as of September 2017 (Jun. 2, 2023), available at https://www.gtac.gov.za/Publications/Signed-Closed%20PPP%20Projects%20updated%20doc.pdf.

[37] A Case Study on Ilembe – Siza Water Concession, SADC PPP Case Studies (Jun. 2, 2023), available at https://saiia.org.za/wp-content/uploads/2012/07/ppp_ilembe__siza_water_concession.pdf.

[38] GTAC – Government Technical Advisory Centre (Jun. 2, 2023), available at https://www.gtac.gov.za/Pages/projects.aspx.

[39] OECD, *Regulatory Governance*, in OECD Reviews of Regulatory Reform: China 2009: Defining the Boundary Between the Market and the State (2009) (Jun. 2, 2023), available at https://doi.org/10.1787/9789264059429-4-en.

[40] Jihong Wang, *A General Introduction to Public-Private Partnerships in China*, Lexology (2020) (Jun. 2, 2023), available at https://www.lexology.com/library/detail.aspx?g=55bbf186-d7b0-4726-9532-8289f4676719.

China has no basic PPP law; regulation is carried out through a combination of laws that include the Contract Law of the People's Republic of China (1999), Implementing Regulations of the Government Procurement Law of the People's Republic of China (2015), Government Procurement Law of the People's Republic of China (2003); documents defining the national policy (for example, the Guiding Opinions on Further Stimulating Effective Private Investment Vitality and Promoting Sustainable and Healthy Development of the Economy (2017), the Circular of the General Office of the State Council on Guiding Opinions on Promoting the Public-Private Partnership Model in the Public Service Fields (Guo Ban Fa [2015] No. 42), etc.). In addition, the country employs various standards and guidelines, such as the Circular of the Ministry of Finance on Issuing the Operation Guideline for Performance Management of PPP Projects (Cai Jin [2020] No. 13),[41] Implementation Opinions on Promoting Regulated Development of Public Private Partnerships (Cai Jin [2019] No. 10), and the Interpretation on the Circular on Regulating Project Database of the National PPP Integrated Information Platform (2018), among others.

The many multi-level documents did not lead to transparency and specificity in the PPP legislation in China. For example, one of the documents proposes the use of many different instruments, such as switching to mixed ownership and creating foundations or trade unions to encourage private capital to participate in the financing of large-scale PPP projects.[42]

Nevertheless, the lack of distinct forms or types of PPPs as well as the mechanisms for their implementation that have been established at the legislative level does not prevent China from pursuing an active development of this area. For example, the Guiding Opinions of the State Council on Innovating the Investment and Financing Mechanisms in Key Areas and Encouraging Social Investment identified the following priority areas: provision of public services, resources and the environment, environmental protection, infrastructure, etc.[43]

Ongoing PPP projects in China include the following:

1. The Project of Watershed Governance for the Botanical Garden Section (Nakao River) in the Upper Reaches of the Zhupai River in Nanning City.[44] The project includes river regulation, pollution prevention, environmental preservation of the river bed,

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41 Announcement of the First Batch of Commissioned Research Solicitation for Projects in the PPP Field in 2022 from the Government and Social Capital Cooperation Center of the Ministry of Finance (Jun. 2, 2023), available at http://www.cpppc.org/en/czb/994049.jhtml.

42 Guiding Opinions on Further Stimulating Effective Private Investment Vitality and Promoting Sustainable and Healthy Development of the Economy (Jun. 2, 2023), available at http://www.cpppc.org/en/zy/995763.jhtml.

43 Guiding Opinions of the State Council on Innovating the Investment and Financing Mechanisms in Key Areas and Encouraging Social Investment (Jun. 2, 2023), available at http://www.cpppc.org/en/zy/994006.jhtml.

44 China Public Private Partnerships Center (Jun. 2, 2023), available at http://www.cpppc.org/en/zlk/999250.jhtml.

landscaping of the riverbanks, construction of treatment facilities, the creation of a sponge city, and information monitoring;

2. The Huhan East Lake Greenway Phase II Project.[45] This project includes the creation of four landscape green spaces and the construction of eleven landscape nodes.

2.4. India's PPP Legal Regulations

Since the legal system of India is based on the English Common Law system, the lack of specific PPP legislation is understandable. The basics of legal PPP regulation in this country include various guidelines issued by the authorities, such as the Scheme and Guidelines for Financial Support to PPP in Infrastructure;[46] Guidelines for Formulation, Appraisal, and Approval of Central Sector PPP Projects; and Guidelines for Formulation, Appraisal, and Approval of Central Sector PPP Projects.[47]

The emphasis in the development of PPPs is placed on the sectors of social and commercial infrastructure, transport, and water treatment, as well as the energy sector. The Scheme and Guidelines for Financial Support to PPPs in Infrastructure limit the scope of PPPs to fifteen main areas.

Similar to the regulation in South Africa, the instruments of the Ministry of Finance of India provide for a phased regulation of relations to conclude and execute PPP agreements. Despite the lack of detailed characteristics of the types of PPP agreements in these instruments, the reporting data[48] contain both traditional PPPs, such as BOT, DFBOT, BOO, etc., as well as atypical ones, such as leases, hybrid annuity modes (HAM), management contracts (O&M), operation, management, and development agreements (OMDA), input based distribution franchisees, etc.

Illustrative examples of PPPs in the environmental sector in India are the concession agreements for the Teesta IV Project, a 520 MW hydro-power project in the state of Sikkim, the Biomass power project at Sattenapalli, and the creation of a 20 MW hydel based power unit at Telbeila near the city of Pune. All of these agreements were concluded to develop the energy sector to use renewable sources.[49]

2.5. Russian Federation: Laws on PPP and Environmental Protection

Russia has no specific laws on PPPs pertaining to environmental protection; instead, this country has adopted general laws on the various types of PPPs, such as

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[45] The Huhan East Lake Greenway Phase II Project (Jun. 2, 2023), available at http://www.cpppc.org/en/zlk/999300.jhtml.

[46] Scheme and Guidelines for Financial Support to Public Private Partnerships, *supra* note 15.

[47] Guidelines for Formulation, Appraisal, and Approval of Central Sector PPP Projects (Jun. 2, 2023), available at https://www.pppinindia.gov.in/documents/20181/21751/VGF_GuideLines_2013.pdf/.

[48] *See* https://www.pppinindia.gov.in/infrastructureindia/project-list?id=1&searchType=Government%20Infrastructure%20Projects%20(PPP) (Jun. 2, 2023).

[49] The World Bank, *supra* note 5.

Federal Law No. 115-FZ, "On Concession Agreements" dated 21 July 2005 and Federal Law No. 224-FZ, "On Public-Private Partnership and Municipal-Private Partnership in the Russian Federation" dated 13 July 2015. These laws indicate specific areas in environmental protection where PPPs can be used, such as the production, transmission, and distribution of electrical energy (in terms of using renewable energy sources), ecotourism, processing, recycling, detoxification, disposal of solid municipal waste, melioration systems, etc. The list of these areas has been finalized. The list of PPP objects is also finalized and includes immovable property or immovable and movable property technologically related to each other (with some exceptions in the area of information technology) to be created or reconstructed by the private partner. The main objects of concession agreements in the field of environmental protection are the construction or reconstruction of solid waste landfills, dams for hydroelectric power stations, snow-melting stations, hydraulic structures, parks, and other similar projects.[50]

According to statistics, concession agreements in Russia account for 42% of the total volume of investments, PPP agreements account for 16%, and all other forms of PPPs account for 43%.[51] A significant share of these projects is aimed at environmental protection. These figures indicate a significant number of PPP projects that fall outside the scope of special legislation on PPPs.

Conclusion

Our analysis of the legislation on PPPs in the BRICS countries indicates that there is an emerging global trend towards expanding the use of mechanisms to attract private investments in conjunction with the capabilities of the public sector for the implementation of infrastructural and other socially significant projects in environmental protection, in a manner that is consistent with the provisions of the concept of sustainable development and contributes to the achievement of the U.N. Sustainable Development Goals.

Our analysis also showed that only the BRICS countries using the common law system (South Africa and India) have the instruments available to allow potential investors to fully assess the current PPP model in a particular country. This practice developed as a result of a more flexible approach to the regulation of public relations. Undoubtedly, the advantage of taking this approach is the ability to adjust the PPP system and model the known forms and types of PPPs to meet the specific needs of society and the state. The lack of flexibility, for example, of the Russian legislation

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[50] Росинфра [Rosinfra] (Jun. 2, 2023), available at https://rosinfra.ru/.

[51] Инвестиции в развитие городской инфраструктуры: зарубежные и российские тренды [Rosinfra, *Investments in the Development of Urban Infrastructure: Foreign and Russian Trends*] (2021) (Jun. 2, 2023), available at https://pppcenter.ru/upload/iblock/e74/e7449111d9d1fcfc2a1030a21adcffab.pdf.

on PPP regulation, has led to the limited forms, types, and objects of PPPs, which is inconsistent with the modern needs of society and the state to achieve the SDGs.

For interstate projects using environmental PPPs, as well as large-scale projects implemented under the BRICS Environmentally Sound Technology Platform, it is necessary to develop common approaches, principles for the formation and assessment of the implemented projects, the conditions for using forms and models of environmental PPPs, as well as mechanisms used in supranational interaction. Such an approach is in line with the Strategy for BRICS Economic Partnership.[52] This strategy provides for the development of PPPs as a tool for attracting additional resources, as well as investments from the BRICS member states in the processing of mineral resources; the introduction of environmentally friendly technologies of production, storage, and consumption of energy resources; the promotion of the use of renewable energy sources; an increase in the efficiency of using clean energy sources; and the practical implementation of sustainable development initiatives in the BRICS countries, taking national interests into account.

However, the formation of a supranational PPP system in the BRICS countries and the implementation of environmental projects further require a differentiated approach that not only takes into account the specifics of the environmental sphere but also sets target values, tasks, and indicators to be reached in order to achieve environmental and environmentally oriented SDGs.

It is necessary to expand the subject area and the list of PPP objects to implement projects that ensure the protection of the environment, its individual components, ecosystems, resource conservation, environmental safety, and a favorable environmental setting of territories, cities, and other settlements. Additionally, the national legislation on PPPs in the BRICS countries should be made transparent for investors, which means, among other things, enshrining the main obligations and responsibilities of not only the private but also the public partners, as well as guarantees of investors' rights.

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[52] Стратегия экономического партнерства БРИКС до 2025 года [BRICS Economic Partnership Strategy until 2025] (Jun. 2, 2023), available at https://www.economy.gov.ru/material/file/636aa3edbc0dcc2356ebb6f8d594ccb0/1148133.pdf.

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